

# **“FROM RUSSIA” WITHOUT LOVE: CAN THE SHCHUKIN HEIRS RECOVER THEIR ANCESTOR’S ART COLLECTION?**

*Jane Graham\**

## **Abstract**

Sergei Shchukin’s vast modern art collection was confiscated in 1917 by Lenin during the Soviet Nationalizations. Since then the Shchukin heirs have tried in courts around the world to recover “their” artwork, with the most recent development in London during the recent “From Russia” exhibit amid scandal in early 2008. The article first traces the Shchukin family’s legal attempts at reclaiming their property. Then the article examines the recently enacted British legislation, “Part 6 of the Tribunals, Courts, and Enforcement Act of 2007.” The article then compares the new British legislation with similar immunity-from-seizure legislation in the United States. The article then compares the case law of the United States and United Kingdom to demonstrate how the immunity from seizure laws have been interpreted differently. Finally, the article looks at the various options the Shchukin heirs have at recovery and or reparations, and forecasts whether or not they would be successful – or should be.

## **INTRODUCTION**

“This is the biggest hold-up in art history,” declared Andre-Marc Deloque-Fourcaud, as the Royal Academy unveiled the contents of “From Russia” in London in January 2008.<sup>1</sup>

Deloque-Fourcaud is the grandson of Sergei Shchukin and heir to his vast modern painting collection from late nineteenth and early twentieth century Russia. Shchukin’s collection was confiscated by Lenin during nationalization in 1918. Of the 120 works in the “From Russia” exhibition, twenty-three works were once owned by Sergey Shchukin and thirteen were owned

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<sup>1</sup> *‘From Russia’ Art Claimants Want Compensation from Russia*, GOOGLE NEWS, Jan. 22, 2008, <http://afp.google.com/article/ALeqM5iti0qRrATD9xRlNm6uxbTq5ZjZwA>.

by Morozov, another Russian tsarist era collector.<sup>3</sup> Some notable works in the “From Russia” exhibit include *The Dance* by Henri Matisse, *The Dryad* by Pablo Picasso, *The Bath of the Horse* by Kuzma Petrov-Vodkin, *Manifesto of October 17<sup>th</sup>* by Ilya Repin, *Her Name was Vairaumati* by Paul Gauguin, and *Portrait of Doctor Rey* by Vincent Van Gogh.<sup>4</sup> Deloque-Fourcaud, who currently lives in Paris, estimated his grandfather’s paintings were valued conservatively at \$3 billion ten years ago and claims the collection is worth at least twice that amount today.<sup>5</sup>

Deloque-Fourcaud questions the “extremely violent way in which these extraordinary collections, gathered over many years by our forefathers, were taken.” He argues there should be “an agreement made that reasonably compensates and pays a percentage of the material benefits that accrue from exploitation of the works.”<sup>6</sup> However, before Deloque-Fourcaud could bring a claim on British soil in an attempt to recover these paintings, the United Kingdom passed a piece of legislation, which would bar such a claim.<sup>7</sup> The “immunity from seizure” legislation, or Part 6 of the Tribunals, Courts and Enforcement Act of 2007, was due to be implemented in February 2008. By the urging of Culture Secretary James Purnell, the law was instituted on December 31,

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<sup>3</sup> Mark Brown, *Russian Collectors' Heirs Want Compensation for Lost Art*, THE GUARDIAN, Jan. 22, 2008, [www.guardian.co.uk/uk/2008/jan/22/art.artnewsn](http://www.guardian.co.uk/uk/2008/jan/22/art.artnewsn).

<sup>4</sup> From Russia French and Russian Master Paintings 1870-1925 from Moscow and St. Petersburg, <http://www.royalacademy.org.uk/exhibitions/from-russia/about-the-exhibition/from-russia-french-and-russian-master-paintings-18701925-from-moscow-and-st-petersburg,550,AR.html> (last visited June 6, 2009).

<sup>5</sup> *Russian Art Show Opens in the Capital Amid Ownership Row*, GULF TIMES, Jan. 23, 2008, available at [http://www.gulfimes.com/site/topics/article.asp?cu\\_no=2&item\\_no=197375&version=1&template\\_id=38&parent\\_id=20](http://www.gulfimes.com/site/topics/article.asp?cu_no=2&item_no=197375&version=1&template_id=38&parent_id=20)

<sup>6</sup> Brown, *supra* note 2.

<sup>7</sup> *Russia approves UK art exhibition*, BBC – NEWS, Jan. 10, 2008, <http://news.bbc.co.uk/2/hi/entertainment/7180714.stm>.

2007, when the Russian authorities threatened to withdraw the “From Russia” exhibition at the Royal Academy.<sup>8</sup>

This article will trace the history of the Shchukin art collection, the circumstances under which it was nationalized, and the Shchukin family’s subsequent attempts at reclaiming their property. Then, this article will examine the language and legislative history of Part 6 of the Tribunals, Courts, and Enforcement Act of 2007, the political and legal context in which it was written, its interplay with United Nations and European Union cultural property laws, and its effect on cultural property restitution and reparations in the United Kingdom. Then, this paper will compare the British “immunity from seizure” legislation to similar statutes in the United States, including 22 U.S.C. § 2459 and the Foreign Sovereign Immunities Act. Recent case law involving cultural property claims in the United Kingdom and the United States will also be compared to demonstrate how “immunity from seizure” statutes have been interpreted by different courts. Finally, this article will look at various options the Deloque-Fourcaud family may exercise, and forecast whether or not they would be successful.

## I. BACKGROUND OF THE “FROM RUSSIA” EXHIBITION

### a. History of the Shchukin Collection

From the latter half of the 18<sup>th</sup> Century, the Shchukin were an established family in Moscow. Ivan Shchukin, the patriarch, was a successful businessman in the textile industry, and attained a net worth of 4 million gold rubles.<sup>9</sup> When Ivan Shchukin married the daughter of Pyotr Konovich Botkin, a prominent tea merchant and avid patron of the arts, Shchukin was

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<sup>8</sup> *Id.* See also Mark Stephens, *A Common Thief Does Not Obtain Ownership of Stolen Goods, and it is no Different When the Thieves are the Bolsheviks*, THE ART NEWSPAPER, Jan. 31, 2008, <http://www.theartnewspaper.com/article.asp?id=7511>.

<sup>9</sup> BEVERLY WHITNEY KEAN, ALL THE EMPTY PALACES: THE MERCHANT PATRONS OF MODERN ART IN PRE-REVOLUTIONARY RUSSIA 126 (1983).

introduced to arts and culture, and started collecting art.<sup>10</sup> Ivan Shchukin had eleven children. Sergei was the third son of the family.<sup>11</sup> Sergei loved to visit his uncle Mikhail Botkin in St. Petersburg to look at his paintings and sculptures. Sergei was shrewd and ambitious, and when he grew older, Sergei became the head of the family's business.<sup>12</sup> As a well-to-do textile businessman, Sergei Shchukin was part of a new merchant class, a bourgeoisie which could not identify with the Russian aristocracy as landed elite, but who were despised by the working class.

In 1897, Sergei Shchukin bought his first Monet painting, marking the beginning of a large art collection. Within twelve years Shchukin amassed a varied collection of Western Art, including twelve more Monet paintings, and an assortment of Pissarro, Sisley, Renoir, and Gauguin works. In 1893, Ivan bought his son Sergei the Trubetskoy Palace and presented it to him as the future site of the Shchukin collection.<sup>13</sup> For his collection, Sergei Shchukin bought major works by Matisse, Cezanne and Picasso. Shchukin loved Matisse's work so much that in 1909, he commissioned the artist to paint *Dance* and *Music* for two large decorative panels.<sup>14</sup> These paintings hung on the staircase landing in the Trubetskoy Palace, alongside 36 other

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<sup>10</sup> *Id.* at 127.

<sup>11</sup> *Id.* at 133.

<sup>12</sup> *Id.* at 134.

<sup>13</sup> *Id.* at 135.

