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Immunity for Artworks on Loan? A Review of International Customary Law and Municipal Anti-seizure Statutes in Light of the "Liechtenstein" Litigation

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Immunity for Artworks on Loan? A Review of International Customary Law and Municipal Anti-seizure Statutes in Light of the *Liechtenstein* Litigation

Matthias Weller *

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I. INTRODUCTION

The immunity of states and their representatives is a principle of customary international law¹ whose roots go back three thousand years: "Wherever in the world relations grew up between separate peoples, actually or potentially hostile, the duty to give special protection to the envoy who bore messages was observed and enforced by sanctions which were in origin religious."² Today, Article 29 of the Vienna Convention on Diplomatic Relations expressly prescribes that a diplomatic agent shall be inviolable and that he shall not be liable to any form of arrest or detention by the host state.³ Artworks on loan from foreign states have metaphorically been characterized as "peace envoys."⁴

The German government recently decided to provide for the regulatory framework that allows public authorities to issue return guarantees with respect to artworks on loan from abroad.⁵ In describing its regulatory aim, the government directly borrowed from

1. See e.g., BURKHARD HESS, STAATENIMMUNITÄT BEI DISTANZDELIKTEN: DER PRIVATE KLÄGER IM SCHNITTPUNKT VON ZIVILGERICHTLICHEM UND VÖLKERRECHTLICHEM RECHTSSCHUTZ 29 (C.H. Beck 1992). HELMUT DAMIAN, STAATENIMMUNITÄT UND GERICHTSZWANG: GRUNDLAGEN UND GRENZEN DER VÖLKERRECHTLICHEN FREIHEIT FREMDER STAATEN VON INLÄNDISCHER GERICHTSBARKEIT IN VERFAHREN DER ZWANGSVOLLSTRECKUNG ODER ANSPRUCHSSICHERUNG 10 (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Series No. 89, 1985).

2. E. Denza, *Diplomatic Agents and Missions, Privileges and Immunities*, in 1 ENCYCLOPEDIA OF PUBLIC INT'L LAW 1040 (R. Bernhard ed., 1992); see also JOLANTA KREN KOSTKIEWICZ, STAATENIMMUNITÄT IM ERKENNTNIS- UND IM VOLLSTRECKUNGSVERFAHREN NACH SCHWEIZERISCHEM RECHT 76 (Stämpfli 1998).

3. Jonathan Brown, *Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations*, 37 INT'L & COMP. L.Q. 53, 72 (1988).

4. E.g., Erik Jayme, *Neueste Entwicklungen im internationalen Kunstrecht*, Lecture Before Graz Jurisprudential Faculty (May 16, 2004), in KUNST IM RECHT, 2004 (on file with author); Erik Jayme, *Das Freie Geleit für Kunstwerke*, in 11 LUDWIG BOLTZMANN INSTITUT FÜR EUROPARECHT—VORLESUNGEN UND VORTRÄGE 4 (Gerte Reichelt ed., Vienna 2001) (Kunstwerke als „Botschafter guten Willens“) [hereinafter Jayme, *Das Freie Geleit*]; Erik Jayme & Alexander Geckler, *Internationale Kunstausstellungen: „Freies Geleit“ für Leihgaben*, 20 IPRAX 156, 156 (2000) (Ger.).

5. Gesetz zur Umsetzung von Richtlinien der Europäischen Gemeinschaften über die Rückgabe von unrechtmäßig aus dem Hoheitsgebiet eines Mitgliedstaats verbrachten Kulturgütern und zur Änderung des Gesetzes zum Schutz deutschen Kulturgutes gegen Abwanderung [Kulturgutsicherungsgesetz] [KultgutSiG] Oct. 21, 1998, BGBl I at 2, 70 (F.R.G.).

the terminology of diplomatic privileges and frankly speaks of “safe conduct” for artworks.⁶ Academic writing in Germany and Switzerland supports such terminology.⁷ Besides Germany, several other states have already enacted anti-seizure statutes granting immunity to artworks on loan from abroad including France⁸ and, most recently, Belgium⁹ and Switzerland,¹⁰ but also numerous provinces of Canada¹¹ and states of the United States¹² as well as the U.S. Congress.¹³ Australia¹⁴ and Ireland¹⁵ enacted statutes

6. Official Explanatory Report to the draft of section 20 of the Act, BTDrucks 13/10789, at 10 (May 26, 1998): “[translated:] the regulation renders possible a guarantee of safe conduct for cultural property on loan from abroad e.g. for art exhibitions in the Federal Republic” [hereinafter BTDrucks 13/10789]. See also Reply of the Government to an Informal Parliamentary Query of the Members of Parliament Ina Albowitz, Hans-Joachim Otto (Frankfurt), Hildebrecht Braun (Augsburg), and certain other Members of Parliament and the Liberal Democrats Parliamentary Party (Antwort der Bundesregierung auf die kleine Anfrage der Abgeordneten Ina Albowitz, Hans-Joachim Otto (Frankfurt), Hildebrecht Braun (Augsburg), weiterer Abgeordneter und der Fraktion der F.D.P.), BTDrucks 14/6603, at 2 (July 16, 2001): “[translated:] safe conduct for artworks on loan” [hereinafter “BTDrucks 14/6603”].

7. Jayme, *Das Freie Geleit*, supra note 4; see also Erik Jayme, *L'immunité des oeuvres d'art prêtées—quelques procédures et législations récentes en Europe*, in CLAIMS FOR THE RESTITUTION OF LOOTED ART 175 (Marc-André Renold & Pierre Gabus eds., 2004); Julia El-Bitar, *Das Verhältnis zwischen „Freiem Geleit“ und gemeinschaftsrechtlicher Rückgabeklage* 16 EUZW 173 (2005) (Ger.); Erik Jayme, *KUNST IM RECHT, FAKULTÄTSTAG DER RECHTSWISSENSCHAFTLICHEN FAKULTÄT GRAZ* 13 (Graz 2004); Andrea F.G. Raschér & Florian Schmidt-Gabain, *Besserer Schutz für den internationalen Leihverkehr unter Museen? Die „Rückgabegarantie“ im Kulturgütertransfergesetz*, in AKTUELLE JURISTISCHE PRAXIS/PRACTIQUE JURIDIQUE ACTUELLE 686, 689 (2005) (Switz.); Wallace Stuart, *Immunity from Seizure of Cultural Objects—the Experience in the United States*, in CLAIMS FOR THE RESTITUTION OF LOOTED ART 183 (Marc-André Renold & Pierre Gabus eds., 2004); Marc Weber, *Bundesgesetz über den internationalen Kulturgüterschutz*, in ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 495, 518 (2004) (Switz.).

8. Law No. 94-679 of August 8, 1994, Journal Officiel de la République Française [J.O.] [Official Gazette of France], August 10, 1994, p. 11668.

9. Loi modifiant le Code judiciaire en vue d'instituer une immunité d'exécution à l'égard des biens culturels étrangers exposés publiquement en Belgique, Moniteur Belgique no. 233 of June 29, 2004, at 52719.

10. Bundesgesetz über den internationalen Kulurgütertransfer [KGTG] June 20, 2003, Kulturgütertransfergesetz, 444.1, art. 10–13 (Switz).

11. Exemptions from Seizure, R.S.Q., ch. C-25, at 553.1 (2005) (Can.); Foreign Cultural Property Immunity Act, R.S.A., ch. F-17 (2000) (Can.); Law and Equity Act, 253 R.S.B.C. § 55 (1996) (Can.); Foreign Cultural Objects Immunity from Seizure Act, R.S.O., ch. F-23 (1990) (Can.).

12. N.Y. ARTS & CULT. AFF. LAW § 12.03 (2005); TEX. CIV. PRAC. & REM. CODE ANN. § 61.081 (2005); R.I. GEN. LAWS § 5-62-8 (2004).

13. Immunity from seizure under judicial process of cultural objects imported for temporary exhibition or display. 22 U.S.C. § 2459(a) (2005).

14. Protection of Movable Cultural Heritage Act, 1986, Act. No. 11 § 14(3) amended by Act No. 8 (2005) (Austl.).

15. National Monuments (Amendment) Act (Act No. 17/1994) (Ir.). available at <http://www.irishstatutebook.ie/ZZA17Y1994S5.html> (last visited Sept. 6, 2005).

protecting artworks on loan from abroad at least against forfeiture proceedings.

Are we witnessing the emergence of a legal principle of immunity for artworks on loan from abroad? This Article analyzes to what extent such a principle exists or is about to come into being and what its legal potential might be. To this end, Part II examines one of the leading cases about artworks on loan, the *Liechtenstein* case, and compares it to other controversies about loaned artworks to identify possible signs of a development in court practice towards a principle of immunity for artworks on loan. Against the background of the legal weaknesses of a yet inchoate concept of immunity for artworks on loan under public international law, Part III analyzes the various municipal anti-seizure statutes positively guaranteeing immunity to artworks on loan, comparing the different regulatory schemes and identifies controversial legal issues.

