put it, delivery of possession of the goods as well as property and risk all took place upon shipment. It followed that "delivery of the goods took place upon shipment in every sense that can conceivably be relevant under Article 5(1)(b) of the Judgments Regulation", at [48].

But more difficult questions are sure to arise in the future. In particular, it is now very common for the seller in an FOB contract to require the bill of lading to be made out to him so that he retains control of the goods until paid on presentation of the documents. In such forms of FOB contract and in CIF contracts generally the role of the documents becomes much more important. Lord Mance indicated that in his view there were strong arguments in favour of always focusing on the physical place of shipment, at least in FOB contracts. Such a view, he said, would accord with the language of Article 5(1)(b) and with the desirability of having an easily applicable rule for determining a sole, easily identifiable, jurisdiction. A rule whereby delivery occurred for these purposes wherever the goods happened to be when property passed on presentation of the documents could clearly raise great practical difficulties.

But Lords Rodger and Bingham preferred to reserve opinion on this question. Lord Rodger pointed out, at [20] and [21], that there may well be strong grounds, in such a case, for arguing that the presumption under section 32 SGA 1979 is displaced and thus that the goods would not as a matter of English law have been "delivered" to the buyer on shipment. Whether they would none the less have been delivered for the purposes of Article 5(1)(b) gives rise to other questions which it was unnecessary to decide, at [20] and [21].

LOUISE MERRETT

PUBLIC POLICY AND CULTURAL OBJECTS

THE Republic of Iran has recently sought the aid of the English courts to recover objects of cultural heritage originating from Iran which find their way into English auction houses and antiques dealers. The question seems easy: are the objects the property of the state or of the dealer who is in possession of them? The conflict of laws answer is also apparently easy: apply the *lex situs* of the property at the time of the transaction to determine its ownership. Nevertheless, these cases are surprisingly complex. The arguments between the parties depend on difficult matters both of fact and of law. The state has to show that it has some title to the property in order to recover the piece of cultural heritage itself, and the defendant usually claims to have obtained good title by acquiring the property in some intermediate country. There

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may be matters of limitation or prescription. These all require evidence of foreign law to be proved in England and the foreign law experts often disagree. There are also challenges in proving the facts surrounding the origins of the property; for example, whether, when and where it was illegally excavated. In addition, there may be alternative claims to recover the property itself and otherwise in damages for conversion. The latter is decided under English law but has an incidental question of the right to possession claimed by the state which depends on the *lex situs*. No surprise then that judges seek to clear preliminary issues in the hope that the parties will settle before the main proceedings.

In *Republic of Iran* v. *Barakat* [2007] EWCA Civ 1374 the Court of Appeal reversed the finding of Gray J. as to the content of Iranian law to hold that the state was entitled to the property. Matters of foreign law are special facts and therefore open to appeal. It is not necessarily attractive that after a long hearing at first instance the Court of Appeal so readily overturned the decision. Reversing the finding of Gray J. threw up a further complication. Was the Iranian law, which made unauthorised excavation of cultural objects illegal, a penal or public law such that the state could not make a claim in England in respect of it? There is a great deal of muddled thinking in this area. Generally, where a choice of law rule (here the *lex situs*) indicates a domestic system of law to answer a substantive question (here who is the owner or entitled to possession of goods), the court merely applies that law. It does not enquire as to the content of that domestic law. In truly exceptional cases when English conceptions of justice are so fundamentally outraged by the result, the courts will not recognise the law as a law at all. Those are the rare laws which seriously infringe human rights and those which are a gross breach of established rules of international public law (*Kuwait Airways Corporation* v. *Iraqi Airways* [2002] 2 A.C. 883). There are also intermediate cases where the law is recognised as having effect within the foreign state but not enforced outwith that state. That category of laws include penal (*i.e.* criminal) or revenue garnering laws which are considered part of the fundamental sovereign powers of independent states. The English courts will not enforce such laws at common law but would have to do so where there is English or EU legislation requiring it. Nevertheless, those laws are recognised; for example to accept as owner someone who has obtained the property via the state. Further, there is a controversial residual category of "other public laws" which, like penal and revenue laws, are said to be matters of sovereign power such that they should only be recognised and not enforced. Someone seeking to rely on such a law to claim title to property will have to show that it was possessed within the boundaries of the foreign state,