<sup>14</sup> Henri Matisse, <http://www.moodbook.com/history/modernism/henri-matisse-music-dance.html> (last visited June 6, 2009).

important Matisse's, fifty Picassos, sixteen Gauguins, four Van Goghs and a roomful of Cézannes.<sup>15</sup>

b. Political Backdrop of Russian Revolution of 1917 Era

With the 1914 outbreak of the First World War, there was a new upsurge of Slavic patriotism. This was a time where all Russian classes met in cathedrals, and as commentators at the time declared, “war was declared and all at once not a trace was left of the revolutionary movement.”<sup>16</sup> This did not last for long. After the demoralizing defeat for Russia at the Battle of Tannenberg, the mood changed to bitterness, and class hatreds started seething again.<sup>17</sup> By 1917, murmurs of revolution started. Shchukin heard that a friend, Lunacharsky, the son of a textile merchant, was jailed as an agitator. Shchukin decided that his wife and young daughter could not remain in Russia. With fake papers, Shchukin’s wife and daughter left for Weimar, Germany.<sup>18</sup>

On November 7, 1917, the Congress of Soviets convened in Petrograd. The next evening, Lenin declared, “we shall now proceed to construct the Socialist order.”<sup>19</sup> Winter Palace was taken by the revolutionaries and members of the Kerensky cabinet were arrested and led into conference room by Red Guards. On December 1917, the nationalization of all industries was legalized. In January 1918, Shchukin was arrested. He was then taken to local headquarters for questioning, and was soon imprisoned. After a brief time, Shchukin was informed by a

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<sup>15</sup> *Id.* See also Wlademar Januszczak, *From Russia at the Royal Academy: The Russian Bear Courts Colourful Miss France in the Show of the Year So Far*, *Writes Waldemar Januszczak*, *TIMES* (London), Jan. 27, 2008, available at [http://entertainment.timesonline.co.uk/tol/arts\\_and\\_entertainment/visual\\_arts/article3241245.ece](http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/visual_arts/article3241245.ece).

<sup>16</sup> KEAN, *supra* note 8, at 126.

<sup>17</sup> *Id.* at 245.

<sup>18</sup> *Id.* at 253.

<sup>19</sup> *Id.* at 254.

delegation that all his artistic works in private collections were to become property of the State and would be administered by the People's Commissariat for Enlightenment. The Trubetskoy Palace and Ivan Morozov's home were to become two museums of Modern Western Art and would be opened to the public.<sup>20</sup> Ironically, a short time later Sergei Shchukin was offered the position of guide and curator for the new museum, and he promptly accepted. However, this offer was not a form of compensation but for service to the Soviet Culture.

Within months, the new Revolutionary Guard vastly changed the face of Russia. On June 28, 1918, all commercial enterprises of more than one million rubles were nationalized.<sup>21</sup> A Socialist Russia was becoming unlivable for Sergei Shchukin, a merchant of the tsarist era. One morning in August 1918, Sergei boarded a train at Bemsy Station, and left Russia, at the age of sixty-three.<sup>22</sup> Sergei left for Weimar, and soon after settled in Paris. Shortly after leaving, the fate of Shchukin's art collection was sealed. On the door of the Trubetskoy Palace, a seal was placed, dated November 15<sup>th</sup>, 1918, which stated:

Since the Art Gallery of Sergey Ivanovich Shchukin is an exclusive collection of the great European masters, especially French, of the late nineteenth and early twentieth centuries, and since, because of great artistic value, it is of great national importance for the people's culture, the Council of People's Commissars have decreed . . . . that it shall count as the State property of the Russian Soviet Federated Socialist Republic and shall come under the administration of the People's Commissariat for Education.<sup>23</sup>

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<sup>20</sup> *Id.* at 256.

<sup>21</sup> *Id.* at 260.

<sup>22</sup> *Id.* at 261.

<sup>23</sup> *Id.*

This was Decree Number 851 (Laws and Decrees of the Workers and Peasant's Government), and was signed by Lenin.<sup>24</sup> Declaring Shchukin's art collection of "great national importance for the people's culture," Shchukin's art collection was taken as state property.

Until the outbreak of World War II, Shchukin's collection remained at the Museum of Modern Western Art.<sup>25</sup> The paintings were hidden away for safekeeping during the war. When the war ended in 1945, the museum was not re-opened. Stalin's regime ordered the "purge of decadent modernism," and in 1948 the Museum of Modern Western Art was abolished by law.<sup>26</sup> The Shchukin collection was divided into two parts: one part was sent to the Pushkin Museum of Fine Arts in Moscow, and a larger portion was sent to the State Hermitage Museum, Russia's largest repository for art. However, the modern style of painting was taboo under Stalin's regime, and the paintings were not displayed in general view, but limited to foreign visitors, art scholars, and writers with a special interest.<sup>27</sup>

#### c. Sergei Shchukin's Descendants' Numerous Lawsuits to Recover the Art Collection

The descendants of the Shchukin family have filed numerous lawsuits since the 1950's to recover their family's property. In 1953 Irina Shchukin, Sergei Shchukin's daughter, sued the Soviet government for possession of several of her father's original Picasso paintings, including *After the Ball*, *Young Woman*, *The Embrace*, and *Friendship* while they were displayed in Paris at the *Maison de la Pensee Francaise* exhibit.<sup>28</sup> The exhibition in Paris closed immediately. Irina

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 289.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 289-90.

Shchukin ultimately lost her lawsuit. After this episode, the French government asked Madame Matisse to approach Irina Shchukin and make Shchukin promise that she would not try to institute another lawsuit if the paintings in question were displayed in Paris again.<sup>29</sup> Throughout the 1960's, Shchukin's paintings appeared in numerous exhibitions across the world, including Tokyo, Otterlo in the Netherlands, New York, and Washington D.C.<sup>30</sup>

In the 1990's, the Shchukin descendants attempted legal action to gain a concession of the proceeds from the exhibits when they displayed at several museums. Since 1994, Deloque-Fourcaud has attempted legal action three times against Russian museum exhibitions in Paris, Rome and Los Angeles that featured artworks from their ancestors' collections.<sup>31</sup> In 1993, Irina Shchukina, filed a lawsuit in France over a loan of 21 works of art by the Hermitage Museum in St. Petersburg, Russia and the Pushkin for a Matisse exhibition at the Pompidou Centre.<sup>32</sup> In 2000, Deloque-Fourcaud filed a lawsuit concerning a Matisse that was on loan from the Hermitage Museum for an exhibition in Rome.<sup>33</sup> Both suits were unsuccessful.

However, the Shchukin family has not challenged every exhibit featuring their ancestor's artworks. For example, Irina Shchukin did not challenge an exhibition of art from Russia in Essen, Germany in 1993 that honored Shchukin and another prominent Russian collector whose

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<sup>29</sup> *Id.* at 290.

<sup>30</sup> *Id.*

<sup>31</sup> John Varoli, *Russian Collectors' Heirs Seek Compensation for Artworks*, BLOOMBERG, Jan. 21, 2008, <http://www.bloomsber.com/apps/news?pid=20601088&sid=acsAhcnewUjA&refer=muse>.

<sup>32</sup> Ruth Redmond-Cooper, *Disputed Title to Loaned Works of Art: The Shchukin Litigation*, 1 ART ANTIQUITY & L. 73, 73-74 (1996).

<sup>33</sup> *Rome Court to Rule in Dispute over Russian Painting*, AGENCE FRANCE-PRESS, June 9, 2000.



art the new Russian government had also nationalized in 1918.<sup>34</sup> Additionally, Deloche-Fourcaud took no action when paintings formerly owned by his grandfather appeared at a 2001 exhibition of art from the Hermitage in Las Vegas. He said that this was due to lack of financial resources.<sup>35</sup>

The most recent legal challenge was in 2003 against the Los Angeles County Museum of Art (LACMA). The LACMA exhibition "Old Masters, Impressionists, and Moderns: French Masterworks From the State Pushkin Museum, Moscow" which was due to open July 27, 2003, included twenty-five works that were originally in Sergei Shchukin's collection and nationalized by the Lenin regime. On July 15<sup>th</sup>, 2003, Deloche-Fourcaud filed suit against the museum. He claimed that Lenin's nationalization of that art was illegal. Therefore as an heir to his grandfather's estate, Deloche-Fourcaud had an ownership interest in, among other art in the permanent collection of the Pushkin, the twenty-five works which were originally in Sergei Shchukin's collection, known in the suit as the "Contested Objects". He asked LACMA to pay treble the proceeds that LACMA will earn if (1) the Contested Objects are included in the Exhibition; and (2) declare that the Contested Objects are not entitled to 2459(a) immunity from "seizure."<sup>36</sup> The United States of America and LACMA moved to dismiss the Complaint for failure to state a claim upon which relief may be granted, pursuant to 22 U.S.C. § 2459(b). The motion was made on the grounds that: 1) LACMA is immunized from this lawsuit; 2) Plaintiff's claims impermissibly interfere with United States foreign policy; 3) Plaintiff's claims are non-justiceable because they ask the court to adjudicate a political question; 4) Plaintiff's claims are

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<sup>34</sup> David Galloway, *A Tribute to Moscow Visionaries*, INT'L HERALD TRIB., Aug. 7, 1993, at 7.

<sup>35</sup> Marilyn Henry, *Lenin's Spoils Given Pass by U.S. Officials; Exhibit Reopens Wounds for Heirs of Art Patron*, WASH. POST, Dec. 15, 2002, at A1.