II. THE *LIECHTENSTEIN* CASE:¹⁶ NO PRINCIPLE OF IMMUNITY FOR ARTWORKS AT SIGHT?

On its surface, the *Liechtenstein* case revolves around the interpretation of a treaty concluded between the Allied Forces and Germany shortly after World War II¹⁷ (the Settlement Convention) that, *inter alia*, excludes German courts from reviewing the legality of expropriations of German external assets seized for reparation purposes under the authority of occupation law. At its heart, the case raises the question of the existence and extent of immunity of

16. Prince Hans-Adam II of Liechtenstein v. Germany, 2001-VII Eur. Ct. H.R. 7.

17. Convention on the Settlement of Matters Arising out of the War and the Occupation, May 26, 1952, 6 U.S.T. 4411, 332 U.N.T.S. 219. Chapter 6 of the Settlement Convention concerns reparation, and the provision relevant to the *Liechtenstein* case, article 3, reads as follows:

1. The Federal Republic of Germany shall in the future raise no objection against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany.

....

3. No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraphs 1 and 2 of this Article, or against international organisations, foreign governments or persons who have acted upon instructions of such organisations or governments.

The Settlement Convention is one of the 'Bonn Conventions' designed to end the Occupation Regime.

artworks on loan from abroad. But before going into the legal issues, it is important to consider the artwork itself.

A. *The Artwork*



The artwork in question is the painting *Scene at a Roman Lime Kiln* by the Dutch seventeenth century baroque painter Pieter van Laer, also known—due to his deformed stature—as *il bamboccio* (little barrel)¹⁸ and, as such, founder of a group of mainly Dutch artists called *i bamboccianti*. This group worked in Rome in the mid-seventeenth century and, with its works, constituted a distinct genre, *i bambocciate*, small works representing trivial or banal subjects related to contemporary Italian life. Examples of depictions in this genre include blacksmiths shoeing horses in grottoes,¹⁹ brigands attacking travellers,²⁰ as well as idlers around Roman lime-kilns²¹

18. AXEL JANECK, *UNTERSUCHUNG ÜBER DEN HOLLÄNDISCHEN MALER PIETER VAN LAER, GENANNT BAMBOCCIO* 66 (Offset-Druck Gugel Würzburg 1968).

19. PIETER VAN LAER, *Maniscalco in una grotta* (1635), reprinted in GIULIANO BRIGANTI, ET AL., *I BAMBOCCIANTI* 62 illus. 1.26 (Ugo Bozzi Editore 1983); PIETER VAN LAER, *Maniscalco in una grotta* (1635), reprinted in BRIGANTI, ET AL., *supra*, at 62 illus. 1.27.

20. PIETER VAN LAER, *Assalto notturno al cascinale* (1630), reprinted in BRIGANTI, ET AL., *supra* note 19, at 68 fig. 1.25; PIETER VAN LAER, *Assalto ai viaggiatori* (1630), reprinted in *I BAMBOCCIANTI*, (*supra* note 19), at 61 fig. 1.40.

such as the painting in question here, the *Scene at a Roman Lime Kiln*²²—a typical theme of Bamboccianti art.²³

In the decades after the World War II, the painting seemed lost, but eventually turned up again in 1981 in an exhibit of the Oblastní gallery in Gottwaldov in Czechoslovakia.²⁴ It is still unclear whether the painting is identical with Pieter van Laer's *Large Limekiln*—the preeminent work in this genre—that was painted in Rome in 1637 and that is known through a contemporary engraving by *Cornelis Visscher*, who appears to have created his work as a copy or as a reconstruction of what he heard about Peter van Laer's *Scene at a Roman Limekiln*.²⁵

The *Large Limekiln* strikes for its monumentality: in reality limekilns were small, whereas Peter van Laer's resembles a massive antique ruin.²⁶ Thus, the artist seems to allude to a conventional motif at the time: Roman ruins.²⁷ At the same time the painting recalls the ancient Roman practice of fuelling the limekilns with the marble and travertine blocks that formed Rome's monumental ancient structures in the first place—an almost diabolic implication of the painting and, at any rate, an ironic critique of the conventional genres at the time.²⁸

B. Facts and Legal Issues

The *Scene at a Roman Lime Kiln* had formed part of the Liechtenstein principal family's art collection at least since 1767.²⁹ Until the end of World War II, the painting had been stored in one of the family's castles on the territory of the now Czech Republic. In 1946, the then Czechoslovak Republic confiscated the family's property situated in its territory, including the painting. The confiscation was based on Beneš Decree no. 12 (the Beneš Decree) on the "confiscation and accelerated allocation of agricultural property of

21. PIETER VAN LAER, *Landschaft mit Morra-Spielern (Der kleine Kalkofen)* (1642), I BAMBOCCIANTI 191 fig. 19.2. (David A. Levine & Ekkehard Mai eds., *Electa* 1991).

22. PIETER VAN LAER, *Szene um einen römischen Kalkofen*, reprinted in I BAMBOCCIANTI, *supra* note 20, at 207 fig. 19.12.

23. David A Levine, *The Roman Limekilns of the Bamboccianti*, 70 THE ART BULLETIN No. 4 569, 569-70, 575 (1988) (noting at least fifteen distinct compositions by *Bamboccianti* artists in which furnaces for making lime play a prominent role).

24. VAN LAER, *supra* note 21.

25. Levine, *supra* note 22, at 575.

26. *Id.* at 576.

27. *Id.*

28. *Id.* at 579.

29. *Prince Hans-Adam II of Liechtenstein*, 2001-VII Eur. Ct. H.R. at 9; FRANZ SMOLA, *DIE FÜRSTLICH LIECHTENSTEIN'SCHE KUNSTSAMMLUNG—RECHTSFRAGEN ZUR VERBRINGUNG DER SAMMLUNG VON WIEN NACH VADUZ IN DEN JAHREN 1944/45*, at 26 (Peter Lang Publishing 1999).

German and Hungarian persons and of those having committed treason and acted as enemies of the Czech and Slovak people”³⁰ An appeal lodged with the local courts by the principal family failed in 1951.³¹

In 1991, the Wallraf-Richartz Museum of the city of Cologne in Germany obtained the painting as a temporary loan for an art exhibit on *i Bamboccianti*³² from the Czech Historical Monuments Office. Again the Liechtenstein principal family, now through His Serene Highness Prince Hans-Adam II of Liechtenstein, moved to recover the painting and applied, at the Cologne Regional Court, for an interim injunction ordering the municipality of Cologne to hand over the painting to a bailiff at the end of the exhibit. The Cologne Regional Court granted the injunction and the painting was sequestered. In the main proceedings, however, the Cologne Regional Court held that the action to recover the painting was inadmissible due to Article 3 of the Settlement Convention.³³ The court’s holding is questionable: Article 3 of the Settlement Convention applies to “German external assets,” that is, assets situated outside Germany owned by German nationals.³⁴ It was His Serene Highness Prince Franz Joseph II of Liechtenstein, however, who owned the painting at the time, and he never was a German national.³⁵ Nevertheless, both the Upper Regional Court of Cologne³⁶ and the German Federal Court of Justice³⁷ confirmed the decision on appeal and thus denied the Prince any access to German courts in order to determine his property rights vis-à-vis the Czech Republic.

30. Dekretu prezidenta republiky č. 12/1945 Sb. o konfiskaci a urychleném rozdělení majetku Němců, Maďarů, zrádců a nepřátel), issued by the President of the former Czechoslovakia Beneš on June 21, 1945 (on file with author) [hereinafter Dekretu prezidenta republiky].

31. *Prince Hans-Adam II of Liechtenstein*, 2001-VII Eur. Ct. H.R. at 9.

32. See VAN LAER *supra* note 21.

33. Landesgericht Köln [LG Köln] [Reg’l Court of Cologne] Oct. 10, 1995, 6 IPRAX 419 (F.R.G.).

34. Bardo Fassbender, *Klageausschluss bei Enteignungen zu Reparationszwecken—Das Gemälde des Fürsten von Liechtenstein*, 20 NEUE JURISTISCHE WOCHENSCHRIFT 1445, 1446 (1999) (describing the Cologne Regional Court’s ruling).

35. Oberlandesgericht Köln [OLG Köln] [Upper Reg’l Ct. of Cologne] July 9, 1996, 22 U 215/95, sub I 2 b aa, VIZ 1998, 213 = ROW 1998, 242 = OLGR Köln 1998, 103.

36. *Id.*

37. Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 25, 1997, II ZR 213/96, unpublished: the Court did not decide on the merits but rejected—without reasoning—the appeal for lack of general relevance of the legal issues (*grundsätzliche Bedeutung*) and for lack of prospects of success (*fehlende Erfolgsaussichten in der Sache*); see Zivilprozessordnung [ZPO] [Civil Procedure Statute] § 546 (F.R.G.).

