

23. 541 U.S. 677 (2004).
24. Republic of Austria v. Altmann, 541 U.S. 677, 711 (2004), Justice Brenner, with whom Justice Souter joins, concurring.
25. See also Hess, supra note 3, 273.
26. Marina Mahler, Gustav Mahler's granddaughter, has asked for the restitution of a painting by Munch, now in the Belvedere, which belonged to Alma Mahler-Werfel, see Daniela Gregori, Mein Munch – Kunst-Krimi: Marina Mahler fordert die Rückgabe eines Bildes, Frankfurter Allgemeine Zeitung (2 March 2006), 37.
27. The Detroit Institute of Arts and the Toledo Museum of Arts, see Jordan Meijas, Jetzt klagen die Museen – Erbfälle: Neuer Streit um Gemälde aus jüdischem Besitz, Frankfurter Allgemeine Zeitung (28 Jan. 2006), 37.
28. German Federal Court (Bundesgerichtshof), 24.10.2005, Neue Juristische Wochenschrift 2006, 689.
29. See Christian Baldus, Internationaler Kulturgüterschutz: Renaissance der Ersitzung, in Klaus Grupp/Ulrich Hufeld (eds.), Recht, Kultur, Finanzen, Festschrift Mußgnug (2005), 525 s.
30. Dieter Krimphove, Das europäische Sachenrecht – Eine rechtsvergleichende Analyse nach der Komparativen Institutionenökonomik, Lohmar-Köln (2006), 381, favours such flexible compensation solutions from the standpoint of a comparative economic analysis of law.
31. UNIDROIT Convention, Explanatory Report, in Acts and Proceedings of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, Presidenza del Consiglio dei Ministri, Dipartimento per l'informazione e l'editoria, Roma (1996), 30.

The Return of Ernst Ludwig Kirchner's Berliner Straßenszene – A Case Study*

Matthias Weller**

I. Introduction

The Berliner Straßenszene (street scene) of 1913, one of the leading paintings of the famous German group of expressionist artists Die Brücke (the bridge) including Ernst Ludwig Kirchner,¹ heralds – and mirrors in its painting technique – a new modern, bustling way of city life in Berlin at the eve of the First World War and, to a certain extent, represents Berlin as such as well as presumably one of the most important contributions to modern art of German origin. The Brücke Museum in Berlin acquired the painting in 1980 for 1.9 million DM after all Berlin Museums had agreed to abstain from any other acquisitions for the period of two years in order to raise the necessary money. The decision of the Berlin Senate at the end of July 2006² to return the painting to Anita Halpin, grand-daughter and heir of the former Jewish owner Alfred Hess, has rightly been deplored as an “amputation”³ of the “unique collection” of the Brücke Museum and an inestimable loss for Berlin and probably even the work of art itself, since a painting of a “Berliner Straßenszene” will not assume the same charisma outside Berlin. Most notably, however, the Berlin Senate's decision has faced severe criticism, and many commentators held it to be wrong and far from constituting a “fair and just solution”⁴ in the sense of the Washington Principles.⁵ The strongly controversial public debate and the fact that Anita Halpin raised further claims for the return of paintings of the Hess collection from German museums⁶ convinced the German Government to convene a “crisis summit” of art law as well as art market and museum experts whose first part took place on 20 November, the second on 11 December 2006 at the

Chancellor's Office in Berlin in order to learn the lesson from the Kirchner case.⁷ What could this lesson possibly be? Any evaluation has to start from the underlying facts of the dispute. On the basis of the information available to the public, these facts are the following:

