

Rejecting *Renvoi* for Movable Cultural Property: *The Islamic Republic of Iran v. Denyse Berend*

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INTRODUCTION

In *Iran v. Berend*, the High Court in London had occasion to revisit one of the most enduring problems of private international law and cultural property. Effective regulation of the illicit market in cultural property is extremely difficult, because many measures aimed at stemming the illicit trade actually contribute to the black market.¹ Courts in both England and the United States have shown that they are prepared to use criminal laws to convict persons involved in the illegal trade in antiquities exported in violation of foreign patrimony laws.² As a result, much cultural property policy debate in recent years has focused on the extent to which the criminal law can impact the illicit trade.³ The extent to which national ownership declarations can be used in civil disputes remains less clear.

Nearly every nation has recognized the need to protect and preserve beautiful and historic objects. Approaches vary considerably, as does their efficacy. At a systemic level, there appears to be a great deal of work to be done. The gap seems to be growing between what we think should happen to art and antiquities and what is actually happening. In a recent case before the High Court in London, a dispute over an antiquity from the ancient city of Persepolis involved the possibility of enforcing Iran's national patrimony law under English conflict of laws principles. The outcome could have resulted in some far-reaching consequences for the antiquities market in England and Wales. However, Justice Eady declined to apply the principle of *renvoi*. Had he held for Iran under this conflict of laws theory, perhaps the private law of England and Wales would have become a powerful basis for source nations seeking to enforce their national patrimony declarations abroad.

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BACKGROUND

The case concerned a fragment of an Achaemenid limestone relief, carved in the first half of the fifth century B.C. The carving had been buried from the time of the invasion of Alexander the Great until 1932 when it was excavated by Ernst Herzfeld. Persepolis is a historic monument, and many Iranians view Persepolis in much the same way as the Greeks view the Acropolis.⁴

In 1974 Denyse Berend, a French citizen, purchased the relief at an auction in New York through an agent. For 30 years the limestone relief hung in her Paris home. In 2005, the 85-year-old widow attempted to sell the object at Christie's in London, but on April 19 an injunction was granted in favor of Iran which sought to block the sale temporarily.⁵ Iran sought the return of the object as a part of a national monument, "in accordance with certain legal provisions dating from the first half of the twentieth century."⁶ Preceding the trial, a number of museums and antiquities dealers were wary of the potential impact the decision would have for owners of Persian antiquities in England and abroad. As art dealer Michel van Rijn said, "If the High Court goes the direction of Iran it will send shivers down the spines of art collectors and museums.... It could set a precedent and Iran could claim more pieces worldwide."⁷ That may be true; however, there seems little doubt that the fragment originated from Persepolis and was taken from Iran at some point, almost certainly after the city was excavated in 1932.

THE DEFENDANT'S ARGUMENTS

Berend defended her claim for ownership on three grounds. First, she argued the fragment should be classified as movable property. Under English choice of law rules, French law should govern the dispute; because under the *lex situs* principle set out in the case of *Winkworth v. Christie's*, Berend obtained title only when she took delivery of the object in France, in November 1974.⁸ Second, Berend also argued that she took possession in good faith and obtained good title under article 2279 of the French Civil Code. Finally, the relief was in the possession of the defendant for more than 30 years, and she would have obtained title by prescription under article 2262 of the French Civil Code.

IRAN'S POSITION

Initially, Iran argued that the fragment should be classified as immovable property, which seems to make intuitive sense. After all, when the relief was sitting in Persepolis, it was hardly movable, at least until it was cut away. This argument was rejected, however; Justice Eady makes clear that the parties have stipulated that as

a “matter of English law and of French law the fragment is to be characterized as movable property.”⁹

Forced to admit that the object was a movable, Iran argued that the English court should apply French conflict of law rules and use the doctrine of *renvoi*.¹⁰ *Renvoi* describes the situation in which a court applying foreign law will also apply the foreign state’s conflicts of law rules. Those principles may sometimes refer back to the law of a third nation, which was Iran in this case. In introducing *renvoi*, Iran also argued that a French Judge would find an exception to the general *lex situs* rule and apply Iranian law by looking to the policy embodied in a number of international agreements to which France has agreed in recent years.