The core argument, which has been unanimously rejected in the German academic literature,³⁸ was that the spirit of the Settlement Convention obliges Germany to leave any decision as to what constitutes “German external assets” to the foreign state seizing the property for reparation purposes with respect to Germany’s responsibilities after World War II.³⁹ In addition, the expropriations under the Beneš Decree appeared as forfeitures against certain persons disloyal during the war and occupation rather than “reparations” in the sense of the Settlement Convention. Finally, it is surprising that the picture in question was considered “agricultural property” in the sense of the Beneš Decree on “confiscation and accelerated allocation of agricultural property.”⁴⁰

In sum, it appears more than questionable whether the German courts correctly interpreted the Settlement Convention and lawfully deprived the Prince of his day in court under the Settlement Convention’s provisions. Nevertheless, neither the German Federal Constitutional Court⁴¹ nor the European Court of Human Rights,⁴² to which the Prince subsequently turned, could see any violations of fundamental and human rights as far as guarantees of property and

38. See e.g., Fassbender, *supra* note 34, at 1446; Ignaz Seidl-Hohenveldern, *Völkerrechtswidrigkeit der Konfiskation eines Gemäldes aus der Sammlung des Fürsten von Liechtenstein als angeblich “deutsches” Eigentum*, 6 IPRax, 410, 411 (1996). On the one hand, such interpretation leads to the result that German courts must abstain from adjudicating upon any seizure of property situated abroad if the acting state qualifies the property as German and declares the seizure to pursue reparation purposes. Under Chapter 6 of Article 5 of the Settlement Convention, Germany is obliged to compensate the former owner for his loss. The indebted person under the scheme of the Settlement Convention is, therefore, not the affected individual, but the Federal Republic of Germany. The spirit of the Convention thus turns out to be the facilitation of reparation by seizure of German assets situated abroad without facing jurisdictional obstacles erected by German courts. From this perspective, a treaty interpretation that applies its regulatory scheme to the measures of any third state seems in conformity with its spirit. On the other hand, such interpretation provokes tensions with other rules of international law, in particular the principle that the nationals of neutral states such as Liechtenstein nationals must not be burdened with reparation measures out of a war in which their state was not involved.

39. Oberlandesgericht Köln [OLG Köln] [Upper Reg’l Ct. of Cologne] July 9, 1996, 22 U 215/95, sub I 2 b aa, sub I 2 b aa: (“Dem Sinn und Zweck des Teiles VI Art. 3 Überleitungsvertrag ist in der praktischen Anwendung der Bestimmung insoweit Rechnung zu tragen, als das Vorliegen ihrer Voraussetzungen unter maßgeblicher Berücksichtigung des der konkreten Beschlagnahmehandlung zugrunde liegenden Rechtes des enteigneten Staates zu beurteilen ist.”).

40. Dekretu prezidenta republiky, *supra* note 29.

41. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] January 28, 1998, 6 IPRAX 482, 482–83 (1998) (note Karl Doehring at 465); EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT 408, 409 (1998) (note Bardo Fassbender at 459); 40 ARCHIV DES VÖLKERRECHTS 215, 215–42 (2002) (note Dieter Blumewitz); 36 ARCHIV DES VÖLKERRECHTS 188, 188–97 (1998) (note Hermann Weber).

42. *Prince Hans-Adam II of Liechtenstein*, 2001-VIII Eur. Ct. H.R. at 1.

access to justice are concerned.⁴³ After the failure of all of the Prince's attempts to recover the painting in his individual capacity, the Principality of Liechtenstein sought recourse at the last judicial instance in the world by instituting proceedings against Germany at the International Court of Justice for violation of Liechtenstein's sovereignty and for compensation, but also lost its case.⁴⁴

C. *The Vociferous Silence of the Courts on Immunity for Artworks on Loan*

It seems that the German courts simply did not want to adjudicate upon the delicate and highly politicized question surrounding the legality of the expropriation by Czechoslovakia based on the Beneš Decrees under public international law and its potential repercussions on the Prince's claim.⁴⁵ To avoid any decision on the merits of that issue, however, the German courts resorted to a highly questionable interpretation of a treaty, avoiding a decision based on property rights and due process guarantees.

Had there been a principle of immunity for artwork on loan from abroad, the courts could have possibly reached the ultimate result of the litigation—return of the painting to the Czech Republic—by alternative points of reason: (1) that German jurisdiction is not barred by Chapter 6 of Article 3 of the Settlement Convention, because the property in question is not German property in the sense of that provision; and (2) that the question of whether or not the Beneš Decree violates public international law can be left open, since an artwork on loan from abroad enjoys immunity from any kind of seizure by the authorities of the host state and thus shall be returned

43. See Art. 14(1) GG ("Property and the right of inheritance shall be guaranteed"); European Convention on Human Rights, Dec. 10, 1948, art. 6(1) ("In the determination of his civil rights and obligations . . . , everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."); European Convention on Human Rights, Protocol 1, Mar. 20, 1952, art. 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.")

44. Certain Property (Liech. v. F.R.G.), 2005 I.C.J. 123 (Feb. 2005).

45. Compare, e.g., the controversial opinions in Jochen A. Frowein, et al., *Legal Opinion on the Beneš-Decrees and the Accession of the Czech Republic to the European Union* (European Parliament Directorate-General for Research, Working Paper, 2002), available at http://www.europarl.eu.int/studies/benesdecrees/pdf/opinions_en.pdf with Prof. Dr. Dieter Blumenwitz, *Gutachten*, Oct. 21, 2002, available at http://www.sbg.ac.at/whbib/templates/blumenwitz-gutachten_%20z.%20frowein.htm; but see also Karl Doehring, *Völkerrechtswidrige Konfiskation eines Gemäldes de Fürsten von Liechtenstein als „deutsches Eigentum“: Ein unrühmlicher Schlußpunkt*, 6/98 IPRA 465, 466 (1998). The issue was left open *ratione temporis* by the ECHR in its decision upon the Prince's claim against Germany. *Prince Hans-Adam II of Liechtenstein*, 2001-VIII Eur. Ct. H.R. at 1.

to its lender. Had there been such a principle, the courts probably would have availed themselves of it. But the courts remained silent. Is it indeed correct to assume that there is no such principle?

D. *Immunity for Artworks on Loan as a Rule of International Customary Law?*

In the absence of any expressly written source of law available to the German courts at the time—the German anti-seizure statute was enacted after the *Liechtenstein* litigation had started—German courts could only have established that customary international law grants immunity to artworks on loan.

1. The General Prerequisites of Customary International Law

The essence of custom is, according to Article 38(1)(a) of the Statute of the International Court of Justice, as generally known, the “evidence of a general practice accepted as law.”⁴⁶ The actual practice indulged in by states constitutes the initial factor. State practice covers any act or statement by a state from which views about its *opinio iuris* may be inferred⁴⁷ including, *inter alia*, treaty practice and statements by heads of states⁴⁸ as well as a municipal laws,⁴⁹ in particular if accompanied by governmental explanatory reports containing an *opinio iuris*⁵⁰ and municipal court decisions interrelating with public international law issues.⁵¹ A rule of customary international law may well emerge quickly and even on the basis of one particular act of practice if supported by general acceptance as law.⁵² A few persistent objectors cannot prevent the emergence of a universal rule of customary international law.⁵³ If the evidence of a general practice accepted as law is limited to a certain geographical, political or cultural region, the emergence of regionally

46. *E.g.*, ALBERT BLECKMANN, *VÖLKERRECHT* 74 n.197 (2001) (on file with author).

47. *See e.g.* MALCOM N. SHAW, *INTERNATIONAL LAW* 71 (3d ed. 1994).

48. *E.g.*, KNUT IPSEN, *VÖLKERRECHT* 188 n.17 (4th ed. 1999).

49. *E.g.*, *id.* at n.18; *see also* BURKARD HESS, *STAATENIMMUNITÄT BEI DISTANZDELIKTE* 31 (1992) (referring particularly to municipal immunity legislation).

50. BLECKMANN, *supra* note 45, at 75 n.200; HESS, *supra* note 48 (referring particularly to the *travaux préparatoires* of municipal immunity legislation as an extraordinarily valuable source for assessing state practice and the respective state's *opinio iuris*).

51. *See e.g.*, KARL DÖHRING, *VÖLKERRECHT* 135 n.313 (1999); OPPENHEIM'S *INTERNATIONAL LAW* 41 (Sir Robert Jennings & Sir Arthur Watts, eds., Longman Group UK Limited 1992) (1905) (“Decisions of municipal courts represent the most frequent form in which judicial consideration is given to international law.”).

52. *E.g.*, BLECKMANN, *supra* note 45, at 74 n.198.

53. *E.g.*, IPSEN, *supra* note 48, at 191 n.26.

limited rules of customary international law is possible.⁵⁴ In light of the aforesaid, it is indisputable that municipal anti-seizure statutes must be taken as relevant state practice and an expression of an *opinio iuris*.