II. Provenance of the Painting

Originally, the painting formed part of the probably most important collection of German expressionists at the time including seven paintings by Ernst Ludwig Kirchner, the collection of the Jewish shoe manufacturer and entrepreneur Alfred Hess in Erfurt, Germany. Due to the Great Depression in 1929, his company faced financial difficulties,⁸ and the family was forced to sell pieces of the collection for their living, for example another Kirchner painting, the Potsdamer Platz that Anita Halpin also recently claimed for restitution – a claim the New National Galerie (Neue Nationalgalerie) Berlin turned down once it could present a photo of the buyer's living room in 1930 including the Potsdamer Platz.⁹ When Alfred Hess died in 1931, his son Hans inherited the collection. Shortly after the so-called Machtergreifung on 30 January 1933, he left Germany for Great Britain, and his mother Thekla, Alfred's wife, administered the collection. She could relocate parts of it to Switzerland, and the Berliner Straßenszene was displayed at the Kunsthalle Basel in 1933 as well as at the Kunsthaus Zurich in 1934 for sale for the price of 2,500 RM.¹⁰ On 4 September 1936, the Kunsthaus Zurich, acting on behalf of Thekla Hess, sent the painting to the Cologne Art Society (Kölnischer Kunstverein) from where it was sold to Carl Hagemann for the price of 3,000 RM.¹¹

When Hagemann died in 1940, the family donated the painting to the then director of the Frankfurt Städel Museum, Ernst Holzinger, and after the latter's death in 1970, his widow eventually sold the painting to the Brücke Museum in Berlin in 1980.

III. Reasons for the Sale in Germany

One of the crucial issues of this provenance is of course the question why exactly the painting returned to Germany in 1936. It has been submitted that Thekla Hess sought to sell the painting in Germany because the works of German expressionists were not appreciated outside Germany at the time and attempts to receive a good price in Switzerland had failed. The Berlin Senate however, relied, inter alia, on an affidavit signed by Thekla Hess on 1 April 1958 in the course of the administrative proceedings that her son Hans Hess instituted at the then Berlin Restitution and Compensation Agency in which he eventually received, by decision of 8 July 1961, the highest possible compensation of DM 75,000 on the basis of the German Act on Compensation of Victims of the Nazi Persecution (*Bundesentschädigungsgesetz*).¹² In this affidavit, Thekla Hess declared that, on the occasion of her numerous journeys from Switzerland to Germany until 1936, she was coerced under threat against herself and her family members in Germany by agents of the German secret state police, the so-called Gestapo, to have the Hess collection returned to Germany.¹³ On the basis of the sources publicly available it appears unclear whether this incident took place prior or subsequently to the transport of the Berliner Straßenszene to the Cologne Art Society and, if the former was the case, how this work of art then could, in light of the "interest" the Gestapo had expressed, be ultimately transferred to and stay with a person, Carl Hagemann, who is believed to have kept distance to the Nazis and is known for supporting expressionist art and artists,¹⁴ how the painting could be sold for a price considered to have been above market value¹⁵ and be saved from destruction together with other pieces of "degenerate art" hidden in the archives of the Frankfurt Städel Museum, why Ernst Ludwig Kirchner congratulated Hagemann to his acquisition in February 1937,¹⁶ and why Thekla herself never raised a claim to this painting during her life-time but only her grand-daughter Anita Halpin now.¹⁷

IV. The Steps towards a "fair and just Solution"

It was clear from the outset that there was no legal claim under the German restitution legislation because, inter alia, the time limits for filing such claims had expired a long time ago.¹⁸ The Berlin Senate therefore relied on the Washington Principles of 3 December 1998,¹⁹ the Statement by the Federal Government and other public entities on the tracing and return of Nazi-confiscated art, especially from Jewish property of 14 December 1999²⁰ declaring the need to implement the Washington Principles and, in particular, the ministerial manual on the details of this implementation, the so-called *Handreichung*²¹ that provides for a scheme of examination of claims including explanations and comments on its application to specific issues. This scheme expressly builds on the substantive rules of the German restitution legislation²² that in turn relies on the restitution legislation of the Allied Forces in order to continue the lines of case law that have emerged over the decades about the interpretation of core concepts in this context, in particular the conditions for the application of the rebuttable presumption of the loss of an asset due to Nazi persecution and the evidentiary rules applicable to rebut the presumption.

In order to benefit from the rebuttable presumption that the loss of an asset is attributable to Nazi persecution, the claimant has to show that firstly, he or his legal predecessors were subject to persecution for racial, political or religious reasons between 30 January 1933 and 8 May 1945, and secondly that he or his legal predecessors lost property by forced sale, expropriation or in other ways attributable to Nazi persecution. In the case of a loss of property due to a contractual transaction the presumption applies to the benefit of either individually or collectively persecuted persons that the loss of property in the course of the relevant transaction is attributable to Nazi persecution, however rebuttable on the cumulative production of evidence that (1) the price of the sale is adequate, (2) the seller could freely dispose of the received money, and (3), in the case of sales after 15 September 1935, that (i) the conclusion of the transaction would have taken place, in its core conditions, also in the absence of the Nazi regime or (ii) the transaction successfully served the financial interests of the persecuted person, as is, according to the manual, the case for example, if the buyer assists the seller to transfer assets abroad.