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in order that the title might be merely recognised. Without some form of possession, the claim becomes one of enforcement and fails. However, someone relying on the same law to defend a claim from a previous owner can do so (*Princess Paley Olga* v. *Weisz* [1929] 1 K.B. 718). The distinctions are fine and not entirely supportable. Confusingly, where the state itself claims the property the courts often turn to a different line of authority, the act of state doctrine. That relies on the non-justiciability of the claim in the English courts. They will simply not adjudicate a claim for the enforcement of a foreign penal, revenue or other public law (see Dicey & Morris Rule 3(1)). A state which has to rely on such a rule of its own law for title is powerless to obtain its property once someone else has possession of it in England.

The Court of Appeal initially followed *Re State of Norway's Application (Nos. 1 & 2)* [1990] 1 A.C. 723 to apply the act of state doctrine. First, uncontroversially, the court held that the foreign law is categorised as English law would do. Despite criminal sanctions in the relevant Iranian law, the provisions on ownership would be applied as they were not penal in themselves but proprietary. Secondly, the court accepted that there is indeed a category of "other public laws" which are not enforceable and not even justiciable. This category includes claims "involving the exercise or assertion of a sovereign right" or which "seek to enforce governmental interests". The court did not expand on what these laws might be beyond remarking that they are acts *de jure imperii*, which takes us no further. It gave examples of exchange control legislation, defence of citizens and possibly export restrictions. What of protection of cultural heritage laws by compulsory acquisition?

In a sudden switch and without further explanation, the court then correctly held that this claim was to assert rights of ownership, rather than to enforce export restrictions. The claim was patrimonial and fell within the *lex situs* approach. There was therefore no principled reason not to recognise the state's title despite the lack of possession. The court held that the requirement for possession depends on the way in which the state has acquired ownership. This is a question of the interpretation of the relevant law which this case shows to be unpredictable. The more difficult cases are those of compulsory acquisition or confiscation within the state's territory such as *Williams & Humbert Ltd.* v. *W&H Trademarks (Jersey) Ltd.* [1986] A.C. 368. The court in *Barakat* said these are public laws and may be recognised only if the state has had possession, at [148]. There is nothing in the court's reasoning to help identify which side of the line a future case will fall.

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Entirely unnecessarily, the court further considered whether there was any general public policy principle not to enforce the Iranian law. It decided that there was not, indeed there are positive reasons of comity to enforce the cultural heritage provisions of foreign states, at [154]. But the idea that choice of law is grounded in comity is challengeable. In addition, this dangerous aside entirely misinterprets the role of public policy in conflict of laws. Where the applicable law determines the result, public policy has a negative (not positive) effect and only in the rarest of cases. Otherwise, the courts will be tempted into investigating the content of the foreign law, and refusing to apply law it dislikes. That would undermine the foundations of choice of law.

These cultural heritage cases remain uncertain. They will turn on the drafting of the original law and its unpredictable interpretation by English courts. Also, facts which are merely coincidental become critical; such as whether in law or fact the state was in possession of the artefact, who now is in possession and who is making or defending the claim. The many international instruments seem to lack real effect as none was relevant to this appeal. Property cases need clear rules, those who have acquired the artefacts should be able to predict the outcome and international art thieves must be discouraged. The judgment has done little to clear the muddy waters.

PIPPA ROGERSON

MODIFICATION AND DISCHARGE OF RESTRICTIVE COVENANTS: THE HOUSING ACT 1985

IN *Lawntown Ltd.* v. *Camenzuli* [2007] EWCA Civ 949, [2008] 1 All E.R. 446, the Court of Appeal provided the first guidance on the exercise of the county court's discretion under section 610 of the Housing Act 1985 to modify or discharge restrictive covenants. This discretion is distinct from the analogous and more familiar power of the Lands Tribunal under section 84 of the Law of Property Act 1925, as amended.

The Camenzulis owned one of a pair of semi-detached houses in London on an estate of similar properties; all were originally intended to be single dwellings. Both their home and the adjoining property, bought by Lawntown Ltd., a property development company, were subject to restrictive covenants prohibiting conversion of the houses into flats. Lawntown began work converting their property into flats only to face objections from the Camenzulis on two grounds: no

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