2. Sovereign Immunity as Rule of International Customary Law

If one perceives states or state entities as the owner of property situated abroad, such as traveling artwork, it is logical to resort to the general principles of sovereign immunity. The obligation to grant immunity to foreign states with respect to their conduct or their property forms part of positive international law, be it treaty or customary law, not merely of comity.⁵⁵ Such privileges include, to differing extents, immunity from jurisdiction and enforcement measures.⁵⁶

3. Jurisdictional Immunity vs. Immunity from Enforcement

Under the modern restrictive and no longer absolute approach towards sovereign immunity, a state enjoys immunity only with respect to acts *de iure imperii*, not with respect to acts *de iure gestionis*.⁵⁷ As far as jurisdictional immunity is concerned, the characterization depends on the nature of the act in question rather than the purpose the state claiming immunity pursues.⁵⁸ If a state lends an artwork to a museum abroad, the loan or the constructive possession must be considered the legal relationship in question. Loans and possessory relations, however, are legal relationships equally open to individuals and thus have to be qualified as an act *de iure gestionis*.⁵⁹

54. Dietrich Schindler, *Regional International Law*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 161 (Rudolf Bernhard ed., 1992).

55. Helmut Steinberger, *State Immunity*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 615, 619 (Rudolf Bernhard ed., 1992).

56. See REINHOLD GEIMER, INTERNATIONALES ZIVILPROZESSRECHT 219 n.562 (5th ed. 2005); JOLANTA KREN KOSTKIEWICZ, STAATENIMMUNITÄT IM ERKENNTNIS UND IM VOLLSTRECKUNGSVERFAHREN NACH SCHWEIZERISCHEM RECHT 261 (1998); *Id.* at 616. Compare, e.g., Foreign Sovereign Immunities Act 1976, 28 U.S.C. § 1604 (2005) (jurisdictional immunity) with Foreign Sovereign Immunities Act 1976, 28 U.S.C. § 1609 (2005) (immunity from enforcement measures).

57. See, e.g., SHAW, *supra* note 47, at 433, 436.

58. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 16 (27) (F.R.G.); United States Foreign Sovereign Immunities Act 1976, 28 U.S.C. §§ 1603(d), 1609, 1610(a)(2) (2005); GEIMER, *supra* note 55; IGNAZ SEIDL-HOHENVELDERN, VÖLKERRECHT 271 n.1479 (1997); Steinberger, *supra* note 55, at 625; SHAW, *supra* note 47, at 441.

59. Steinberger, *supra* note 55, at 626.

Sovereign immunity, however, also includes immunity from enforcement measures,⁶⁰ and on this level it is the purpose rather than the nature of the act in question that determines the characterization of the act or the use of property as *de iure imperii vel gestionis*.⁶¹ As a rule of customary international law, the forum state must not levy any kind of enforcement measures including interim protective measures, seizures, attachments, and the like against the foreign state with respect to property situated in the forum state and serving purposes *de iure imperii* of the foreign state invoking immunity.

This is the line of arguments of which the French courts availed themselves in the seminal Shchukin litigation. The Shchukin litigation concerned the return of several Matisse paintings on loan from two state-owned museums—the Hermitage and the Pushkin Museum—to the Centre Georges Pompidou, despite the restitution claims of heirs of the owners prior to the artwork's expropriation during the 1917 Russian Revolution.⁶² The Tribunal de Grande Instance de Paris held that it could not grant preliminary relief in favor of the claimants in the absence of a waiver of sovereign immunity by Russia.⁶³

This is also the *opinio iuris* of the Belgian legislature. In the Explanatory Report to its anti-seizure statute in 2004, the legislature explicates that nothing prevents it from affirming and re-enforcing the immunity of states lending artworks to Belgium with respect to these artworks.⁶⁴ Affirming such immunity presupposes its existence—as a rule of customary international law—in the first place.⁶⁵

60. See *supra* note 56, and accompanying text.

61. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 46 (342) (F.R.G); GEIMER, *supra* note 55, at 220; Steinberger, *supra* note 55, at 628.

62. T.G.I. Paris, RG no. 6218/93 (on file with author) (“Qu'en l'absence de renonciation de l'État à son privilège, le Tribunal ne peut prononcer à son encontre une mesure conservatoire, même aussi limitée que le séquestre qui ne préjuge pas du sort de l'action au principal, engagée par ailleurs, en raison de l'immunité de juridiction dont il bénéficie”); see also Ruth Redmond-Cooper, *Disputed Title to Loaned Works of Art: The Shchukin Litigation*, 1 ART, ANTIQUITY AND LAW 73 (1996); Mark M. Boguslavskij, *Irina Shchukina's Suit (on the Decision of a French Court)*, 4 INT'L J. OF CULTURAL PROP. 325 (1995).

63. *Id.*

64. Chambre des Représentants de Belgique, *Projet de Loi modifiant le Code judiciaire en vue d'instituer une immunité d'exécution à l'égard des biens culturels étrangers exposés publiquement en Belgique*, Exposé des Motifs, April 27, 2004, DOC 51 1051/001, 4 (“Rien ne fait obstacle à ce que cette immunité soit consacrée et renforcée dans une disposition de droit positif.”); see also Frédéric Dopagne, *Immunité d'exécution et biens culturels étrangers : à propos de l'article 1412ter du Code judiciaire*, in JOURNAL DES TRIBUNAUX 2 (2005).

65. Dopagne, *supra* note 64, at 2.

4. Purpose of *de iure imperii* of a Loan?

The assumption of immunity for artworks on loan from foreign states, however, is based on the condition that the purpose of the loan is one *de iure imperii*. At first, there is a peculiarity in the Matisse case that supports the proposition that the cultural exchange between states constitutes such a purpose: the applicants had moved to withdraw their motion for interim relief (*désistement d'instance*),⁶⁶ but the court rejected this motion.⁶⁷ The court held that the Russian Federation could oppose the withdrawal motion. The court agreed with the Russian Federation's argument that a conclusive court decision was necessary to eliminate any uncertainty menacing the general interest in international cultural relations.⁶⁸ Therefore, the French court's decision must be interpreted as a deliberate expression of a state practice granting immunity for artworks on loan from foreign states.

In addition, through international treaties, many states—including Germany—have committed themselves to supporting the exchange of cultural objects. For example, the signatory states to the European Convention on Culture undertake to facilitate the circulation and exchange of cultural objects and take the necessary measures to grant access to cultural objects under their control.⁶⁹ The

Force est néanmoins de reconnaître que la disposition commentée n'innove pas véritablement : loin d' 'instaurer', comme le laisse croire l'intitulé de la loi, une immunité qui n'aurait point existé en son absence, elle se contente, s'agissant au moins des États, de mettre par écrit, à propos des biens culturels, une règle bien établie du droit international coutumier.

66. Nouveau Code de Procédure Civile art. 394. ("Le demandeur peut, en toute matière, se désister de sa demande en vue de mettre fin à l'instance").

67. *Id.* art. 395. ("Le désistement n'est parfait que par l'acceptation du défendeur. Toutefois, l'acceptation n'est pas nécessaire si le défendeur n'a présenté aucune défense au fond ou fin de non-recevoir au moment où le demandeur se désiste"). *Id.* art. 396. ("Le juge déclare le désistement parfait si la non-acceptation du défendeur ne se fonde sur aucun motif légitime").

68. T.G.I. Paris, RG no. 6218/93.

Que les défendeurs sont donc recevables, en application des dispositions de l'article 395 du Nouveau Code de Procédure Civile à s'opposer au désistement d'instance ; attendu qu'ils justifient par ailleurs d'un motif légitime de refus, au sens de l'article 396 du même Code, en faisant valoir la nécessité pour eux, faute de désistement d'action, de faire juger la fin de non-recevoir qu'ils soulèvent à l'encontre des prétentions des demandeurs qui constituent un élément d'insécurité dans les relations culturelles interétatiques qu'ils ont la charge de promouvoir dans l'intérêt général.