Applying these rules to the Kirchner case, the following picture emerges: The Hess family were Germans of “mosaic belief” as it was put on Hans Hess’s certificate of birth submitted to the Senate of Berlin.²³ In the case of Jewish claimants, the presumption of a collective persecution applies.²⁴ However, both Hans and his mother Thekla, were outside Germany in safe states at the time of the relevant transaction which has given rise, in light of early court decisions in restitution matters,²⁵ to the argument that in this case the presumption of collective persecution does not apply to the result that the claimant would have to show that he or she was persecuted individually. The claimant in this case, Anita Halpin, daughter of Hans Hess, relied on the said affidavit signed by her grand mother Thekla according to which she had been coerced under threat against herself and her family members in Germany to have the Hess collection returned to Germany.²⁶ Whether such a document suffices as evidence of the fact that Hans, the then owner, was individually persecuted despite living outside Germany in a safe state at the relevant time of the transaction, is of course a matter of evaluation – as is every decision upon evidence. However, it appears to not exceed the margin of discretion granted by the Handreichung to the respective entity deciding about a claim that the Berlin Senate relies on this affidavit in order to regard individual persecution as sufficiently established, although it has to be noted that the affidavit of a person close to the claimant’s interests and, even more, the claimant’s own affidavit is usually held to be of reduced weight. And presumably Thekla, having acted as Hans’s agent and administrator, must be considered to be the “claimant” in this sense for the purposes of evaluating the credibility of the affidavit, as soon as the persecution against Thekla is to be considered a persecution of Hans which is the necessary precondition for the claim under the Handreichung and the very fact in question at this stage. Nevertheless, there seems to be only little scope for drawing moral strength from this circumstance to the benefit of the Berlin Senate: would it really have been morally advisable to insist on the submission that the affidavit was not sufficiently credible? Unfortunately however, the Berlin Senate presented a reasoning of its decision to return the painting only weeks later, after years of confidential negotiations, by a first press release of 17 August 2006,²⁷ when the public discussion had already reached its climax, and only the Senate’s State Secretary Barbara Kissler, in a speech of 28 September 2006 held at the Senate’s House,²⁸ referred to the affidavit in a sec-

ond press release of 28 August 2006, and never made available to the public a copy of this affidavit even though the document, according to State Secretary’s speech, must be part of the files of the administrative proceedings for compensation of Hans Hess and therefore should be in the archives of the competent Berlin authorities. This is particularly unfortunate, because the affidavit seems to be the turning point when it comes to the plausibility of the Berlin Senate’s decision.

For, only on the basis of this affidavit it is plausible and in accordance with the Handreichung to apply to the benefit of the claimant the presumption that the transfer of property by a contractual transaction is attributable to Nazi persecution – a presumption that is only rebuttable by, inter alia, showing that the seller in fact received the purchase price.²⁹ The second turning point of the case therefore is the question what the adequate standards of proof are for the respondent of the claim that seeks to rebut the presumption. The Berlin Senate seemed to have acted under the impression that full evidence of the fact that the money had been received by Thekla Hess in Switzerland was necessary, and the Senate was at the end of the day unable to produce a document that evidences the successful transfer of the money to Switzerland – at the same time heavily attacked for not having exhausted all available sources of information.³⁰