Iran argued the policy was highlighted in a number of international instruments, including the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, as well as the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.¹¹ The 1970 UNESCO convention was the first international response to the dramatic accounts of the looting of archaeological and other sites, which began to appear in the 1960s.¹² France ratified the 1970 UNESCO convention on January 7, 1997, and has signed the UNIDROIT convention but not formally implemented it. These international agreements are noteworthy because they attempt to provide a regulatory framework for ending the illicit trade in cultural property. Thus they speak to a general policy objective of preventing the looting and destruction of archaeological sites.

Iran argued that this policy argument should lead a French judge to find an exception for the recovery of object sought in this case.¹³ Although neither convention has direct bearing on the fragment, Iran stressed that a French judge would be mindful of the policy implications of the two instruments in applying an exception to the *lex situs* rule. Iran argued that a French judge should apply Iranian law in these circumstances, because the relief was clearly taken from Persepolis some time after 1932. Before looking at Justice Eady’s analysis of the application of *renvoi*, it may be helpful to gain a general understanding of the concept itself.

AN INTRODUCTION TO *RENVOI*

Renvoi, meaning *to return*, is a complicated legal doctrine that has created a number of interesting theoretical questions. The doctrine maintains that “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.”¹⁴ The applicable law could thus be a foreign law, that of the forum, or even the law of a third state, as Iran argued in this case. The doctrine has received a great deal of criticism by both scholars and judges, yet it continues to appear in international jurisprudence from time to time.¹⁵

Renvoi is a unique choice of law principle, and arises fairly infrequently. Its fit within modern conflicts of law cases is often complicated by its inherent lack of certainty and uniformity. It seems to work best in theory, whereas applying it in practice has often proved difficult.

The doctrine has been revived of late, most recently in the decision of the High Court of Australia in *Neilson v. Overseas Projects Corporation of Victoria Ltd.*¹⁶ Mrs. Neilson injured herself falling down stairs in her apartment in China. She sued her husband's Australian employer, the Overseas Projects Corporation, arguing they had been negligent. Under Australian choice of law rules, the law of the place of the harm, or *lex loci delicti*, would govern her claim. This would have meant Chinese law would apply, but that claim had been barred by a 1-year statute of limitations. The High Court, however, found in favor of Neilson under the doctrine of *renvoi*. The High Court referred back to the law of Australia, meaning Australia's limitations period applied and Neilson prevailed.

There are three general criticisms of *renvoi*. First, it means that experts on foreign laws are given a great deal of deference. This was clearly the case in *Berend*, as Justice Eady did not seem overly impressed with the legal expert used by the claimant in this case.¹⁷ Second, it can result in a potentially endless circle in which two states each attempt to apply the laws of the other.¹⁸ This criticism presents a nice intellectual puzzle, but it did not present a problem in *Berend* because Iran argued its own law (and not English law) would be applied by a French judge. Finally, it can lead to situations when a court must consider the laws of multiple foreign legal systems, as was the case here.

JUSTICE EADY'S ANALYSIS

Although Justice Eady did not explicitly discuss it, the possibility that an application of *renvoi* would have created several potential difficulties for future judges, and would likely have had a profound impact on the antiquities trade in England and Wales, may have played a role in shaping his opinion. As he said, "I can think of a number of reasons why it might be desirable to apply generally, in dealing with national treasures or monuments, the law of the state of origin but that is a matter for governments to determine and implement if they see fit."¹⁹ Although he did acknowledge some potential merits in applying *renvoi* to cultural property, he considered such a decision firmly in the province of governments, and not the courts.

Renvoi has never been applied to movables in English law, a hurdle which proved too difficult for the claimant in this case. Justice Eady framed the first issue as follows:

As a matter of the English conflict of laws rules, in determining the question of title to the fragment as movable property situated in France, will the English court apply only the relevant provisions of French domestic law, or apply the relevant French conflict of laws rules as well as any relevant substantive provisions of French domestic law?²⁰

Deciding whether to apply *renvoi* in any given context is a *question of policy*.²¹ It is a useful tool to allow like cases to be similarly decided regardless of the forum. An English judge must look to domestic policy in deciding whether the policy of the law of the foreign state would be furthered by using *renvoi*. It allows a judge to further the public policy objective of a particular choice of law rule. In English law it has most often been applied to the law of succession, but not in contracts or torts.