69. Convention culturelle européenne de Paris art. 4, Dec. 19, 1954 ("Chaque Partie contractante devra, dans la mesure du possible, faciliter la circulation et l'échange des personnes ainsi que des objets de valeur culturelle aux fins d'application des articles 2 et 3"); *id.* art. 5. ("Chaque Partie contractante considérera les objets présentant une valeur culturelle européenne qui se trouveront placés sous son contrôle

European Convention on the Protection of Archaeological Heritage⁷⁰ adopts and reinforces that approach.⁷¹ The Agreement on the Importation of Educational, Scientific and Cultural Materials, in the first sentence of its Preamble, highlights the importance of “free exchange of ideas and knowledge” and acknowledges that “this interchange is accomplished primarily by means of . . . cultural materials.”⁷² According to Article III(1), “the Contracting States undertake to give every possible facility to the importation of . . . cultural materials, which are imported exclusively for showing at a public exhibition approved by the competent authorities of the importing country and for subsequent re-exportation.”⁷³ Article III(2) may even be read as a provision empowering the host-State to guarantee the return of cultural material on loan to exhibitions: “Nothing in this article shall prevent the authorities of an importing country from taking such steps as may be necessary to ensure that the materials in question shall be re-exported at the close of their exhibition.”⁷⁴

Germany is a signatory state to more than 90 bilateral treaties about the cooperation in cultural matters. In most of these treaties Germany agrees to support the cultural co-operation, *inter alia*, by exchanging cultural objects between museums.⁷⁵ The same applies to Austria, for example.⁷⁶

In his speech at the 1999 German-Russian Cultural Forum in Potsdam, the then-President of the Federal Republic of Germany, Roman Herzog, emphasized the importance of a cultural dialogue as a new dimension of foreign relations.⁷⁷ According to the German head

comme faisant partie intégrante du patrimoine culturel commun de l'Europe, prendra les mesures nécessaires pour les sauvegarder et en facilitera l'accès.”).

70. European Convention on the Protection of the Archaeological Heritage, May 6, 1969.

71. *Id.* (“With a view to the scientific, cultural and educational aims of this Convention, each Contracting Party undertakes to: (a) facilitate the circulation of archaeological objects for scientific, cultural and educational purposes.”).

72. U.N. Educ., Sci. & Cultural Org. [UNESCO], *Agreement on the Importation of Educational, Scientific and Cultural Materials*, Florence, It., 1950, pmb1.

73. *Id.* art. III(1).

74. *Id.* art. III(2).

75. See, e.g., Convention on Cultural Cooperation, F.R.G.-Czech Rep., art. 6, no. 4, Apr. 11, 1978, BGBl. 11 1979, at 940 (on file with author).

76. See http://www.aussenministerium.at/view.php3?r_id=59&LNG=de&version= (last visited Dec. 29, 2004) (showing that as of October 1, 2004, Austria is signatory state to 25 bilateral treaties on cultural co-operation).

77. Roman Herzog, Speech on the Occasion of Deutsch-Russischen Kulturforum Potsdamer Begegnungen am (Apr. 27, 1999), in Government Bulletin of Apr. 29, 1999, at 217 (on file with author) (“Die Notwendigkeit der Kommunikation und des gegenseitigen Kennenlernens ist heute eine humanistische, politische und kulturelle Herausforderung. . . . Deshalb wird die Außenpolitik in Zukunft auch als kultureller Dialog angelegt werden müssen. Von der Peripherie rückt dieser ins Zentrum der Politik.”).

of state, cultural exchange has become an integral part of the German foreign relations policy. Cultural exchange is primarily effectuated by the exchange of cultural property. The facilitating and guaranteeing of cultural exchange is precisely the regulatory intent of any anti-seizure statute.⁷⁸

Many states had already enacted anti-seizure statutes granting immunity for artworks on loan at the time of the first German decision in the *Liechtenstein* case: Quebec (1965),⁷⁹ the United States on the federal level (1965),⁸⁰ New York (1968),⁸¹ to some extent Australia (1986),⁸² Manitoba (1987),⁸³ Ontario (1990),⁸⁴ France (1994),⁸⁵ and to some extent Ireland.⁸⁶ Other states have done so in the meantime: British Columbia (1996),⁸⁷ Germany (1998),⁸⁸ Texas (1999),⁸⁹ Alberta (2000),⁹⁰ Rhode Island (2000),⁹¹ Belgium (2004),⁹²

78. See, e.g., Message of the Swiss National Council of Nov. 21, 2001, BBl. 2002, at 535 (on file with author) (Finally, the introduction of a return guarantee for cultural objects that a foreign institution lends for an exhibition into Switzerland is to improve the position of Swiss Museums in the international art loan intercourse).

79. Exemptions from Seizure, R.S.Q., ch. C-25, at 553.1; Foreign Cultural Property Immunity Act, R.S.A., ch. F-17; Law and Equity Act, 253 R.S.B.C. § 55; Foreign Cultural Objects Immunity from Seizure Act, R.S.O., ch. F-23.

80. 22 U.S.C. § 2459.

81. N.Y. ARTS & CULT. AFF. LAW § 12.03; TEX. CIV. PRAC. & REM. CODE ANN. § 61.081; R.I. GEN. LAWS § 5-62-8.

82. Protection of Movable Cultural Heritage Act, 1986, Act. No. 11 § 14(3).

83. Exemptions from Seizure, R.S.Q., ch. C-25, at 553.1; Foreign Cultural Property Immunity Act, R.S.A., ch. F-17; Law and Equity Act, 253 R.S.B.C. § 55; Foreign Cultural Objects Immunity from Seizure Act, R.S.O., ch. F-23.

84. *Id.*

85. Law No. 94-679 of August 8, 1994, Journal Officiel de la République Française [J.O.] [Official Gazette of France], August 10, 1994, p. 11668.

86. National Monuments (Amendment) Act (Act No. 17/1994) (Ir.). available at <http://www.irishstatutebook.ie/ZZA17Y1994S5.html> (last visited Sept. 6, 2005).

87. Exemptions from Seizure, R.S.Q., ch. C-25, at 553.1; Foreign Cultural Property Immunity Act, R.S.A., ch. F-17; Law and Equity Act, 253 R.S.B.C. § 55; Foreign Cultural Objects Immunity from Seizure Act, R.S.O., ch. F-23.

88. Gesetz zur Umsetzung von Richtlinien der Europäischen Gemeinschaften über die Rückgabe von unrechtmäßig aus dem Hoheitsgebiet eines Mitgliedstaats verbrachten Kulturgütern und zur Änderung des Gesetzes zum Schutz deutschen Kulturgutes gegen Abwanderung [Kulturgutsicherungsgesetz] [KultgutSiG] Oct. 21, 1998, BGBl I at 2, 70 (F.R.G.).

89. N.Y. ARTS & CULT. AFF. LAW § 12.03; TEX. CIV. PRAC. & REM. CODE ANN. § 61.081; R.I. GEN. LAWS § 5-62-8.

90. Exemptions from Seizure, R.S.Q., ch. C-25, at 553.1; Foreign Cultural Property Immunity Act, R.S.A., ch. F-17; Law and Equity Act, 253 R.S.B.C. § 55; Foreign Cultural Objects Immunity from Seizure Act, R.S.O., ch. F-23.

91. N.Y. ARTS & CULT. AFF. LAW § 12.03; TEX. CIV. PRAC. & REM. CODE ANN. § 61.081; R.I. GEN. LAWS § 5-62-8.

92. Loi modifiant le Code judiciaire en vue d'instituer une immunité d'exécution à l'égard des biens culturels étrangers exposés publiquement en Belgique, Moniteur Belgique no. 233 of June 29, 2004, at 52719 (date entered into force: June 29, 2004).

and Switzerland (2005).⁹³ As was already insinuated above, many of the aforementioned legislators avail themselves of terms directly taken from public international law such as “immunity”⁹⁴ or “safe conduct”⁹⁵ to define their regulatory intent and thereby seem to express an understanding of the roots and origins of the reasoning behind their anti-seizure statutes.

Furthermore, cultural exchange is a policy that not only Germany and its bilateral treaty partners endorse, but also the European Community. According to Article 151(2) of the EC-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.⁹⁶

In light of the previously mentioned, one may consider that loaned artwork is in the forum state for the purpose of cultural exchange between states—a purpose *de iure imperii*, protected from seizure by customary international law. Presumably, such immunity bars enforcement measures stemming from proceedings between two parties distinct from the lending state, but affecting the state-owned property indirectly—as in the *Liechtenstein* litigation.⁹⁷ It seems,

93. Bundesgesetz über den internationalen Kulurgütertransfer [KGTG] June 20, 2003, Kulurgütertransfersgesetz, 444.1, art. 10–13 (Switz).

94. Immunity From Seizure Act (IFSA), 22 U.S.C. § 2459; Foreign Cultural Property Immunity Act, R.S.A., ch. F-17; Foreign Cultural Objects Immunity from Seizure Act, R.S.O., ch. F-23.

95. BTDrucks 13/10789, *supra* note 6, at 10; BTDrucks 14/6603, *supra* note 6, at 2.

96. Frank Fechner, *Article 151 EC-Treaty no. 26*, in KOMMENTAR VERTRAG ÜBER DIE EUROPÄISCHE UNION UND VERTRAG ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFTEN (Hans von der Groeben et al. eds, Baden-Baden 6th ed. 2003). See also Decision 508/2000/EC Art. 1, 2000 O.J. (L 63) 2.

The Culture 2000 programme shall contribute to the promotion of a cultural area common to the European peoples. In this context, it shall support cooperation between creative artists, cultural operators, private and public promoters, the activities of the cultural networks, and other partners as well as the cultural institutions of the Member States and of the other participant States in order to attain the following objectives: (a) promotion of cultural dialogue and of mutual knowledge of the culture and history of the European peoples; (b) promotion of creativity and the transnational dissemination of culture and the movement of artists, creators and other cultural operators and professionals and their works . . .