Arguably, the Senate’s understanding of the standard of burden of proof does not precisely reflect the instructions of the Handreichung that expressly states: “either party may seek to meet its burdens of proof by submitting evidence of circumstances that typically support the relevant fact if documents directly to the point are not available”.³¹ However, even if the Berlin Senate had made use of this reduced standard of proof to its own benefit, it appears rather doubtful whether anything had changed the picture: the only circumstances currently known that could have supported the fact that Thekla Hess did receive the money in Switzerland was that Carl Hagemann, the buyer, is described to have been a person of integrity and was an experienced businessman with international relations who was, in 1936, presumably capable of successfully transferring 3,000 RM to Switzerland, and that Thekla Hess never raised claims herself. These circumstances certainly assume certain weight. Whether they suffice to meet even the reduced standard of proof is a matter of evaluation³² – a factor that again might have been utilized more

strongly in the negotiations, especially in light of the importance of the painting for the cultural history of Berlin,³³ and the city might have been able to negotiate at least a temporary stay of the painting at the Brücke Museum for, e.g. another year before it be ultimately returned (and put up for auction³⁴) which would have given the public both the chance to see the painting once more and, on this occasion, to learn about its history³⁵ and, above all, about the precise moral considerations that resulted in the decision to return the work of art as a “fair and just solution”. The public might have taken the opportunity to agree with the Senate’s considerations, and its lawful decision might ultimately have become morally persuasive and thus could have assumed legitimacy.

Speaking of legitimacy, it is particularly difficult to understand why the Berlin Senate abstained from any known attempt to refer the case to the Advisory Commission on the Return of Cultural Property seized as a Result of Nazi Persecution, especially Jewish Property³⁶ that met in Berlin on 14 July 2003 for its constitutive meeting and includes leading personalities such as the former President of the Federal Republic of Germany, Dr Richard von Weizsäcker, the former President of the German Parliament Professor Rita Süßmuth, the former President of the Federal Constitutional Court, Professor Jutta Limbach and others. To be sure, this body serves as a mediator only if both sides to the dispute so desire. Should indeed the claimant have refused to submit the case to this body, such refusal would have considerably strengthened the moral position of the Senate.

V. Conclusions

The conclusions from this case study may be summarized as follows: Despite the criticism in the media, the Berlin Senate’s decision is acceptable as a step to achieve a just and fair solution in the sense of Washington Principle no. 8, in particular in light of Principle no. 4 as implemented in Germany by the Handreichung. At the same time, the Senate did not fully exhaust the strength of its position in the negotiations. Not exhausting the margin for negotiations might be an appropriate additional gesture by the state that has to assume the responsibility for the situation the Washington Principles are dealing with. However, the gesture of self-restriction in negotiations about a just and fair solution is only of moral value, if the reasons and the degree of self-restriction are precisely and comprehensive-

ly communicated to the public. If the latter two propositions meet with approval, the information policy of the Berlin Senate was a disaster, and the bottom line of this case study turns out to be an almost trivial, but at the same time fundamental one: A just and fair solution based on moral considerations depends above all on its plausible, transparent, comprehensive and timely reasoning. The Commissioner of the Government for Culture and Media (Beauftragter der Bundesregierung für Kultur und Medien) might have learned the lesson: in its Press Release of 20 November 2006 the need for “transparency” is particularly stressed.³⁷