<sup>36</sup> *Id.* at 272.

non-justiceable because they require the court to invalidate an Act of State by the Russian Government; and 5) Plaintiff inexcusably delayed in filing his lawsuit.<sup>37</sup> The U.S. District Court agreed with the United States and LACMA's arguments, and dismissed the suit with prejudice.<sup>38</sup> The District Court's ruling is notable because it demonstrates that courts are not willing to pay treble the proceeds that museums earn towards people who claim that the property is rightfully theirs, at least in the Ninth Circuit.

d. "From Russia" Controversy at the Royal Academy

In October of 2007, The State Hermitage Museum said they would loan more than 120 paintings by artists such as Cezanne, Gauguin, Matisse, Kandinsky and Malevich to the Royal Academy of Arts. This exhibition would be called "From Russia: French and Russian Master Paintings 1870-1925 From Moscow and St. Petersburg." However, they would only loan these paintings to the Royal Academy if the U.K. government guaranteed that the works could not be confiscated by local courts from a third party lawsuit.<sup>39</sup> Knowing that a large portion of the exhibit was from Sergei Shchukin's collection, the Russian authorities were concerned that the Shchukin family would try to claim the art in a British Court proceeding. Toby Sargent, the deputy head of news at the United Kingdom Department for Culture, Media, and Sport replied that the United Kingdom could not provide such a guarantee until they had checked the provenance of the works. He wrote a letter of assurance from the United Kingdom to the Russian

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<sup>37</sup> *Id.* at 291.

<sup>38</sup> Konstantin Akinsha & Grigorij Kozlov, *Fighting for Their for Their Rights*, ARTNEWS, Apr. 2008, available at [http://www.artnewsonline.com/issues/article.asp?art\\_id=2474](http://www.artnewsonline.com/issues/article.asp?art_id=2474).

<sup>39</sup> John Varoli & Farah Nayeri, *Hermitage Won't Send Art to London Without Guarantee* (Update1), BLOOMBERG, Oct. 24, 2007, <http://www.bloomberg.com/apps/news?pid=20601088&sid=aLpIvSHoUheU&refer=muse>.

government that stated, "under English law... the works of art loaned for exhibition will be immune from any process to enforce a judgment or arbitration award unless the state itself has waived this immunity. This immunity will extend to applications to seize or attach the property in question. The government will use its best endeavors in accordance with the law of England to ensure the safe return of all objects lent."<sup>40</sup> However, this was not strong enough to assure the Russian government. On December 19, the Russian authorities cancelled the loans.

In response, the Royal Academy appealed to the Department for Culture, Media, and Sport. Within days, the immunity from seizure legislation passed in Parliament. This new legislation would foreclose any claims from descendants from the Shchukin family for paintings from the "From Russia" exhibition. James Purnell, the United Kingdom Secretary of State for Culture, Media and Sport signed an order on December 30, 2007 in the middle of holiday recess, to bring the new legislation into force the following morning. In concert with the new anti-seizure legislation, the Royal Academy introduced new Due Diligence procedures to follow when borrowing art works which arose from a questionable provenance.<sup>41</sup> On January 9, 2008, the Russia Federal Agency for Culture and Cinematography gave its formal approval, and the 124 paintings were sent to London, from Dusseldorf. The paintings arrived at the Royal Academy on January 11, 2008.<sup>42</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> See Report Outlining the Royal Academy's Due Diligence Procedures for Works of Art and Cultural Objects on Loan From Abroad to Temporary Exhibitions, with particular reference to: 'From Russia: French and Russian Master Paintings 1870 – 1925 from Moscow and St. Petersburg,' <http://static.royalacademy.org.uk/files/ra-web-due-diligence-appendix-2-russia-231.doc> (last visited June 6, 2009).

<sup>42</sup> Martin Bailey, *Brown and Putin Withdraw Their Patronage as Russian Loan Show Opens at the Royal Academy*, THE ART NEWSPAPER, Feb. 1, 2008.

Just eight days later, the Shchukin heirs started making noises about possible reparations for the lost artwork. Delocque-Fourcaud issued a statement saying he did not want restitution of the paintings, but that he should receive a percentage of the material benefits that accrue from the exploitation of the works, referring to loan fees and reproduction charges. The paintings were on exhibition until April 18, 2008. After a stream of failed legal claims since the 1950s, it is unclear if there are any methods available for the Shchukin heirs to pursue in order to recover at least some of the value from their ancestor's paintings. Throughout this paper, the Shchukin heirs' options for recovery and restitution will be discussed.

## II. BRITISH "IMMUNITY FROM SEIZURE" ACT, RELATED LEGISLATION AND CASE LAW

### a. Description of Immunity from Seizure Act

Passed in Parliament in December 2007, Part 6 of the Tribunals, Courts, and Enforcement Act of 2008 (Immunity from Seizure Act) set forth new rules for the protection of cultural objects on loan. According to this new legislation, an object protected under the definition of "protected object" may not be seized or forfeited under any enactment or rule of law.<sup>43</sup> The statute has explicit conditions for what constitutes a "protected object." According to Part 6, 134 Protected objects, Section 2, the protected object must be: 1) kept outside the U.K; 2) not owned by a resident of the U.K; 3) its importation should not contravene a prohibition or restriction on the import of goods; and 4) brought for public display in a temporary exhibition at a public museum or gallery.<sup>44</sup> The museum or gallery must comply with certain requirements, such as

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<sup>43</sup> Tribunals, Courts, and Enforcement Act, 2007, c. 15, § 135 (1) (Eng.), *available at* [http://www.uk-legislation.hmso.gov.uk/acts/acts2007/ukpga\\_20070015\\_en\\_13](http://www.uk-legislation.hmso.gov.uk/acts/acts2007/ukpga_20070015_en_13).

<sup>44</sup> *Id.* at § 134 (2)(a-e).

satisfying a list of due diligence procedures to find the provenance of the object's ownership.<sup>45</sup> It must be approved by an "appropriate authority", which includes (a) the Secretary of State, in relation to an institution in England, (b) the Welsh Ministers, in relation to an institution in Wales, (c) the Scottish Ministers, in relation to an institution in Scotland, and (d) the Department for Culture, Art and Leisure, in relation to an institution in Northern Ireland.<sup>46</sup>

The explanatory notes to Immunity from Seizure Act explain the statute's purpose and application. The statute provides "immunity from seizure to objects which have been lent to this country from overseas to be included in a temporary exhibition at a museum or gallery." Immunity will be given from any form of seizure ordered in civil or criminal proceedings, and from any seizure by law enforcement authorities. The immunity will apply provided that the import of the object in question complies with the law on the import of goods, and that the museum or gallery has published information about the object as required in regulations made by the Secretary of State.<sup>47</sup>

There is one exception to the immunity from seizure rule in the statute. While an object is protected under this section it may not be seized or forfeited under any enactment or rule of law, unless: 1) the property is seized or forfeited by virtue of an order of the court in the United Kingdom, and 2) the United Kingdom court is required to make the order under, or under

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<sup>45</sup> *Id.* at § 136 (2)(a-b). *See also* Report Outlining the Royal Academy's Due Diligence Procedures, *supra* note 40, (demonstrating the type of procedures a museum or gallery must follow to comply).

<sup>46</sup> Tribunals, Courts, and Enforcement Act, c. 15, § 136 (5)(a-d).

<sup>47</sup> Tribunals, Courts and Enforcement Act, 2007, <http://www.opsi.gov.uk/ACTS/acts2007/en/07en15-j.htm> (last visited June 6, 2009).

provision giving effect to, a Community obligation or any international treaty.<sup>48</sup> While the definition and application of “[c]ommunity obligation” is unclear from the statute, the explanatory notes explain that this exception applies in situations where the United Kingdom must comply with its obligations under EU or international law.<sup>49</sup> The explanatory notes state that this exception would apply in a situation where a British court is asked to enforce an order for the seizure of an object made by the courts of another country to confiscate proceeds of crime.<sup>50</sup> It is important to note that the bill only precludes physical seizure of a tangible work. Under the bill, it is still possible to bring an action for damages against the museum or for restitution for unjust enrichment, conversion, or declaration of title.<sup>51</sup>

#### b. Legislative and Legal Context in which Immunity from Seizure Legislation was Passed

News stories have given the appearance that James Purnell, pushed the anti-seizure legislation through in order to secure the exhibit because the Russian Government would not allow the “From Russia” exhibit into the United Kingdom. However, legislative history and debates in the House of Lords demonstrate that the Immunity from Seizure Bill was considered for several years before the “From Russia” controversy. Since 2005, anti-seizure legislation has been of concern for the British Parliament. With countries such as the United States, Germany, and France passing anti-seizure protection, the safeguard was becoming an international norm.