See La Convention Européenne, Dec. 12, 2002, CONV. 460/02 (commentator discussing the relevance of the legal value of “culture” in the new Treaty for a European Constitution).

97. GEIMER, *supra* note 55, at 203.

Soweit das Vermögen fremder Staaten dem Zugriff des Gerichtsstaats entzogen ist, ist dieses ‘persönliche Vorrecht’ des fremden Staates auch in Verfahren, an denen nur Dritte beteiligt sind, zu gewährleisten. So darf in einem Prozess zwischen Privaten die beklagte Partei durch das vom Kläger angerufene

therefore, that the German courts in the *Liechtenstein* litigation could have availed themselves of a more convincing line of arguments to secure the return of the painting if they had taken recourse to a principle of immunity for artworks on loan from foreign states for the public purposes of cultural exchange.

5. Sovereign Immunity for State Museums?

Nevertheless, problems remain even if a court endorses the concept of immunity as explained here: does a public entity like a state museum lending artworks abroad enjoy the same immunity the state enjoys? There seems to be no consistent state practice with regard to immunity of public agencies, instrumentalities or other entities legally distinct from the foreign states.⁹⁸ Then again, not only the French courts in the *Shchukin* litigation,⁹⁹ but also the United States Supreme Court in its *Altmann* decision,¹⁰⁰ abstained from drawing a distinction between the states of Russia or Austria and the respective state-owned museums.

6. Sovereign Immunity and Ownership?

Although an unsettled issue, granting immunity for artworks on loan from foreign states to the benefit of their property rests on the assumption that the artwork is the state's property. It is not without reason that, for example, the Belgium anti-seizure statute that purports to reflect customary international law expressly requires that the artwork is the "property" of the foreign lending state.¹⁰¹ It seems, therefore, that any Belgian court willing to grant immunity on the basis of the aforesaid will have to answer the preliminary question of ownership. But this is the very question of the entire litigation, and it now comes up again at the very beginning of all legal

Gericht nicht zu einem Verhalten verpflichtet werden, das auf einen Eingriff in ein dingliches Recht eines auswärtigen Staates hinausläuft, vorausgesetzt, dem Staat hätte Immunität eingeräumt werden müssen, wenn das Verfahren unmittelbar gegen ihn gerichtet worden wäre.

See also DAMIAN, *supra* note 1, at 82 (Immunity as a "persönliches Vorrecht fremder Staaten, das diesen auch in Verfahren gegen Dritte zu gewähren ist.").

98. Steinberger, *supra* note 54, at 620. See generally Andrea Schulz, *Parastaatliche Verwaltungsträger im Verfassungs- und Völkerrecht, dargestellt am Beispiel des Goethe-Instituts unter besonderer Berücksichtigung des Staatsorganisationsrechts*, (Berlin 2000).

99. Boguslavskij, *supra* note 61.

100. *Republic of Austria v. Maria Altmann*, 541 U.S. 677 (2004). See 28 U.S.C. § 1603 (a)-(b) (2005).

101. Article 1412ter § 1 Code judiciaire, available at <http://www.dekamer.be/FLWB/pdf/51/1051/51K1051001.pdf> ("... les biens culturels qui sont la propriété de puissances étrangères sont insaisissables...").

considerations of the court seized with the matter. On the other hand, if a state possesses someone else's artwork and uses it for the purpose *de iure imperii* of cultural exchange and as a "peace envoy," such conduct should constitute an act *de iure imperii* enjoying immunity, irrespective of whether the lending state is in fact the owner. This seems to be the approach of the French anti-seizure statute that merely requires a foreign state to lend cultural objects for the purposes of cultural exchange.¹⁰²

7. Sovereign Immunity by Agreement?

There are no formal requirements to treaties. According to Article 3 of the Vienna Convention on the Law of Treaties, the fact that the Convention, pursuant to Article 2, does not apply to unwritten international agreements shall not affect the legal force of such agreements. Therefore, the lending state may conclude by oral communication between the competent authorities an agreement with the receiving state, granting immunity to a specific artwork loaned to institutions or persons situated in the host state.¹⁰³ Under such an agreement, the involved museums could be regarded as agents of the respective states exercising acts *de iure imperii*. The host museum would then be protected, not only against enforcement measures, but also against any judicial proceeding in connection with the loan. Therefore, such an agreement seems to be an elegant mode of eliminating the uncertainties identified above in the context of sovereign immunity under public international law. So far, however, states have apparently not yet availed themselves of this technique.

E. Conclusion

If at all, the principle of immunity for artworks on loan from abroad under public international law can only work in the case of loans from states. Even then, many uncertainties remain. Therefore, if a state wants to further its public interest in cultural exchange by granting immunity to loans from private persons, it should enact an anti-seizure statute in which it expressly grants immunity to artworks on loan from abroad. Moreover, unlike France and Germany, it should not wait until politicized litigation about a specific artwork on loan arises. Sometimes, however, there may be little time left to enact an anti-seizure state, as was the case in Belgium where a large international exhibition was expected to take

102. Law No. 94-679, of Aug. 8, 1994, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 8, 1994, p. 11668.

103. Norman Palmer, *Adrift on a Sea of Troubles: Cross-Border Art Loans and the Specter of Ulterior Title*, 38 VAND. J. TRANS'L L. 947 (2005).

place soon and the legislature had to enact a statute prior to the arrival of the loaned paintings.¹⁰⁴

III. SHAPING ANTI-SEIZURE STATUTES

Any state that is about to enact an anti-seizure statute has to take account of two different concerns. First, every statute has to be shaped in conformity with norms higher in rank than the respective statutory law, in particular with constitutional and human rights. In this respect, the *Liechtenstein* decision of the European Court of Human Rights provides for significant guidelines because the provision under scrutiny there, Chapter 6 of Article 3 of the Settlement Convention, and the anti-seizure statutes, have one feature in common: they both interfere with the individual's human rights, in particular the guarantee of access to justice in that they bar proceedings about claims for restitution or bar effective justice by granting immunity from seizure. In addition, anti-seizure statutes raise the question of whether their effects are in conformity with Article 1 of the First Protocol to the European Convention on Human Rights. The latter issue, however, was not dealt with *ratione temporis* in the *Liechtenstein* litigation.¹⁰⁵ It is nevertheless worthwhile to go further into the reasoning of that decision in order to determine potential limits of anti-seizure statutes in light of the human right to access to justice. In Europe, anti-seizure statutes may conflict with EC-Directive 93/7/EEC.¹⁰⁶ Second, legislatures should build on the experiences with existing anti-seizure statutes and the respective regulatory choices.

A. Anti-Seizure Statutes and Access to Justice

Because anti-seizure statutes do not merely grant immunity from seizures but also block any court proceedings about claims for restitutions,¹⁰⁷ they clearly interfere with a claimant's right to access of justice as guaranteed by Article 6 § 1 of the European Convention on Human Rights.¹⁰⁸ Such a limitation, however, may be justified if

104. Dopagne, *supra* note 64, at 2.

105. *Prince Hans-Adam II of Liechtenstein*, 2001-XII Eur. Ct. H.R. at 32; see generally NORMAN PALMER, MUSEUMS AND THE HOLOCAUST 48 (Institute of Art and Law Ltd. 2000).

106. Council Directive 93/7/EEC, 1993 O.J. (L 74) 74–79.

107. E.g., German Act on the Protection of Cultural Property § 20(4) (“[u]ntil recovery by the lender judicial proceedings on recovery, interim measures, attachments and seizures are inadmissible”); 22 U.S.C. § 2459 (“no court . . . may issue or enforce any judicial process, or enter any judgment, decree, or order, for the purpose or having the effect of depriving [the receiving museum] of custody or control of such object”).

108. *Prince Hans-Adam II of Liechtenstein*, 2001-XII Eur. Ct. H.R. at 25.

the infringing measure pursues a legitimate aim.¹⁰⁹ In the *Liechtenstein* case, the European Court of Human Rights held that bringing the occupation regime to an end was a legitimate aim of the Settlement Convention and the respective implementing German statute: "In these unique circumstances, the limitation on access to a German court, as a consequence of the Settlement Convention, had a legitimate objective."¹¹⁰ In addition the Court held that, "for the applicant, the possibility of instituting proceedings in the Federal Republic of Germany to challenge the validity and lawfulness of the expropriation measures . . . was a remote and unlikely prospect."¹¹¹ In light of such a "fortuitous connection between the factual basis of the applicant's claim and German jurisdiction,"¹¹² the Court finally, in weighing the conflicting interests involved here, came to the conclusion that the German measure was justified.