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1. See e.g. recently *Jutta Hülsewig-Johnen* (ed.), Ernst Ludwig Kirchner und die “Brücke”: Selbstbildnisse – Künstlerbildnisse, Bielefeld 2005; Roland Scotti (ed.), Ernst Ludwig Kirchner und die “Brücke”: die Jahresmappen der Brücke 1906 - 1912 und die Chronik der Brücke KG 1913 aus der Sammlung Eberhard W. Kornfeld, Bern-Davos, Davos 2005.
2. Senate’s Administration for Science and Culture (Senatsverwaltung für Wissenschaft, Forschung und Kultur), Pressemitteilung of 17 August 2006; *Barbara Kisseler*, State Secretary, Speech of 28 August 2006 at the Berlin Senate’s Commission for Cultural Affairs (Kulturausschuss), see e.g. <http://www.art-net.de/magazine/sonder/pdf/20060912kisseleruflerl.pdf>, 11 December 2006.
3. *Bernd Schultz*, Amputation einer einzigartigen Sammlung – Ernst Ludwig Kirchners Gemälde “Berliner Straßenszene” aus dem Berliner Brücke-Museum ist zu Unrecht als Raubgut eingestuft worden, *Frankfurter Allgemeine Zeitung* of 4 November 2006, Nr. 257, at p. 45.
4. See e.g. *Peter Raue*, Nicht fair und nicht gerecht – Der Senat hat falsch verhandelt und die Öffentlichkeit ausgeschlossen, *Der Tagesspiegel* online of 24 August 2006, see <http://www.tagesspiegel.de/kultur/archiv/24.08.2006/2730947.asp>, 11 December 2006; *Stefan Kirschner*, Kein Verständnis – Berlin verzichtet auf den Rückkauf von Kirchners „Berliner Straßenszene“ und streitet über deren Restitution, *Die Welt* of 29 August 2006, at p. 23; see Heinrich Wefing, Rückgabe oder Weiterverkauf? Die Debatte hat begonnen: Der Fall Kirchner und die Restitution von NS-Raubkunst, *Frankfurter Allgemeine Zeitung* of 12 September 2006 Nr. 212, p. 35; *Christoph Stölzl*, Interview by the Netzeitung of 17 August 2006: „Kirchner case of utmost danger”, <http://www.netzeitung.de/deutschland/interviews/432907.html>, 11 December 2006; Joint Press Release of 14 August 2006 by Ludwig von Pufendorf, Förderkreis Brücke-Museum, Wolfgang Henze, Ernst-Ludwig-Kirchner Archiv Wichtrach/ Bern, and Bernd Schultz; see also Bernd Schultz, note 3.
5. Washington Conference Principles on Nazi-Confiscated Art of 3 December, 1998, Principle no. 8: “If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution”.