Some have argued that the underlying policy analysis of *renvoi* renders it moot in most cases. As foreign law applies only when a court has determined that a foreign state has a legitimate interest in the application of its law and policy, it follows that the application of that internal law dominates and precludes applying the law of another foreign state.²² Here, Iran argued that the spirit of French law dictated that the law of a source nation, Iranian law in this case, would lead a French judge to apply the law of the source nation. However, reaching this result requires a judge to apply the difficult and often controversial *renvoi* doctrine. Justice Eady must have undertaken this policy analysis, but he did not clearly lay out the issues or actually walk through the policy choices at play. Rather, he relied most heavily on the fact that *renvoi* was never applied to movables in England and Wales. Not only did he not endorse the application of *renvoi* in this case, he seemed to preclude any future application of *renvoi* for movable cultural property:

I see no room either as a matter of policy for its introduction in the context of a tangible object such as that in contention here . . . I can find no reason to differ from Millett J. and to hold, *for the first time*, that public policy requires English law to introduce the notion of *renvoi* into the determination of title to movables.²³

The relevant policy analysis should have looked at whether a French court, in looking at the policies underlying both the UNESCO and UNIDROIT conventions, would have decided that Iranian law should govern the dispute. Justice Eady attached significance to the fact that although France had ratified the 1970 UNESCO convention in 1997, it had never been expressly incorporated into French law. However, he also seemed unclear about exactly what this incorporation entailed. France was bound by the European Council Directive of March 15, 1993, on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State.²⁴ France may have not seen legislation specifically implementing the 1970 UNESCO convention as necessary, but in 1999 a Dutch court rejected a claim by a Cypriot church for the return of four icons acquired by a bona fide purchaser. The buyer had argued that Netherlands' ratification of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict did not apply to deny his private property rights as a bona fide purchaser and the court agreed.²⁵ Even if a French court were to apply the 1970 UNESCO convention, it would unlikely give it retroactive effect. Justice Eady correctly noted that the UNIDROIT convention places a *backstop* limit of 50 years from the time an object was wrongly

expropriated, which surely would have presented some difficult problems for Iran to overcome.²⁶

Justice Eady relied heavily on *Macmillan v. Bishopsgate Investment Trust*, in which Justice Millett outlined a rather confusing rubric for the policy decisions at play in evaluating an application of *renvoi*.²⁷ Reference was also made to Justice Moore-Bick's opinion in *Glencore International AG v. Metro Trading International*, which states,

If the *lex situs* rule in relation to movables rests, at least in part, on a recognition of the practical control exercised by the state in which they are situated, there is something to be said for applying whatever rules of law the courts of that state would actually apply in determining such questions.”²⁸

This proved unhelpful to the claimant as well. Although it indicated a general desire to apply the rules of the nation in which an object is located, the “something to be said” phrase was far too vague to lead Justice Eady to endorse *renvoi* in this case.

Because *renvoi* was not applied, all that remained was to apply French Law to the dispute. Justice Eady indicated that the *lex situs*, or location of the object dictated that French domestic will be applied to the dispute.²⁹ In this case, because the defendant acted in good faith, she would have obtained title in November 1974 when she took possession of the fragment.³⁰

In the end, an English judge must interpret French law in its current state and cannot attempt to create new rules. On balance, Justice Eady considered it “highly unlikely” that a French court would apply Iranian law to the dispute. Justice Eady weighed the testimony of the two French law experts on this question, and provided several reasons why he thought a French court would not apply Iranian law.³¹ First, there was no precedent for such an application in France. Second, the failure of the French legislature to incorporate the UNESCO convention into domestic law seemed to indicate that the legislature had, by not acting, strongly indicated its unwillingness to be bound by its provisions. Third, the application of the Iranian law would mean that there are no limitations provisions in the current case. Fourth, there would be no provision allowing for compensation to Berend for her purchase of the relief in good faith. Finally, even though the claimant argued the conventions had been incorporated into French domestic law, Justice Eady stated,

These conventions have been around a long time without being incorporated into the law of France, and [Maître Foussard, the French law expert for the defendant] asked rhetorically why as a matter of judicial policy the hypothetical French court should suppose that the time has become ripe for their implementation in 2007.³²

Justice Eady was understandably reluctant to use *renvoi* to apply Iranian law in this case. *Renvoi* had never been used in the context of movables in English law. He recognized that there may be “a number of reasons why it *might* be desirable to apply [*renvoi*] generally, in dealing with national treasures or monuments, the

law of the state of origin, but that is a matter for governments to determine and implement if they see fit.”³³ *Renvoi* was originally designed to foster consistency across jurisdictions. However, Justice Eady found the argument by Justice Millett in *Macmillan* particularly relevant. As Justice Eady stated, “It seems from the context to be clear that Justice Millett was endorsing an established policy in English law of choosing the *lex situs* in the sense of domestic law. Otherwise it would hardly make sense for the judgment to reject the doctrine of *renvoi*.”³⁴