The relevant reasoning behind of this decision is: fortuitous connections between the factual bases of a claim with the state whose courts deny access to justice strongly reduce the weight of the claimant's guarantees under Article 6 § 1 of the European Convention on Human Rights. This reasoning can presumably be transferred to the situations under scrutiny here—the place of an international exhibition gathering artworks from all over the world usually does not have any close links to the acts and legal relationships constituting the ownership issue. Therefore, even an anti-seizure statute that, like the German version, excludes not only seizures but also court proceedings about ownership will probably be held justified. This is especially true in light of the reduced weight of the claimant's guarantees and of the legitimate purpose of cultural exchange—endorsed by many of the member states of the European Council and the European Union.¹¹³

Whether such a holding deserves support is not self-evident; the Prince as well as usual claimants in international art loan cases do not have access to justice in the "genuine forum,"¹¹⁴ that is, in the courts of the state to which the ownership question has the closest connections. It is the very essence of such controversies that an unexpected change arises to litigate in a remote forum. One might therefore also argue that at least in clear situations of denial of justice (*deni de justice*), the individual's right to access of justice should prevail, even though the claimant resorts to a remote forum on the occasion of an international art loan.

109. *Id.*

110. *Id.* at 27.

111. *Id.* at 29.

112. *Id.*

113. See *supra* note 96 and accompanying text.

114. *Prince Hans-Adam II of Liechtenstein*, 2001-XII Eur. Ct. H.R. at 29.

In addition, third party claims for the recovery of artworks on loan from abroad may arise in states whose courts have closer connections to the ownership dispute and would perhaps not be regarded as a remote forum. In the French Shchukin litigation,¹¹⁵ for example, the claimant was a French national. Although nationality is, if at all, a weak connecting factor in the context of international jurisdiction,¹¹⁶ the case is grounded on more immediate connections to the forum state than the *Liechtenstein* case. Then again, under such an approach, anti-seizure statutes would be subject to a vague exception which would deprive them of their intended purpose—to *guarantee* the return of artworks on loan from abroad—which might be taken into account by the European Court of Human Rights when it weighs interests in comparable cases.

B. *Anti-Seizure Statutes and EC-Directive 93/7/EEC*

Article 5 of Council Directive 93/7/EEC of March 15, 1993, addresses the return of cultural objects unlawfully removed from the territory of a Member State.¹¹⁷ Pursuant to that directive, any member state of the European Union may, in the courts of the member state where the object is situated, initiate proceedings against the possessor of a cultural object unlawfully removed from the complainant's territory with the aim of securing the return of that object.

Such claims of a member state may conflict with a return guarantee issued under an anti-seizure statute. As yet, it is unclear how this conflict is to be reconciled. On the one hand, European Community (EC) law, including secondary legislation such as directives implemented in the national legal orders pursuant to Article 249(3) of the EC, takes priority over national law, and national law must be interpreted in light of EC law. Therefore, even if it were possible, under the national methodology of interpretation of statutes,¹¹⁸ to extend the scope of Section 20(4) of the German Act on the Protection of German Cultural Property beyond its wording to encompass claims of other Member States under EC Directive 93/7/EEC,¹¹⁹ such an interpretation would still have to be in

115. See T.G.I. Paris, RG no. 6218/93, *supra* note 61; see also Redmond-Cooper, *supra* note 61; Boguslavskij, *supra* note 63.

116. See, e.g., Council Regulation 44/2001, art. 3(2), Annex I (C. CIV. arts. 14, 15 (Fr.)) 2001 O.J. (L 12) 1–23 (EC) (Brussels I Regulation) (discussing jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

117. Council Directive 93/7/EEC, 1993 O.J. (L 74) 74–79.

118. See, e.g., KARL LARENZ, *METHODEN DER RECHTSWISSENSCHAFTEN* 350 (4th ed. 1991) (providing an in-depth analysis of means and limitations to interpret and extend the wording of statutes under German law).

119. See El-Bitar, *supra* note 7, at 176. *But see* BTDrucks 13/10789, *supra* note 6, at 10 (“private Rechte” [private rights], i.e. not those of states).

conformity with Directive 93/7/EEC, which would be rather unlikely.¹²⁰

On the other hand, EC secondary law must be interpreted in light of EC primary law. According to Article 151(2) EC, "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." One might therefore argue that such statement of policy suffices in order to justify a teleological reduction of the scope of Directive 93/7/EEC in the case of temporary art loans from another Member State.¹²¹ In as much as immunity for artworks on loan from abroad is to be conceptualized as a rule of customary international law,¹²² such a rule forms part of EC law on the level of EC primary law¹²³ and thus reinforces the argument of a teleological reduction of Directive 93/7/EEC.

C. Anti-Seizure Statutes and Regulatory Choice

Comparing the various anti-seizure statutes in force,¹²⁴ certain regulatory choices can be identified: (1) a self-executing return guarantee¹²⁵ versus administrative act in each individual case,¹²⁶ including rescission of the administrative act under certain conditions or exclusion thereof;¹²⁷ (2) inclusion of private lenders versus immunity only for artworks from non-individual or even only public lenders; (3) immunity only for exhibitions versus immunity also for scientific purposes such as restoration or art historian analysis; (4) immunity from any kind of seizure, including those under criminal

120. ISABEL KÜHL, INTERNATIONALE LEIHVERKEHR 25 (2004); Angelika Fuchs, *Kulturgüterschutz im Kulturgutsicherungsgesetz*, 2000 IPRAX 281, 286. *But see* El-Bitar, *supra* note 7.

121. Erik Jayme & Alexander Geckler, *Internationale Kunstausstellungen: "Freies Geleit" für Leihgaben*, 2000 IPRAX 156, 157.

122. *See supra* Part II.

123. Case 21-24/72, *Int'l Fruit Co. v. Produktschap voor Groeten en Fruit*, 1972 E.C.R. 1219; Werner Schroeder in RUDOLF STREINZ, VERTRAG ÜBER DIE EUROPÄISCHE UNION UND VERTRAG ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFTEN, Art. 249 EGV no. 19 (Munich 2003); RUDOLF GEIGER, VERTRAG ÜBER DIE EUROPÄISCHE UNION UND VERTRAG ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT 703 (Munich 3rd ed. 2000); Astrid Epiney, *Zur Stellung des Völkerrechts in der EU*, 1999 EUZW 5, 11.

124. For the respective texts see Appendix.

125. *E.g.* N.Y. ARTS & CULT. AFF. LAW § 12.03; Law and Equity Act 253 R.S.B.C. § 55(1); R.I. GEN. LAWS § 5-62-8; TEX. CIV. PRAC. & REM. CODE ANN. § 61.081.

126. *E.g.* Law No. 94-679 of August 8, 1994, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], August 8, 1994, p. 11668; 22 U.S.C.A. § 2459 (IFSA); Foreign Cultural Property Immunity Act, R.S.A., ch. F-17 § 2; Foreign Cultural Objects Immunity from Seizure Act, R.S.M., ch. F-140, § 1; Foreign Cultural Objects Immunity from Seizure Act, R.S.O., ch. F-23, § 1; Code of Civil Procedure, R.S.Q., ch. C-25, § 553.1 (1976); Kulturgüterschutzgesetz § 20 (F.R.G.); Kulturgütertransfersgesetz, art. 10 (Switz.).

127. Kulturgüterschutzgesetz § 20 (F.R.G.)

law, versus immunity merely from seizures pursuant to motions under private law; (5) immunity only for non-profit activities versus immunity for commercialized exhibitions as well; (6) exception from immunity for stolen¹²⁸ artworks; (7) exclusion of the host state's cultural property; and (8) immunity only from seizures or from any kind of court proceedings with respect to loaned art.¹²⁹ Inserting the most important of the aforementioned issues into a table results in the following:

Table: Regulatory Choice in Anti-seizure Statutes

Immunity is or includes:	Europe				USA				Canada				
	G	B	F	S	USA	NY	TX	RI	Mn	BC	Ont	Qb	Al
Self-executing	-	+	-	-	-	+	+	+	-	+	-	-	-
Private Lenders	+	-	-	-	+	+	+	+	+	+	+	+	+
Criminal Law Seizure	+	+	+	+	+	+	+	+	+	+	+	+	+
Commercial Activities	+	-	+	-	-	-	-	-	-	-	-	-	+
Stolen Artworks	+	+	+	+	+	+	-	+	+	+	+	+	+
Court Proceedings	+	-	-	+	+	+	+	+	+	+	+	-	+

Amongst the many controversial points on the optimal shaping of anti-seizure statutes,¹³⁰ two considerations should be added to the discussion.