- on, recognizing this may vary according to the facts and circumstances surrounding a specific case". On the quality in legal theory of these norms as "narrative norms" and their general relevance in art law see e.g. Erik Jayme, Narrative Normen im Kunstrecht, in Jürgen Becker et al. (eds.), *Recht im Wandel seines sozialen und technologischen Umfelds*, Festschrift für Manfred Rehinder, Munich/Berne 2002, pp. 539 et seq.; see also Erik Jayme, Die Washingtoner Erklärung über Nazi-Enteignungen von Kunstwerken der Holocaustopfer: Narrative Normen im Kunstrecht, *Museen im Zwielicht*, Ankaufspolitik 1933 – 1945, Kolloquium vom 11. und 12. Dezember 2001 in Köln, Veröffentlichungen der Koordinierungsstelle für Kulturgutverluste Vol. 2 (2002), pp. 247 et seq.
6. E.g. Franz Marc's „Die kleinen blauen Pferde“ of 1911 from the State Gallery (Staatsgalerie) Stuttgart, Ernst Ludwig Kirchner's „Urteil des Paris“ of 1913 from the Wilhelm-Hack-Museum in Ludwigshafen, and Lyonel Feininger's „Barfüßerkirche in Erfurt“ of 1924, also from the State Gallery (Staatsgalerie) Stuttgart, see e.g. Peter Dittmar, *Guter Wille bremsst das Restitutionskarussell nicht*, *Die Welt* of 21 November 2006, <http://www.welt.de/data/2006/11/21/1119214.html> (11 December 2006).
 7. Commissioner of the Government for Culture and Media (Beauftragter der Bundesregierung für Kultur und Medien), Press Release of 20 November 2006; Press Release of 11 December 2006, reprinted e.g. at the German Institute of Art and Law's homepage www.ifkur.de; see also *Henrike Schulte*, Expertentreffen zu Restitutionsfragen – ein Schritt nach vorn, *artnet Magazine*, <http://www.artnet.de/magazine/features/diall/diall11-21-06.asp>, 11 December 2006.
 8. See Federal Administrative Court (Bundesverwaltungsgericht), decision of 28 April 2004 – Case 8 C 12/03, *Sammlung der Entscheidungen des Bundesverwaltungsgerichts (BVerwGE)* Vol 120, pp. 362-369, at no. 2, dealing with claims of the Conference on Jewish Material Claims against Germany, Inc. in respect to real property originally owned by Alfred Hess's company; see also *Christina Feilchenfeldt/Peter Romilly*, *Die Sammlung Alfred Hess*, *Weltkunst* 89 (Oktober 2000), p. 89.
 9. See e.g. *Anna Blume Huttenlauch*, *Berlin Street Fight*, *artnet Magazine*, <http://www.artnet.com/magazineus/features/huttenlauch/huttenlauch11-7-06.asp> (11 December 2006).
 10. Legal Opinion „Rechtliche Würdigung Rückgabeverlangen der Frau Anita Halpin - Ernst Ludwig Kirchner „Berliner Straßenszene“ of 29 September 2005 by von Trott zu Solz Lammek Rechtsanwälte, see <http://www.artnet.de/magazine/sonder/pdf/20060906wueringung.pdf>, 11 December 2006.
 11. See the document „Liste der Gemälde der Sammlung Hagemann“ of 9 March 1947 (<http://www.artnet.de/magazine/pdf/lis-te090347.pdf>, 11 December 2006, probably compiled by Hagemann's heirs shortly after his death on the basis of his notes, see *Henrike Schulte*, *Hagemanns Liste*, *artnet Magazine* of 11 November 2006 (<http://www.artnet.de/magazine/news/schulte/schulte11-10-06.asp>, 11 December 2006).
 12. See sections 55(1) Sentence 1, 58 Sentence 1 German Act on Compensation of Victims of the Nazi Persecution (*Bundesentschädigungsgesetz*) limited compensation to DM 75,000; for the background to the German post-war restitution and compensation legislation based on legislation enacted by the Allied Forces see e.g. *Harald König*, *Claims for the Restitution of Holocaust era Cultural Assets and Their Resolution in Germany*, *Art, Antiquity & Law* 2007, Issue 1.
 13. *Barbara Kisseler*, State Secretary, Speech of 28 August 2006 at the Berlin Senate's Commission for Cultural Affairs (Kulturausschuss), see e.g. <http://www.artnet.de/magazine/sonder/pdf/20060912kisseleruf-lierl.pdf>, 11 December 2006; see *David J. Rowland*, *Rowland & Associates*, Press Release of 18 August 2006, citing from Thekla Hess's affidavit as follows: "In 1936 during the late evening hours two agents of the secret police from Nuremberg, coerced me under threat to have the pictures in the Hess collection being kept at the time at 'Kunsthaus (Gallery) Zurich' returned to Germany immediately. Even though I understood fully that this threat could result in the complete loss of the entire collection, I had no choice other than [sic!] to give into the pressure being exerted by this all-powerful agency of the government in the hope that my own life and that of my own family would not be further jeopardized".
 14. See e.g. *Eva Mongi-Vollmer*, *Von der Kunst des Sammelns: Carl Hagemann – ein Sammler seiner Zeit*, in *Das Städel/Museum Folkwang Essen* (eds.), *Künstler der Brücke in der Sammlung Hagemann: Kirchner, Heckel, Schmidt-Rottluff, Nolde, Ostfildern* 2004, pp. 45 et seq., at p. 47; *Hans Delf*, *Carl Hagemann – Eine biographische Skizze*, in *Das Städel/Museum Folkwang Essen* (eds.), *Künstler der Brücke in der Sammlung Hagemann: Kirchner, Heckel, Schmidt-Rottluff, Nolde, Ostfildern* 2004, pp. 169 et seq., at p. 175.
 15. See *Arnold Budczies*, art collector and Carl Hagemann's friend, Letter of 25 March 1937, as cited in *Bernd Schultz*, Letter to the Berlin Senator of Science, Research and Culture of 10 August 2006 (<http://www.artnet.de/magazine/sonder/pdf/KIRCHNER-SKAN-DAL11aug2006.pdf>, 11 December 2006, to Carl Hagemann, commenting on the acquisition of the "Berliner Straßenszene": "(...) freilich ist der Preis sehr hoch [yet, the price is very high]".
 16. *Christoph Stölzl*, Interview by the *Netzeitung* of 17 August 2006: „Kirchner case of utmost danger“, <http://www.netzeitung.de/deutschland/interviews/432907.html> (11 December 2006), citing Kirchner "Nun hat es doch in Deutschland seinen guten Platz gefunden".
 17. These circumstances are emphasized by *Bernd Schultz*, supra note 3; *Peter Raue*, supra note 4; *Christoph Stölzl*, supra note 4.
 18. See e.g. *Harald König*, *Claims for the Restitution of Holocaust Era Cultural Assets and Their Resolution in Germany*, *Art, Antiquity & Law* 2007, Issue 1; see also *Harald König*, *Grundlagen der Rückerstattung – Das deutsche Wiedergutmachungsrecht*, *Osteuropa* vol. 56, issue 1-2/2006, pp. 371 et seq., at p. 378; but compare *Sabine Rudolph*, *Das Recht kennt einen Anspruch auf Rückgabe*, *Die Zeit* of 9 November 2006, Nr. 46 (<http://www.zeit.de/2006/46/Restitution?page=all>, 11 December 2006) who holds that the special restitution and compensation legislation does not preempt the general rules under German substantive law governing claims for the recovery of chattel. This holding, however, appears to be in conflict with the case law by the German courts, see e.g. German Federal Court of Justice, decision of 8 October 1953, case IV ZR 30/53, *Neue Juristische Wochenschrift (NJW)* 1953, 1909.
 19. See supra note 5.
 20. <http://www.lostart.de/stelle/erklaerung.php3?lang=english>, 11 December 2006.
 21. Beauftragter der Bundesregierung für Kultur und Medien, Handreichung von Februar 2001 zur Umsetzung der "Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz" vom Dezember 1999, Berlin, 5th ed. 2006.
 22. Handreichung (supra note 21), sub V a, p. 17.
 23. *Barbara Kissler* (supra note 2).
 24. See e.g. Highest Restitution Court (Oberstes Rückerstattungsgericht) Berlin, *Neue Juristische Wochenschrift/Rechtsprechung zum Wiedergutmachungsrecht (NJW/RzW)* 1956, p. 210.
 25. E.g. Upper Regional Court (Oberlandesgericht) Hamm, *Rechtsprechung zum Wiedergutmachungsrecht (RzW)* 1954, p. 41.
 26. See supra note 13.
 27. Senatverwaltung für Wissenschaft, Forschung und Kultur, Pressemitteilung of 17 August 2006: „Kirchner zurecht zurückgegeben“, see e.g. *Henrike Schulte*, *Senat äußert sich zur Kirchner-Restitution*, *artnet* of 23 August 2006 (<http://www.artnet.de/magazine/features/schulte/schulte08-23-06.asp>, 11 December 2006).
 28. See supra note 13.
 29. See supra note 21 and accompanying text.
 30. See in particular *Bernd Schultz*, Letter to the Senator of Science, Research and Culture of 10 August 2006, p. 4 (<http://www.artnet.de/magazine/sonder/pdf/KIRCHNER-SKAN-DAL11aug2006.pdf>, 11 December 2006, who rightly criticizes that the Senate did not consult the Ernst-Ludwig-Kirchner Archive Wichtrach/Berne in Switzerland. However, up to date no further evidence in this matter appeared from this archive.
 31. Handreichung (supra note 21), Exhibit V a – Explanations to the Scheme of Examination (Erläuterungen zum Prüfraster), Explanation on V b) bb, with reference to case law by the Highest Restitution Court (Oberstes Rückerstattungsgericht) Berlin, *Rechtsprechung zum Wiedergutmachungsrecht (RzW)*