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<sup>48</sup> Tribunals, Courts, and Enforcement Act, 2007, c. 15, § 135(1)(a-b).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> 687 PARL. DEB., H.L. (5th ser.) (2006) 784, available at <http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/61129-0006.htm>.

Once other countries passed this type of legislation, the United Kingdom started to become a less inviting host in the museum world. In one case, Romania withdrew two items from an exhibition at the Tate for fear of seizure.<sup>52</sup> In fact, Russia, Romania, and Greece insisted they would not lend any works of art the United Kingdom unless anti-seizure legislation was passed.<sup>53</sup> Taiwan had also refused to loan any items to the United Kingdom without the anti-seizure legislation safeguard.

British politicians thought the lack of anti-seizure legislation placed the United Kingdom at a competitive disadvantage in the museum business with other countries that have cultural exchange protection. As Lord Howarth of Newport noted in a House of Lords debate on November 29, 2006, “[t]he difficulties in organizing exhibitions are multiplying and the number of refusals of loans are multiplying.”<sup>54</sup> Lord Howarth then argued that there is public interest in having art exhibitions because London should retain its status as a great cultural center. He also said that these exhibitions promote a better international understanding. Thus, the anti-seizure legislation had been considered by the Parliament as a safeguard to Britain’s cultural wellbeing, well before the “From Russia” controversy.

Nevertheless, the Immunity from Seizure Act has not been without its critics. For example, during the November 2006 debate in the House of Lords, Lord Janner of Braunstone cited several problems with the bill.<sup>55</sup> First he argued that the Bill does not define which objects

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<sup>52</sup> DEPARTMENT FOR CULTURE, MEDIA, AND SPORT, CONSULTATION PAPER ON ANTI-SEIZURE LEGISLATION 2 (2006).

<sup>53</sup> *Id.*

<sup>54</sup> 687 PARL. DEB., H.L. (5th ser.) (2006) 782, *available at* <http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/61129-0006.htm>.

<sup>55</sup> *Id.* at 788.

are protected. They should be cultural objects. Next, Janner stated that the period of protection is not carefully thought through. There is nothing to ensure that items on loan are not brought into the United Kingdom on a semi-permanent basis. Items can be sold while they are on display in the United Kingdom.<sup>56</sup> He also argued that safeguards for the true owners of such property, who have been robbed of them, are totally insufficient. Furthermore, the Bill is incompatible with the United Kingdom's support for the principles laid down in the 1998 Washington Conference on Holocaust-Era Assets. He argued it overrides our existing law, policy and practice on illicitly traded works of art, and art stolen by the Nazis.<sup>57</sup> Mark Stephens, a British cultural property attorney, is even blunter in his criticism of the bill and the British government for passing the Immunity from Seizure Act. In a recent editorial in the *Art Newspaper* regarding the passing of the Immunity from Seizure Bill, Stephens wrote, "The actions of both the British government and the Royal Academy are morally reprehensible and put them both in fundamental breach of the domestic and international standards, to which they apparently only pay lip-service."<sup>58</sup> Stephens argues that Lenin's nationalization of private art collections amounts to the same thing as looting according to international standards. He posits that when the United Kingdom allows looted art into its museums, it is casting a blind eye to illegal activity and is thus partaking in illegal activity itself.<sup>59</sup>

### c. State immunity Act 1978

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Stephens, *supra* note 7, at 188.

<sup>59</sup> *Id.*



Before the Immunity from Seizure Act passed, there were several pieces of domestic British legislation that covered immunity and cultural property. There was the State Immunity Act 1978. According to this act, a State would be immune from the jurisdiction of the courts of the United Kingdom except as provided in the exceptions of the act.<sup>60</sup> Under the first exception, a state is not immune to proceedings against it if it involved a commercial transaction performed in the United Kingdom, which was entered into by the State, or an obligation of the state by virtue of the contract. The statute defined a commercial transaction as: 1) any contract for the supply of goods or services; 2) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and 3) any other transaction or activity.”<sup>61</sup> According to this statute, an art exhibit on loan to the United Kingdom owned by another country would fall within the definition of a commercial transaction. Therefore, it would not be immune from British courts.

The State Immunity Act of 1978 was limited. It only applied to property that was directly owned by the state. It did not apply to any entity distinct from the executive organs of the State’s government.<sup>62</sup> In this respect, the new Immunity from Seizure Act is more expansive, as it applies to both states and independent foreign owners. Whereas the State Immunity Act of 1978 applied only to foreign states, the text of the Immunity from Seizure Act sets forth conditions on “protected objects,” without setting specifications for the ownership of the protected objects. Therefore, the new legislation bars independent foreign owners as well as state and government

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<sup>60</sup> State Immunity Act, 1978, c. 33, § 1 (Eng.), *available at* [http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1978/cukpga\\_19780033\\_en\\_1](http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1978/cukpga_19780033_en_1).

<sup>61</sup> *Id.* at § 3.

<sup>62</sup> DEPARTMENT FOR CULTURE, MEDIA, AND SPORT, *supra* note 51, at 5.

entities from trying to seize cultural objects. If the Shchukin heirs established ownership to their art collection, they would not have been barred under the State Immunity Act of 1978 to bring a claim. Under the new legislation, their claim is barred if it does not fall within the exception.

#### d. Acts Concerning Cultural Property and Crime

There are also two current overlapping pieces of legislation concerning the dealing of stolen or looted cultural property. First, the Dealing in Cultural Objects Offences Act of 2003 makes it an offence to acquire, dispose of, import or export tainted cultural objects, or agree or arranging to do so; and for connected purposes.<sup>63</sup> The penalty is up to seven years in prison or a fine.<sup>64</sup> The act defines a “cultural object” as an object of historical architectural or archeological interest. An object becomes a “tainted cultural object” under the statute if a person removes the object from a building or structure of historical, architectural or archaeological interest where the object has at any time formed part of the building or structure, or it is removed from a monument of such interest. There is also the Proceeds of Crime Act of 2002. This act is a general statute that penalizes people who possess or deal in “criminal property.” It gives extensive powers to confiscate stolen property.<sup>65</sup>

Under these statutes, it might be possible to argue that a specific piece from Shchukin’s collection falls under the definition of a “tainted cultural object” Matisse’s panels *Dance* and *Music* were commissioned by Shchukin with the express purpose to be placed as decorative

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<sup>63</sup> Dealing In Cultural Objects (Offences) Act, 2003, c. 27 (Eng.), available at [http://www.opsi.gov.uk/acts/acts2003/ukpga\\_20030027\\_en\\_1](http://www.opsi.gov.uk/acts/acts2003/ukpga_20030027_en_1).

<sup>64</sup> State Immunity Act, 1978, c. 33, § 3 (Eng.).

<sup>65</sup> Norman Palmer, *Adrift on a Sea of Troubles: Cross-Border Art Loans and the Specter of Ulterior Title*, 38 VAND. J. TRANSNAT’L L. 947, 955 (2005).

panels on the staircase of the Trubetskoy Palace. The Trubetskoy Palace was a structure of historical interest, as it housed a large collection of paintings. Furthermore, it was turned into the Museum of Modern Western Art. One could argue that since the paintings were commissioned specifically as a part of the ornamental staircase in a mansion which became a museum, they should be classified as “cultural objects.” When the Matisse panels were removed from the Trubetskoy Palace, they were taken from a site of historical importance, and therefore became “tainted cultural objects” under this statute. However, even if this were true, this act would not help the Shchukin family. The Dealing in Cultural Objects Offences Act of 2003 has a criminal penalty and it is not a means for recovery of the object by the rightful owner.

e. British Common Law

In cases involving the restitution of nationalized property in United Kingdom case law, plaintiffs have had mixed results. Sovereign immunity covers claims arising from the expropriation by a state which is recognized under English law, where the property in question was at the time located in that state. The facts of the case *Princess Paley Olga v. Weisz and Others* are similar to the facts in the Shchukin heir’s situation.<sup>66</sup> In *Princess Paley Olga*, Princess Paley Olga’s movable items, including furniture, pictures, and objets d’art, were confiscated by revolutionaries during the Revolution of 1918. The revolutionaries became the rulers of the Soviet government, and nationalized the plaintiff’s property. The revolutionaries turned the plaintiff’s home, Paley Palace, into a museum. In 1924, the British Government recognized the

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<sup>66</sup> *Princess Paley Olga v. Weisz*, (1929) 1 Eng. Rep. 718, 719 (K.B.). Princess Paley Olga was the widow of the Grand Duke Paul of Russia.

revolutionaries as the de jure government of Russia. In 1928 the Soviet Republic sold the plaintiff's objects to Weisz, the defendant, who brought the items to England.<sup>67</sup>

Princess Paley Olga brought an action against the defendant to recover these items. The judge ruled that the plaintiff's items were the rightful property of the Russian state on several grounds.<sup>68</sup> First, the Paley Palace was turned into a museum. The court cited a Russian Decree of March 18, 1923, which stated, "Works of art, antiques, and articles of historical interest being in museums and depositories as forming part of the Museum Fund and being safeguarded by State means, are recognized to be State property."<sup>69</sup> Second, Decree No. 111 of the Council of People's Commissaries stated that the property of people "fleeing from Russia" would automatically be confiscated and become property of the Russian state.<sup>70</sup> The *Princess Paley Olga* precedent has been upheld in a more recent case.<sup>71</sup> In *Williams and Humbert v. W & H Trademarks*, the court held that the English courts recognize as valid foreign laws which operated lawfully to expropriate property within the jurisdiction of the foreign state and vested ownership in its nominees.<sup>72</sup> In the Shchukin case, the Trubetskoy Palace, which housed the Shchukin Collection, was turned into the Museum of Modern Art. Like *Princess Paley Olga*, this set of facts would be protected under the Russian Decree of March 18, 1923. Also, the Shchukin family fled Russia. Like *Princess Paley Olga*, those "fleeing from Russia" would fall under

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<sup>67</sup> *Id.* at 718.