Two other factors made application of *renvoi* a poor fit here. First, applying the rule would have had a serious impact on a number of antiquities transactions in England and Wales. It would have made English courts an excellent potential forum for source nations seeking to enforce their national patrimony laws and made London’s antiquities dealers and auction houses confront the way they do business. Quite clearly, Justice Eady felt this was the kind of decision that should be made by the government, not by a judge. Second, the doctrine can often be difficult for judges to apply, as the discussion by Justice Millett in *MacMillan* makes abundantly clear.

CONCLUSION

Although he acknowledged the potential benefits of applying *renvoi* to movables which are parts of a “national treasure or monument,” Justice Eady in *Berend* was hesitant to reach into unknown territory and apply *renvoi* to a movable. Certainly, he could have recognized the United Kingdom’s recent accession to the 1970 UNESCO convention as an indication that the United Kingdom was endorsing this very policy; but although such accession may indicate a strong willingness on the part of a nation to combat the illicit trade in cultural property, it does not necessarily result in a workable legal framework for accomplishing those aspirations.

On one level, it is regrettable that rare antiquities were taken from Persepolis. Iran certainly has an interest in these parts of its history. However, one wonders why it did not pursue a claim in 1974 when Berend purchased the relief. For whatever reason, Iran chose not to assert its rights at that time.

Applying *renvoi* in *Berend* would certainly have had an impact on the antiquities trade. It might have meant that a great deal of the antiquities transactions, which are conducted in England, would potentially become subject to the laws of source nations. It would have effectively mirrored the emerging situation in the criminal laws of some countries. The recent conviction of Jonathan Tokeley-Parry³⁵ in England and his counterpart Frederick Schultz³⁶ in the United States firmly establish that the criminal laws of England and Wales and the United States honor foreign patrimony laws to some degree.³⁷ To reach a similar conclusion in the civil context would have dramatically increased the power of source nations to claim cultural properties in the courts of England and Wales. Certainly, such a

dramatic change would have engendered a great deal of controversy and is probably the kind of decision the English judiciary is content to leave to Parliament.

ENDNOTES

1. See Bator, "An Essay on the International Trade in Art," p. 318, which argues, "Most current export control systems are self-destructive. The international black market thrives because no alternative is allowed to exist for either buyers or sellers, so that all economic incentives are pushed in favor of the illegal trade."

2. For the position in the United States, see *United States v. McClain*, 545 F.2d 988 (5th Cir.); *United States v. McClain*, 593 F.2d 658 (5th Cir.) cert. denied, 444 U.S. 918 (1979); Yasaitis, "National Ownership Laws as Cultural Property Protection Policy." For England and Wales, see Dealing in Cultural Objects (Offences) Act 2003; Harwood, "Dealing in Cultural Objects (Offences) Act 2003."

3. See Kreder, "The Choice between Civil and Criminal Remedies in Stolen Art Litigation;" Mackenzie, "Dig a Bit Deeper" (stressing that penalties should be increased at the market end of the antiquities supply chain); Mackenzie, *Going, Going, Gone*; Goldberg, "Reaffirming McClain," 1039–42; Gerstenblith, "Identity and Cultural Property."

4. *Iran v. Berend*, [2007] EWHC 132 (QB) (hereinafter *Berend*), para. 1. In fact, many scholars suspect the reliefs may have inspired the sculptors who created the Parthenon. For an image of the relief and the location where it was allegedly taken, see Soudabeh Sadigh Cultural Heritage Network, "Court of London Ignores Iran's Ownership of Achaemenid Bas-relief." <http://www.chnpress.com/news/?section=2&id=6950> (accessed January 21, 2007).

5. *Berend*, para. 3. The injunction was granted by Justice Silber and prevented the sale of the object until a final disposition of the case.

6. *Berend*, para. 2. There exists a paucity of scholarship on Iran's cultural property legislation. Presumably, the legislation was a national ownership declaration. Courts do not generally enforce the export restrictions of other nations. See *King of Italy v. De Medici*, 34 T. I.R. 623 (CH. 1918) granting an injunction for the Italian government's request for an injunction as to state papers, but no injunction was granted for other documents which had merely been exported in violation of Italian law.