- 1976, p. 3.
32. Had the matter been decided by a German court under the standards of proof of the German Code of Civil Procedure (Zivilprozessordnung), the mere fact that the debtor is undoubtedly considered a person of integrity without any apparent motive to withhold payment would not have sufficed to discharge his burden of proof for the payment on a particular debt. To the contrary, had the court inferred from the aforementioned circumstances alone that payment in fact took place it would have made an error in (evidentiary) law, see e.g. Reinhard Greger, in Zöller, Zivilprozessordnung, Cologne, 26th ed. 2006, pre section 284 no. 29: mere probability does not suffice in order to establish evidence based on circumstances (Anscheinsbeweis).
 33. See supra note 1 and accompanying text.
 34. The "Straßenszene" was eventually sold at auction at Christie's for USD 34 million, see Lisa Zeitz, "Berliner Straßenszene" auf der Fifth Avenue, Frankfurter Allgemeine Zeitung of 9 November 2006.
 35. On the interrelation between restitution laws and collective memory see generally Patrick Macklem, Rybná 9, Praha 1: Restitution and Memory in International Human Rights Law, 16 Eur.J.Int'l L. 1 (2005).
 36. <http://www.lostart.de/stelle/kommission.php3?lang=english>, 11 December 2006.
 37. See supra note 7.