<sup>68</sup> *Id.* at 723.

<sup>69</sup> *Id.* at 722.

<sup>70</sup> *Id.* at 723.

<sup>71</sup> See *Williams & Humbert Ltd. v. W&H Trade Marks Ltd.*, (1985) 1985 WL 310924; see also *Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18 (D.C.N.Y 1976).

<sup>72</sup> See *Williams & Humbert*, (1985) 1985 WL 310924.

Decree No. 111. By the *Princess Paley Olga* court's logic, the items in the Trubetskoy Palace were rightfully property of the Russian state.

However, in *The Rose Mary*, a later case in Aden, a British Crown Colony located in present-day Southern Yemen, the court ruled that an expropriation without compensation violates international law.<sup>73</sup> The Persian government nationalized the oil industry, but it did not compensate the companies for the property that was nationalized. Because the companies were not compensated, the court ruled that the oil in dispute was not lawfully expropriated, and was still the property of the oil company plaintiffs. Here, the art work was nationalized, but the Shchukin family was never compensated for the art. Sergei Shchukin's palace was transformed into the Museum of Modern Art, and Shchukin was given the title curator. However, this was not a form of compensation to Shchukin. He was asked to be the curator of this museum while under arrest. However, the Shchukin family was not compensated for the taking, so it was an unlawful expropriation. Therefore, under *The Rose Mary* case, one could argue that the art collection is still the Shchukin's property.

Furthermore, British courts have held that sovereign immunity does not apply if the act does not involve the exercise of a sovereign right or character.<sup>74</sup> Under British law, if the claim does not involve an act sovereign in character, the British court has the authority to both determine and enforce the right.<sup>75</sup> To determine whether an act has sovereign right or character, courts distinguish between penal actions and private actions. A penal action is brought for the

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<sup>73</sup> *Anglo Iranian Oil Co. v. Jaffrate*, 1953 WL 14223.

<sup>74</sup> *Mbasogo v. Logo Ltd.*, [2007] 2 WLR 1062 (appeal taken from Q.B.).

<sup>75</sup> *Huntington v. Attrill*, (1893) 1893 A.C. 150 (H.L.P.C.).

public good and community interest, and is thus sovereign in character. A private or civil action is brought to right a wrong which could have been committed in a private context, and is not sovereign in character. Here, the Hermitage Museum and Pushkin Museum, by virtue of the Russia Federal Agency for Culture and Cinematography, loaned the Shchukin collection to the Royal Academy in London. One might argue that disseminating cultural masterpieces is a goal of a nation. However, at its core, this act is one art museum loaning another art museum some paintings. Private museums exchange in contracts such as this on a regular basis. Thus, the act does not involve the exercise of a sovereign right or character. British courts would not be foreclosed upon hearing a claim involving this transaction.

There is also a recent trend in British common law to cite international principles on cultural property as binding. For example, a British court recently stated in the case *Government of the Islamic Republic of Iran v. The Barakat Galleries Limited*:

In 1970 the signatories to the UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property (ratified by the United Kingdom in 2002) recognized not only that it was incumbent on every State to protect the cultural property within its borders against the dangers of theft, clandestine excavation and illicit export, but also that it was essential for every State to become alive to the moral obligations to respect the cultural heritage of all nations and that the protection of cultural heritage could only be effective if organized both nationally and internationally among States working in close co-operation (recitals 3, 4 and 7).<sup>76</sup>

In a future Shchukin litigation in the United Kingdom, the court could cite this UNESCO Convention to uphold the principle that cultural property should be protected against theft and illicit export. Since the Shchukin art collection was nationalized without compensation, it was an

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<sup>76</sup> See *Iran v. Barakat Galleries Ltd.*, [2007] EWCA (Civ) 1374.

unlawful taking. If a court recognized that the property is still owned by Shchukin family, then Russia's export of it to Britain would be illicit.

As of today, no case has yet applied Part 6 of the Tribunals, Courts, and Enforcement Act. As the United Kingdom has become more sensitive to international organizations, it is arguable that a modern case examining the same question as *Princess Paley Olga* may cite to United Nations treaties and European Community conventions, and come to a favorable result for the Shchukin heirs.

#### IV. INTERNATIONAL LAWS GOVERNING CULTURAL PROPERTY

The British Anti-Seizure Act carves an exception for court orders where there is a European Community obligation or an international treaty. This section of the paper will examine European Community and international treaties to see if the Shchukins can bring a claim based on one of these international laws. First, we will address the United Kingdom's responsibilities as a member of the European Community. While Russia is not a member of the European Community, Deloque-Fourcaud is a citizen of France, a member of the European Community.<sup>77</sup> According to Article 1 of the European Convention of Human Rights, "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."<sup>78</sup> Therefore, Deloque-Fourcaud could bring a suit according to this convention on this basis of his French citizenship.

When considering immunity issues, it is important to consider a person's right to a court. According to the European Convention on Human Rights, Section 1, Article 6, "In the

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<sup>77</sup> Andre Marc Delocque-Fourcaud, <http://www.ichim.org/ichim05/jahia/Jahia/pid/704.html>.

<sup>78</sup> Convention for the Protection of Human Rights and Fundamental Freedoms § 1, art. 1, Nov. 4, 1950, 213 U.N.T.S. 222.

determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”<sup>79</sup> Property rights are part of one’s civil rights, so under this article, someone deprived of their property rights has a right to a fair hearing.

The European Convention on Human Rights also guarantees the right to the peaceful enjoyment of one’s possessions. According to Protocol 1, Article 1, “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”<sup>80</sup> However, this Protocol has a provision that protects a State’s sovereign right to control property within its borders. The protocol continues, “The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”<sup>81</sup> The British Legislature’s Consultation on Anti-Seizure Legislation addressed this issue. They argued that preventing a potential claimant from seeking a particular form of relief in this jurisdiction for a limited period of time strikes a fair balance between the rights of the claimant and the public interest.<sup>82</sup> However, international law mandates that for there to be a legal taking of property, it must serve a purpose, not discriminate against certain individuals, and must be accompanied by just

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<sup>79</sup> *Id.* at § 1, art. 1.

<sup>80</sup> *Id.* at pro.1, art. 1.

<sup>81</sup> *Id.*

<sup>82</sup> DEPARTMENT FOR CULTURE, MEDIA AND SPORT, *supra* note 51.



compensation.<sup>83</sup> In *Beyeler*, a recent European Court of Human Rights case, Italy acquired the plaintiff's painting at well below the market value. The European Court of Human Rights held that Italy was unjustly enriched by this act, and therefore Italy violated Protocol 1, Article 1.<sup>84</sup> In the Shchukin case, the Shchukin family was never compensated for the Russian state's expropriation of their art collection. According to the precedent set by *Beyeler*, Article 1, Protocol 1 was violated, and the Shchukin heirs are entitled to damages arising from unjust enrichment.

On the other hand, the European Community wants to promote intercultural exchange between its members. For example, according to Article 151(2) of the European Community Treaty, "action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in non-commercial cultural exchange" including, *inter alia*, art loans to museums.<sup>85</sup> Additionally, one of the goals of the European Convention on Culture is for its signatories to "undertake to facilitate the circulation and exchange of cultural objects and take the necessary measures to grant access to cultural objects under their control."<sup>86</sup> It will be interesting to see how the European Court of Human Rights balances the competing interests for restoration to the rightful owners and the circulation of cultural objects.

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<sup>83</sup> Benjamin Pollock, *The Tenth Annual Frankel Lecture: Comment: Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution of Nazi Looted Art Claims*, 43 HOUS. L. REV. 193 (2006).