7. Stephanie Condron, "Museums Face Fallout in Fight Over Carving" *The Telegraph*. <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/01/16/nmuseum16.xml> (accessed January 17, 2007).

8. *Berend*, para. 6. *Winkworth v. Christie, Manson & Woods Ltd.* [1980] Ch 496.

9. *Berend*, para. 5.

10. *Berend*, para. 8.

11. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (hereinafter 1970 UNESCO Convention). Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, Rome, June 23, 1995, 2096/DC8, reprinted in 34 I.L.M. 1322 (hereinafter UNIDROIT Convention).

12. See Coggins, "Illicit Traffic of Pre-Columbian Antiquities." The article starts out by saying, "In the last ten years there has been an incalculable increase in the number of monuments systematically stolen, mutilated and illicitly exported from Guatemala and Mexico in order to feed the international art market. Not since the sixteenth century has Latin America been so ruthlessly plundered."

13. *Berend*, para. 11. Special reference was made to article 3 of the UNESCO Convention which states, "The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this convention by the States Parties thereto, shall be illicit." Also reference was made to article 5(i) of the UNIDROIT Convention, "A Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting state."

14. "A Distinction in the Renvoi Doctrine," p. 454.

15. See Lorenzen, "The Renvoi Theory and the Application of Foreign Law;" and Kramer, "Return of the Renvoi."

16. [2005] *HCA* 54.

17. *Berend*, para 53 saying, "There is no doubt [Maitre Berlioz, legal expert for Iran,] lacked the gift of brevity; nor that he was ready to attack the credentials and integrity of others. But I did not conclude that this rendered his evidence unreliable in general."

18. This error was first described by the Belgian jurist Laurent in 1881. See Chait, "Renvoi in Multinational Cases in New York Courts" Chait describes the cycle with the following illustration: "The State A court applies its own choice of law rule, which tells it to look to the law of State B. The State A court looks to State B's entire, or "whole" law, which includes State B's own choice of law rules. As a result, the State A court is sent back to the laws of State A. The court must then decide whether to look only to State A's "internal law," meaning its laws of distribution, or its whole law, which will include its choice of law rules. If it chooses the latter, the court will be forced to look again to the laws of State B and the cycle will ostensibly proceed indefinitely." (144)

19. *Berend* para. 30.

20. *Berend*, para. 19.

21. *Berend*, para. 20.

22. Currie, *Selected Essays on the Conflict of Laws*, 184–85.

23. *Berend*, paras. 23–24.

24. EC Council Directive 93/7 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State. This established a repatriation scheme among European Union member states. It operates for illicit export only, in direct contrast to the UNESCO Convention.

25. See *Autocefale Grieks-Orthodoxe Kerk te Cyprus v. W.O.A. Lans*, noted in 8 *Int. J. of Cul. Prop.* 583. (1999).

26. *Berend*, para 41.

27. [1995] 1 WLR 978, 1008. Justice Millett stated, "The determination of a question of priority between competing claims to property is based on considerations of domestic legal policy. . . . A decision by an English court, based on English principles of conflict of laws, that the question should be determined by the application of the rules of a foreign law is also based on considerations of legal policy, albeit at a higher level of abstractions. It involves a policy decision, at the higher level, that the policy which has been adopted, at the lower level, by English law should not be applied because the considerations which led to its adoption in the domestic law are not relevant in the particular circumstances of the case; and to a policy decision, at a higher level, that the policy which has been adopted, at the lower level, by the foreign law should be applied in its stead."

28. [2001] 1 *Lloyds Rep* 284 at para 41.

29. *Winkworth*, [1980] Ch 496. Interestingly, in that case Justice Slade indicated it may be "theoretically possible" that *renvoi* should be applied if public policy dictated. That case was slightly different in that the English court was anticipating whether an Italian court would actually apply English law. However, this was mere dictum by Justice Slade and was not accorded much weight by Justice Eady.

30. *Berend*, para 33.

31. *Berend*, para 37.

32. *Berend*, paras 36–43, 50.

33. *Berend*, para. 30.

34. *Berend*, para. 32.

35. *R. v. Tokeley-Parry*, [1999] *Crim. L. R.* 578 .

36. *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003).

37. See *Dealing in Cultural Objects (Offences) Act 2003*, c.27.

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