Ein neuer Fall Schiele*

Nikolaus Kraft**

Ich berichte von einem kleinen Fall, der vor kurzem in Österreich unerwartet hohe Wellen geschlagen hat. Im Zentrum des Interesses steht ein zauberhaftes Blatt von Egon Schiele, das in einer Auktion versteigert wurde und anhand dessen man einige für das Auktionswesen interessante Rechtsfragen studieren kann:

1. In seiner am 21.11.2006 abgehaltenen 61. Kunstauktion hat das Wiener Kunstauktionshaus Im Kinsky um € 160.000,- eine Bleistiftzeichnung von Egon Schiele mit dem Titel "Sitzende" (Bleistift auf Papier, 32,1 x 49 cm), signiert und datiert 1917, zugeschlagen. Das der Spätphase des Künstlers entstammende Werk zeigt eine sitzende junge Frau mit nach vorne ausgestreckten Armen, die nach links in Richtung des Betrachters blickt. Das Blatt nimmt im Werk von Egon Schiele eine besondere Stellung ein, weil (soweit bekannt ist) keine zweite Zeichnung mit dem selben Modell existiert. Das Blatt besticht durch seine Einfachheit, seinen sicheren und zugleich luftig weichen Strich und seine besondere Intimität. Der österreichische Kunsthistoriker Peter Baum spricht in einem, im Auktionskatalog wiedergegebenen Zitat von der „für Schiele seltenen Entspannung und Natürlichkeit“ des Blattes. Der Schiele-Experte Rudolf Leopold hat dem Auktionshaus auf Anfrage vor der Versteigerung mitgeteilt, dass Schiele die Zeichnung bereits 1914 angefertigt, aber erst 1917 signiert haben könnte.

2. Das Auktionshaus hat die am 21.11.2006 abgehaltene Versteigerung in Printmedien im In- und Ausland, darunter auch in den Vereinigten Staaten, beworben. Als Werbesujet wurde auch die Bleistiftzeichnung von Egon Schiele verwendet.

3. Nachdem er eine solche Werbeeinschaltung zu Gesicht bekommen hatte, kontaktierte der in den USA lebende, 86-jährige Erwin Hirsch das Auktionshaus. Er gab an, dass die „Sitzende“ seinem 1938 aus Österreich geflohenen Vater gehört habe, er als dessen Erbe – und nicht der Einbringer – Eigentümer des Blattes sei, und forderte, dass die Zeichnung von der Auktion zurückgezogen werde.

Das unfreiwillige Zurückziehen eines – noch dazu umfangreich beworbenen – Kunstwerkes von einer Auktion verursacht für den Einbringer vielfach einen unwiederbringlichen Schaden: Das Kunstwerk ist am Markt „tot“.

Rasches Handeln war geboten. Das Auktionshaus kontaktierte daraufhin den Rechtsvertreter des Einbringers und konfrontierte diesen mit den von Herrn Hirsch geltend gemachten Eigentumsansprüchen. Der Einbringer – ebenso wie Herr Hirsch jüdischer Herkunft – teilte dem Auktionshaus jedoch mit, dass sich das Blatt seit mehr als fünf Jahrzehnten in in jeder Hinsicht unbedenklichen Besitz seiner Familie befinde, er Eigentümer des Blattes sei und keinerlei Anlass habe, daran zu zweifeln, dass er zur Veräußerung des Blattes berechtigt sei. Aufgrund des mit dem Auktionshaus abgeschlossenen Kommissionsvertrages sei das Auktionshaus zur Versteigerung des Blattes verpflichtet. Sollte dies das Auktionshaus als Kommissionär trotz Weisung verweigern, werde er Schadenersatzforderungen geltend machen. Die Preisgabe seiner Identität oder der seines Vertreters wünsche er nicht.

Der Vertreter des Auktionshauses teilte dies Herrn Hirsch mit und verwies diesen an die israelitische Kultusgemeinde in Wien. Dies auch deshalb, weil vom Auktionshaus angestellte Nachfor-