<sup>84</sup> *Beyeler v. Italy*, 33 Eur. Ct. H.R. 52 (2001).

<sup>85</sup> Matthias Weller, *Immunity for Artworks on Loan? A Review of International Customary Law and Municipal Anti-Seizure Statutes in light of the Liechtenstein Litigation*, 38 VAND. J. TRANSNAT'L. L. 997, 1012 (2005).

<sup>86</sup> *Id.* at 1009.

The United Nations also has treaties and conventions applicable to this case. The main Convention is the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Article 2 states:

1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting therefrom.
2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.<sup>87</sup>

The second part declares that states should help make the necessary reparations. Article 13 of the Convention is also applicable. It states:

The States Parties to this Convention also undertake, consistent with the laws of each State:

- a. To prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property;
- b. To ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner;
- c. To admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners.

The words of the UNESCO Convention are broad, and courts can interpret it in different ways. However, in a situation where artwork has been unlawfully expropriated, the victim could be helped under this convention to receive reparations. When applying international laws and treaties to the United Kingdom, it is a delicate balancing act of knowing when one is bound by the law.

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<sup>87</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 2, Nov. 14, 1970, 823 U.N.T.S. 231.

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects also addresses the return of objects.<sup>88</sup> According to Chapter II – Restitution Of Stolen Cultural Objects, *Article 3*, (1) The possessor of a cultural object which has been stolen shall return it, and (2) for the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.<sup>89</sup> To succeed under Chapter II, the Shchukin heirs would have to prove that the cultural object was stolen. The heirs could argue that they were never compensated, and therefore, it was an unlawful expropriation. Since it was an unlawful expropriation, the Russian state retained it unlawfully. Under Article 3, when something is unlawfully retained, it is considered stolen. Once the Shchukin heirs have established Article 3, they could move to Article 4, which states: (1) The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object. Thus, the Russian State would be entitled to compensation under the UNIDROIT Convention if the Shchukin heirs were successful with their restitution claim. Citing the aforementioned laws, the Shchukin heirs would have grounds for a claim based on European Community and International Law. If they were to succeed in such a claim, the exception from the British Anti-Seizure Act, and the art works could be seized.

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<sup>88</sup> Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322, *available at* <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm>.

<sup>89</sup> *Id.* at art. 3.

V. COMPARISON OF BRITISH LAW TO ANTI-SEIZURE LEGISLATION IN THE UNITED STATES

Anti-seizure legislation in the United Kingdom was just passed in January 2008, and there is no British case law that interprets the meaning of the statute. In contrast, the United States has a federal Anti-Seizure Bill originally passed in 1965, and the statute has been interpreted several times in case law. The “Immunity from Seizure Under Judicial Process of Cultural Objects Imported for Temporary Exhibition or Display”, 22 U.S.C. § 2459 (from here referred to as the Federal Anti-Seizure Bill), states that no court shall issue or enforce any judicial process, or enter any judgment, decree, or order, for the purpose or having the effect of depriving that institution or any carrier. The “cultural significance” of an object is determined by the President or his designee, and whether the temporary exhibition or display is of national interest, and notice of this is published in the Federal Register.<sup>90</sup>

There are several distinctions between the United States Federal Anti-Seizure Bill and the United Kingdom’s Anti-Seizure Act. First, the United States’ bill has a requirement that the President or a representative determine whether the object is of cultural significance. The General Counsel of the United States Information Agency acts as the president’s designee.<sup>91</sup> According to Section Two of the Executive Order, the Director of the United States Information Agency, in carrying out this Order:

[S]hall consult with the Secretary of State with respect to the determination of national interest, and may consult with the Secretary of the Smithsonian Institution, the Director of the National Gallery of Art, and with such other officers and agencies of the

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<sup>90</sup> 22 U.S.C. § 2459(a) (2000).

<sup>91</sup> Exec. Order No. 12,047, 3 C.F.R. 167 (1978), *amended in* Exec. Order No. 12,388, 3 C.F.R. 225 (1982), *available at* <http://www.archives.gov/federal-register/codification/executive-order/12047.html>.

Government as may be appropriate, with respect to the determination of cultural significance.

Thus, the United States law determines the “cultural significance” of an object by vesting the power in a certain individual, and listing sources that person may consult to make this determination. On the other hand, the British bill sets forth a number of specific factors an object must meet to be a “protected object.” In the British bill, the impetus is on the museums to follow the due diligence procedures set forth by the Secretary of State.<sup>92</sup> It will be interesting to see in practice if this distinction will make a difference in the statute’s interpretation.

Another difference is the relative power each respective government has in a situation where a judicial proceeding arises. In the British case, the court follows an order through a Community (European) obligation or an international treaty.<sup>93</sup> It seems like in the British legislation, the British court system is submissive to a larger international system, to which it must play a supporting role. In the American immunity from seizure legislation, on the other hand, the United States Attorney from the applicable district has the right to intervene as a party and upon request from an institution adversely affected, in any pending judicial proceeding.<sup>94</sup>

In American cases concerning immunity for cultural property, The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602, plays a major role.<sup>95</sup> The FSIA states in § 1604:

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<sup>92</sup> Tribunals, Courts and Enforcement Act, 2007, c. 15, § 134.

<sup>93</sup> *Id.* at § 135(1).

<sup>94</sup> 22 U.S.C.S. § 2459(b) (LexisNexis 2008).

<sup>95</sup> Foreign Sovereign Immunities Act, 28 U.S.C.S. § 1602 (LexisNexis 2008).

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

The exceptions are where the state has waived their immunity, either explicitly or by implication, or in connection with a commercial activity of the foreign state elsewhere.

The Federal Anti-Seizure Bill has been tested in recent case law. Different circuits in the United States have interpreted the interaction of the FSIA and the Immunity from Seizure Act in different ways. The interpretation has yet to be tested in the Supreme Court. In 2000, the Southern District of Alabama ruled that the Federal Anti-Seizure Bill controls the FSIA in the case of cultural property. In 2000, the petitioners in *Magness* filed a writ of execution to recover assets from the Russian Federation, including the Golden Coronation Carriage, the Grand Piano of Empress Feodorov, and a miniature of Imperial Regalia by Faberge Jewels.<sup>96</sup> The court ruled the plaintiff's items were immune from execution because the Federal Anti-Seizure Bill bars it. The plaintiffs were not allowed to proceed with their suit in *Magness*.

On the other hand, a 2005 District Court for the District of Columbia case held the two doctrines were clear and not inconsistent.<sup>97</sup> In *Malewicz v. City of Amsterdam*, Kazimir Malewicz was a Russian modern artist. He visited Berlin in 1927, but had to return to Russia unexpectedly and entrusted the collection to four friends in Germany: Gustav von Riesen, Hugo Haring, Hans Richter and Dr. Alexander Dorner. When Dorner had to flee Nazi Germany, he entrusted paintings to Haring, one of the four original friends. W.J.H.B Sandberg director of Stedelijk

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<sup>96</sup> *Magness v. Russian Fed'n*, 84 F. Supp. 2d 1357, 1358 (S.D. Ala. 2000).

<sup>97</sup> *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 311 (D.D.C. 2005).

Museum in Amsterdam, approached Haring several times for paintings, but Haring always refused. After Haring died, Sandberg claimed Haring finally agreed to give paintings to the Amsterdam Museum. After the fall of the Iron Curtain, Malewicz's heirs tried to locate lost property and recover it. In 2003, fourteen pieces were exported to the Guggenheim Museum in New York City, arranged under the Mutual Educational and Cultural Exchange Program by the U.S. Department of State. Amsterdam requested that the State Department deem the artwork items of "cultural interest; and of national interest." The State Department granted the exhibit immunity from seizure under 22 U.S.C. § 2459. The Malewicz heirs filed an objection, but immunity was granted. Amsterdam is a "political subdivision" of the Netherlands, and it would be immune from jurisdiction under the FSIA unless it falls into an exception.<sup>98</sup>

The *Malewicz* court made a distinction between the Foreign Sovereign Immunities Act and the Immunity from Seizure Act. According to the court, the doctrines are both clear and not inconsistent.<sup>99</sup> First, the court examined the application of 28 U.S.C. § 2459. The court explained that this statute is for physical custody or control of the item. The *Malewicz* court ruled that since the plaintiffs sued the City of Amsterdam for replevin, and not the Guggenheim Museum in the United States, this statute does not apply.<sup>100</sup> Furthermore, the court explained that the Foreign Sovereign Immunities Act does not apply because the court found it fit the commercial activity exception. Lending artworks to a museum was a commercial activity because a private actor could have done a similar action connected with "trade and traffic or

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<sup>98</sup> *Id.* at 306.

<sup>99</sup> *Id.* at 311.

<sup>100</sup> *Id.* at 311-12.

commerce.”<sup>101</sup> The court ruled that the plaintiff’s suit could proceed. The court made a distinction between a plaintiff suing an American museum versus suing a foreign party. If a plaintiff sues a foreign party, then the Immunity from Seizure Act cannot apply because the foreign museum does not have physical custody or control of the artworks in question.<sup>102</sup> In contrast, the *Magness* court said that the Immunity from Seizure statute does apply to a foreign party, the Russian Federation.

Deloque Fourcaud’s case in Los Angeles was from 2003, and the court cited the *Magness* case as one of the grounds for dismissal.<sup>103</sup> The new precedent from *Malewicz* presents an opportunity for Deloque Fourcaud, but on certain conditions. First, the Shchukin heirs would have to sue the Hermitage or Pushkin Museum while the art was on display in the United States. Like in *Malewicz*, suing the foreign museum would circumvent the Immunity from Seizure statute because the plaintiffs are not seeking seizure in the United States. However, for the same reason, the Shchukin heirs would not be able to sue an American museum. Also, since there is a split in the circuits, it is advisable for the Shchukins to wait until the artwork is on exhibit somewhere within the District of Columbia, where *Malewicz* was decided.

Even if a Shchukin heir’s lawsuit navigated through the complications of the FSIA and the Immunity from Seizure act, it would have to deal with the obstacle of Act of State. Case law states that suits regarding nationalized personal property in foreign nations are barred because of

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<sup>101</sup> Foreign Sovereign Immunities Act § 1602(a)(3).

<sup>102</sup> *Malewicz*, 362 F. Supp. 2d at 311.

<sup>103</sup> Notice of Motion And Motion of Defendant-in-Intervention United States For Order Dismissing the First Amended Complaint with Prejudice, Delocque-Fourcaud v. Los Angeles County Museum of Art, SK061 A.L.I.-A.B.A. 263, (No. CV 03-5027-T(CTX)).



the Act of State doctrine.<sup>104</sup> In *Day Gormley Leather Co. v. National City Bank of New York*, the plaintiffs could not recover money that was nationalized into Russian bank accounts. This was because the United States recognized the Russian government, and their nationalization destroyed any title to which the plaintiff says they have a claim.<sup>105</sup> The Act of State Doctrine was also applied in *Banco Nacional de Cuba v. Sabbatino*.<sup>106</sup> In *Sabbatino*, the Cuban Government expropriated property located in Cuba but owned principally by American nationals. The court held:

[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.<sup>107</sup>

The Act of State Doctrine depends upon the confluence of four factors: 1) the taking must be by a foreign sovereign government; 2) the taking must be within the territorial limitations of that government; 3) the foreign government must be extant and recognized by this country at the time of suit; and 4) the taking must not be violative of a treaty obligation.<sup>108</sup> According to *Sabbatino*, a foreign country's expropriation rights are held inviolable, regardless of their illegality in the international realm. Thus, even if the expropriation of the Shchukin art was illegal under international standards because the family was not compensated, the Shchukin's would probably have no redress under *Sabbatino*.

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<sup>104</sup> *Day-Gormley Leather Co. v. Nat'l City Bank of N.Y.*, 8 F. Supp. 503 (S.D.N.Y. 1934). *See also* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

<sup>105</sup> *See Day-Gormley*, 8 F. Supp. at 505-06.

<sup>106</sup> *Sabbatino*, 376 U.S. 398 (1964).

<sup>107</sup> *Id.* at 428.

<sup>108</sup> *Menzel v. List*, 267 N.Y.S.2d 804 (N.Y. App. Div. 1966).

Fortunately, the rigid *Sabbatino* rule has been weakened by successive case law. In *Menzel*, the court made a distinction between a foreign sovereign government and an organ of the government.<sup>109</sup> In *Menzel*, the plaintiff sought to recover a Chagall painting that she and her husband had left in her Brussels apartment in 1941 as she fled from the Nazis.<sup>110</sup> The court held that the painting was not seized by a foreign sovereign government, but rather the “The Centre for National Socialist Ideological and Educational Research,” an organ of the Nazi party. Since the “foreign sovereign government” requirement was not met, the Act of State doctrine did not apply.<sup>111</sup> However, a later New York case dealing with the nationalization of artwork under the Soviet Government from 1923 distinguished the facts from *Menzel*.<sup>112</sup> According to *Stroganoff*, the appropriation of art under Decree No. 111 of March 5, 1921 was an official decree from the political organ. Therefore, the appropriation of art was an Act of State. It is hard to reconcile these two cases. It is bizarre to distinguish between an official act of the Nazi government and an official act of the Soviet government. Both were totalitarian regimes with government organs stretched deeply into the regulation of culture.

The Act of State doctrine also has several exceptions. The Supreme Court has recognized a commercial exception.<sup>113</sup> In *Dunhill*, the court concluded that “the commercial area the need for merchants to have their rights determined in courts” outweighs any injury to foreign

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<sup>109</sup> *Id.* at 815.

<sup>110</sup> *Id.* at 806.

<sup>111</sup> *See generally id.*

<sup>112</sup> *See Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18 (S.D.N.Y. 1976).

<sup>113</sup> *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

policy.<sup>114</sup> The Cuban government's expropriation of cigar companies was seen as a commercial act, and therefore not subject to the Act of State doctrine. In *American International Group, Inc. v. Islamic Republic of Iran*, the court ruled that a failure to compensate for an expropriation as required by treaty "occurred in connection with a commercial activity of defendants" and therefore was not protected by the act of state doctrine.<sup>115</sup> In a Michigan district court, the judge designed a "balancing test" for the commercial exception as applied to the Act of State doctrine. Judge Boyle stated that an analysis "requires a balancing of the policy-related factors presented by the circumstances of the particular case." In interpreting the commercial exception from the Foreign Sovereign Immunities Act, the *Malewicz* court held that lending artworks to a museum was a commercial activity because a private actor could have done a similar action connected with "trade and traffic or commerce."<sup>116</sup> One could interpret "commercial activity" to mean the same in both the Foreign Sovereign Immunities Act and the Act of State exception. Therefore, lending artwork to another museum is commercial activity. Russia's loan of the Shchukin collection to other museums around the world constitutes commercial activity, and is not protected under the Act of State doctrine. If the Shchukins brought a suit against Russia or the Hermitage or Pushkin Museum in the United States, especially in the Second Circuit, they may succeed.

## VI. SUMMARY OF SHCHUKIN HEIRS' CURRENT OPTIONS

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<sup>114</sup> *Id.* at 706.

<sup>115</sup> *American Int'l Group, Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522 (D.D.C. 1980).

<sup>116</sup> Foreign Sovereign Immunities Act § 1602(a)(3).

First, under Protocol 6 of the Tribunals, Courts and Enforcement Act of 2007, it is still possible to bring an action for damages against the museum or for restitution for unjust enrichment, conversion, or declaration of title. Like the American Immunity from Seizure Act, all the British legislation prevents is the actual seizure of an artwork while it is in a gallery. If the Shchukin heirs simply want compensation, they should try this route, and will probably be successful. A recent case about Iranian antiquities in a London gallery described the law of conversion in Great Britain. To sue in conversion a claimant must show that he had either possession, or an immediate right to possession of the chattel at the time of the act in question. Either relationship with the chattel affords the necessary possessory title to sustain a claim for conversion. If either is shown, the claimant need not be the owner of the chattel in order to succeed in conversion. The owner can be liable in conversion to a person who had either possession or the immediate right of possession at the time of the owner's act.<sup>117</sup> To be successful in a suit for conversion, all the Shchukin heirs need to do is prove that Sergei Shchukin was the rightful possessor at the time the expropriation occurred. They need to convince the court that it was an illegal taking because there was no compensation for the expropriation, regardless of whether there was a decree from the Soviet Government or not. They could sue either the Hermitage or Pushkin Museum, or the Royal Academy in London. Then, the heirs would be able to claim damages from the conversion. Based on European Court of Human Rights law, the Shchukin heirs could probably also succeed in a suit for unjust enrichment, and potentially claim damages.

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<sup>117</sup> See *Iran v. Bakarat Galleries*, [2007] EWCA (Civ) 1374.

If the Shchukin heirs wanted restitution of their ancestor's art collection, they could try several routes. In the United Kingdom, the Shchukin heirs could try to defeat the British Immunity from Seizure Act through Protocol 6's Community obligation or International treaty exception. If the Shchukin's could win a claim in the European Court of Human Rights or the International Court of Justice, the British Immunity from Seizure exception would apply, and the art could be restituted. Since Deloque-Fourcaud is a French citizen, his rights are protected in the European Community, regardless of the fact that the act in question transpired in Russia. He could assert his right under Protocol 1, Article 1 of the European Convention of Human Rights. Deloque-Fourcaud would first have to prove that Sergei Shchukin is the rightful possessor of the art and therefore he is the heir. He will have to show that Russia illegally expropriated the art because there was no compensation. The European Court of Human Rights recently was somewhat sympathetic to a plaintiff whose art was expropriated by Italy.<sup>118</sup> This may be a successful option for Deloque-Fourcaud.

If the Shchukin heirs were successful in a European Court of Human Rights claim based on Protocol 1, Article 1, they could either recover the paintings or they could be compensated, but not both.<sup>119</sup> A recent case held that compensation based on a Protocol 1 Article 1 claim is to "restore as far as possible the situation before the existing breach, and payment of compensation should be made in a lump sum to reflect an amount reasonably related to the value of the property taken in its current value."<sup>120</sup> However, non-pecuniary damages are not recoverable

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<sup>118</sup> See *Beyeler v. Italy*, 33 Eur. Ct. H.R. 52 (2001).

<sup>119</sup> See *The Former King of Greece v. Greece*, 36 Eur. Ct. H.R. 43 (2003).

<sup>120</sup> *Id.*

under this precedent.<sup>121</sup> If the Shchukin artworks on tour generate gross amounts from prints, gift shop items, and other objects, this should be taken into account when calculating compensation reflecting the artwork's current value. However, the heirs would not be entitled to non-pecuniary damages.

The Shchukin heirs could also attempt a claim in the International Court of Justice based on UNESCO and UNIDROIT laws, specifically UNIDROIT Chapter II, Restitution of Stolen Cultural Objects, Article 3. Since Russia is a member of the United Nations, the suit could be directly against Russia or the Pushkin or Hermitage Museum. The obstacle will be in convincing the court that nationalizing artwork by a Soviet Decree constitutes "looting." The Shchukin heirs can show that Sergei Shchukin was never compensated for his collection. Under international law, this does constitute looting. If this claim were successful, then the artwork itself could be returned.

If the Shchukin collection were to go on exhibition in the United States, the Shchukin heirs would also have options. United States case law is most favorable in the District of Columbia under the *Malewicz* precedent. However, due to the American Immunity from Seizure Act, the Shchukin heirs would not be able to sue an American museum that had the artworks on exhibition. Instead, they would have to sue the Russian Federation, the Pushkin Museum, the Hermitage, or all three entities in a United States court. The Shchukin heirs could sue while the artwork was on exhibition. If they were successful, the artwork would be restituted to the family after the exhibition. However, to bring a suit based on a taking that was not fairly compensated in

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<sup>121</sup> *Id.*

a United States jurisdiction, the heirs would have to have first “pursued and exhausted domestic remedies in the foreign state that is alleged to have caused the injury.”<sup>122</sup> Thus, the Shchukin heirs need to try to sue in Russia before they can successfully sue in the United States.

In conclusion, the Shchukin heirs have a variety of options for restitution of their ancestor’s art collection. The Shchukin family has tried to recover restitution for their lost art since the 1950s. While the new British Immunity from Seizure legislation may seem bleak at first for recovery, there are still options available through European, International, and American routes. The international community is becoming more sympathetic to cases such as the Shchukins’. If the Shchukin heirs continue their pursuit, they will eventually be successful in the compensation and or return of their ancestor’s art.

## **Appendix**

### **REPORT OUTLINING THE ROYAL ACADEMY’S DUE DILIGENCE PROCEDURES FOR WORKS OF ART AND CULTURAL OBJECTS ON LOAN FROM ABROAD TO TEMPORARY EXHIBITIONS, with particular reference to:**

#### ***From Russia: French and Russian Master Paintings 1870 – 1925 from Moscow and St Petersburg***

The exhibition consists of 124 paintings lent by the four great Russian State museums, The State Hermitage Museum and State Russian Museum in St Petersburg, and the Pushkin Museum of

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<sup>122</sup> *Millicom Int’l Cellular v. Republic of Costa Rica*, 995 F. Supp. 14, 23 (D.D.C. 1998); *see also Republic of Austria v. Altmann*, 541 U.S. 677, 714 (2004).

Fine Arts and the Tretyakov Gallery in Moscow. The exhibition, entitled *Bonjour Russland*, opened on 18 September 2007 at the Museum Kunst Palast, Düsseldorf. Following its closure on 6 January 2008, it will be presented at the Royal Academy from 26 January to 18 April 2008.

The 127 paintings included therein consist of works made between c.1870 and c.1925 by Russian and French artists. The works have entered the State collections either through acquisition or donation prior to 1917, through seizure shortly after the 1917 Revolution, or through acquisition from various sources after 1917.

The four Russian museums are directly funded by the Russian Federal State and are subject to the direct authority of the Russian Federal Ministry of Culture. All works in their collections are therefore understood to be the property of the State.

Given the course of Russian history in the 20<sup>th</sup> century, due diligence concerning the provenance of all works included in the exhibition has been undertaken, in accordance with the Royal Academy's established procedures: verification of the provenance of paintings by Russian artists and those French artists not included in the Shchukin and Morozov collections, and scrutiny of the provenance of paintings originally acquired by Sergei Shchukin and Ivan Morozov.

In the case of all non-Shchukin and Morozov paintings, provenance information provided by the four museums was crosschecked with their collections' catalogues and other books, including the German language edition of the catalogue, published in September 2007, which accompanied the presentation of the exhibition in Düsseldorf. Careful interrogation was also undertaken of our Russian colleagues, of British scholars with knowledge and experience in the field of Russian art and history at the turn of the 19<sup>th</sup> century and the opening decades of the 20<sup>th</sup> century, and of curators of recent exhibitions that had been either wholly or in part devoted to the arts of Russia, for example, *Russia!*, mounted by the Guggenheim Museum in New York and Bilbao in 2006, and *Modernism: Designing a New World*, shown at the Victoria & Albert Museum, London, also in 2006. No information emerged that suggested that any painting had a problematic provenance and hence would be at risk from a claim from a third party.

The provenance of the French paintings originally acquired by Sergei Shchukin and Ivan Morozov was carefully reconstructed through published and unpublished documentation. A complete record for each painting from date of acquisition to final deposition in 1948 with either the State Hermitage Museum or the Pushkin Museum of Fine Arts was undertaken.

### **REPORT OUTLINING THE ROYAL ACADEMY'S DUE DILIGENCE PROCEDURES FOR WORKS OF ART AND CULTURAL OBJECTS ON LOAN FROM ABROAD TO TEMPORARY EXHIBITIONS**

The Royal Academy's due diligence procedures conform to the national and international standards as laid out in the following:



- Statement of Principles issued by the National Museum Directors Conference on “spoliation of works of art during the Holocaust and World War II period” in 1998;
- *Combating Illicit Trade: Due Diligence Guidelines for Museums, Libraries and Archives on collecting and borrowing Cultural Material* (DCMS, October 2005);
- The UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property;
- The ICOM Code of Ethics;
- SPECTRUM: UK Documentation Standard for Museums.

The Royal Academy’s due diligence procedures are outlined below:

- Provenance details of all objects proposed for inclusion in an exhibition are requested from the lender. The loan form includes sections specifically requesting information regarding provenance, the legitimate title of the current owner and their legal authority to lend the object;
- The exhibition curator is contractually required to undertake full provenance checks, which may necessarily go beyond the information provided by the lender. These include consideration of provenances between 1933 and 1945 and any other information which might suggest possible irregularity of acquisition and current title of ownership. In addition, checks are run on the provenance, ethical status and proof of import into/export out of a particular country of cultural objects in accordance with the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property;
- In cases where the owner is unable to supply all necessary information, the curator contacts the Art Loss Register where appropriate, and/or consults with scholars and fellow curators;
- All records of due diligence checks are retained; they are deemed confidential and kept on file prior to being deposited with the Royal Academy Archive;
- The Royal Academy’s standard “loans-in” agreement as published in its official loan form requires the lender to confirm that their acquisition of the object was legitimate and that their legal ownership of the work was exclusive. In addition, it is now normal practice for most institutional – and some private - lenders to require their own loan agreement or conditions of loan documentation to serve as the official agreement between lender and borrower. In all cases such agreements are scrutinised to ensure that all issues covering provenance and legitimate ownership have been addressed and that they conform to national and international standards.
- Work on due diligence is assigned to the exhibition curator(s) and the exhibition

organiser(s), who are required to work within the due diligence guidelines (see above) and, where appropriate, to consult scholars and curators in the relevant field, and the Art Loss Register. Responsibility for overseeing due diligence procedures lies with the Exhibitions Secretary.

The Royal Academy does not proceed with a loan should any information surrounding its provenance prove to be inconclusive.