1. Self-executing Act vs. Administrative Certification

Whereas the anti-seizure statutes of Belgium, New York, Texas, Rhode Island, and British Columbia grant immunity as soon as the factual setting laid down in the statute occurs, the statutes of Germany, France, Switzerland, Canada, and the United States statutes do not, but require the lender to apply for an administrative

128. TEX. CIV. PRAC. AND REM. CODE ANN. § 61.081.

129. Code of Civil Procedure, R.S.Q., ch. C-25, § 553.1.

130. See, e.g., Andreas F. G. Raschèr & Florian Schmidt-Gabain, *Besserer Schutz für den internationalen Leihverkehr unter Museen? Die „Rückgabegarantie“ im Kulturgütertransfergesetz*, 2005 ASP/PJA 686; Julia El-Bitar, *Das Verhältnis zwischen „Freiem Geleit“ und gemeinschaftsrechtlicher Rückgabeklage*, 2005 EUZW 173; KÜHL, *supra* note 114, at 10–26; Leila Anglade, *Anti-seizure statutes in Art Law: The Influence of „La Danse“ on French Law*, in LIBER MEMORIALIS: PROFESSOR JAMES C. BRADY 3–16 (Oonagh Breen ed., 2001); Laura Popp, *Arresting Art Loan Seizures*, 24 COLUM.-VLA J. L. & ARTS 213 (2001); PALMER, *supra* note 100, at 43–48; Bodo Pieroth & Bernd J. Hartmann, *Rechtswegbeschränkung zur Sicherung des Leihverkehrs mit ausländischen Kulturgütern*, 2000 NJW 2129, 2129–35; Matthias Weller, *International Ownership Disputes over Stolen Artworks in New York: Litigating about Jurisdiction on the Civil-Criminal Line*, 1999 IPRAX 212; NORMAN PALMER, ART LOANS 109–12 (1997).

certificate in order to be protected.¹³¹ On the one hand, self-executing statutes save lenders from potentially cumbersome and lengthy administrative proceedings and usually provide for a predictable legal situation.¹³² On the other hand, a state that reserves the power to issue a return guarantee upon an administrative proceeding, to some extent, keeps control over the artworks falling within the statutorily granted immunity and may thus be able to avoid percussive controversies about artworks with dubious provenance claiming statutory immunity.

For example, the German anti-seizure statute grants discretion to the authorities as to whether or not to issue a return guarantee.¹³³ The statute, however, does not grant unfettered discretion, but the authorities must exercise their discretion in a lawful manner, subject to judicial review. However, the statute does not provide for any standards that could channel the exercise of the discretion. The Explanatory Report to the statute does no more than identify in a general manner the primary purpose of the provision: to enhance and support the international cultural exchange by providing reliability for lenders.¹³⁴ Nevertheless, the authorities are by no means under an obligation to grant a return guarantee. And indeed, the Federal

131. Loi du 14 Juin 2004 modifiant le Code judiciaire en vue d'instituer une immunité d'exécution à l'égard des biens culturels étrangers exposés publiquement en Belgique [Law of June 14, 2004 modifying the legal code in order to institute an immunity of execution with regard to exposed foreign cultural goods publicly in Belgium] (Belg.); N.Y. ARTS & CULT. AFF. LAW § 12.03; TEX. CIV. PRAC. & REM. CODE ANN. § 61.081; R.I. GEN. LAWS § 5-62-8; Law and Equity Act, 253 R.S.B.C. § 55 (1996) (Can.); Gesetz zur Umsetzung von Richtlinien der Europäischen Gemeinschaften über die Rückgabe von unrechtmäßig aus dem Hoheitsgebiet eines Mitgliedstaats verbrachten Kulturgütern und zur Änderung des Gesetzes zum Schutz deutschen Kulturgutes gegen Abwanderung [Kulturgutsicherungsgesetz] [KultgutSiG] Oct. 21, 1998, BGBl I at 2, 70 (F.R.G.); Law. No. 94-679 of Aug. 8, 1994, J.O., Aug. 10, 1994 (Fr.); Loi fédérale sur le transfert international des biens culturels [LTBC] [Cultural Property Transfer Act] June 20, 2003, SR 444.1, art. 13 (Switz.); Foreign Cultural Objects Immunity from Seizure Act, R.S.O., ch. F-23 (1990) (Can.); 22 U.S.C. § 2459.

132. *But see* United States v. Portrait of Wally, 2002 WL 553532 (S.D.N.Y. 2002) (granting claimant's motion to dismiss the government's Third Amended Verified Complaint); United States v. Portrait of Wally, 105 F. Supp. 2d 288 (S.D.N.Y. 2000) (granting claimant's motion to dismiss the government's Second Amended Verified Complaint); *In re Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 677 N.Y.S.2d 872 (N.Y. Sup. Ct. 1998), *rev'd* People v. Museum of Modern Art, 688 N.Y.S.2d 3 (N.Y. App. Div. 1999), *rev'd* 719 N.E.2d 897 (N.Y. 1999) (involving the controversy about the interpretation of section 12 of the Arts and Cultural Affairs Law in the Schiele litigation). *See also* Stephen Clark, *An Illustration: The Schiele Case in the New York State and Federal Courts*, in CLAIMS FOR THE RESTITUTION OF LOOTED ART 33 (Marc-André Renold & Pierre Gabus eds., 2004); Alexander Kaplan, *The Need for Statutory Protection From Seizure for Art Exhibitions: The Egon Schiele Seizures and the Implications for Major Museum Exhibitions*, 7 J.L. & POL'Y 691 (1999); Weller, *supra* note 124 (discussing the Schiele litigation).

133. German Act on the Protection of Cultural Property § 20(1) ("[T]he authority may . . . issue . . ." (emphasis added)).

134. BTD Drucks 13/10789, *supra* note 6, at 10.

German Government declared that it would regard itself to be empowered to lawfully refuse to grant or consent¹³⁵ to a return guarantee if necessary “for political reasons” or in the case of “manifestly misappropriated” property, including, for example, looted cultural property (*Beutegut*).¹³⁶ Thus, German authorities would presumably refuse to issue a return guarantee granting immunity for Holocaust-related artworks, assuming they were aware the works’ past. The authorities should take all conceivable efforts to scrutinize the provenance of artworks to be loaned, because once the return guarantee is issued, it cannot be withdrawn.¹³⁷ Granting immunity for artworks looted in the Holocaust, however, will not be appreciated by the public and discredits the very purpose of anti-seizure statutes.¹³⁸ In order to better prevent such situations, states enacting an anti-seizure statute should consider availing themselves of the solution in the Swiss anti-seizure statute. According to Article 11(1) of the Swiss Cultural Property Transfer Act, the application for a return guarantee is published in the Federal Bulletin including a precise description of the cultural property and its origin.¹³⁹ Article 11(3) of the Act allows third parties to file an objection against the issuance of the return guarantee within 30 days after publication.¹⁴⁰ Failure to file an objection precludes the parties from further action.¹⁴¹ Such a proceeding does not only provide the authorities with more comprehensive information upon which to base their decision, but also helps to justify granting immunity in cases that later turn out to be morally problematic.¹⁴² In addition, as soon as a third party raises a claim for restitution based on ownership, the Swiss authorities will not issue the return guarantee.¹⁴³ In the interest of public support for enhancing the international cultural exchange, this mechanism elegantly prevents Switzerland from either

135. In general the highest competent state authority issues the guarantee, however subject to consent by the federal authorities. See German Act on the Protection of Cultural Property Against Loss § 20(1).

136. BTDrucks 14/6603, *supra* note 6, at 2 (Query 7).

137. See German Act on the Protection of German Cultural Goods Against Loss § 20(3).

138. PALMER, *supra* note 100, at 47.

139. Loi fédérale sur le transfert international des biens culturels [LTBC] [Cultural Property Transfer Act] June 20, 2003, SR 444.1, art. 13 (Switz.).

140. *Id.* art. 11(3).

141. *Id.* art. 11(4).

142. To avoid hard cases with respect to looted artworks seems to be the primary motivation for the UK parliament’s failure to enact an anti-seizure statute. See, e.g., PALMER, *supra* note 100, at 48; Norman Palmer, *Repatriation and Deaccessioning of Cultural Property: Reflections on the Resolution of Art Disputes*, 54 C.L.P. 447, 504 (2001). The mechanisms of the Swiss anti-seizure statute might help to overcome these concerns.

143. Loi fédérale sur le transfert international des biens culturels [LTBC] [Cultural Property Transfer Act] June 20, 2003, SR 444.1, art. 12(1)(a) (Switz.).

entirely exempting “stolen” artworks from the immunity scheme¹⁴⁴ or risking the issuing of return guarantees on uncertain facts that might result in percussive public debate.

2. Court Proceedings on Damages

Some anti-seizure statutes, in particular those from legal systems with French background, merely protect the *res* against enforcement measures such as seizures or attachments.¹⁴⁵ It is evident that their provisions do not bar any third party from instituting judicial proceedings against the receiving museum with respect to loaned artworks, either for recovery of the possession based on ownership or for damages on the basis of tort claims. Judgments that order the defendant to make restitution in states with anti-seizure statutes of the aforementioned type cannot be enforced in the forum state, but may be enforced in other states, particularly if the forum state is a signatory or member state to a regional integration community with a simplified recognition and enforcement interstate mechanism, such as the European Union.¹⁴⁶

Therefore, anti-seizure statutes that limit immunity from enforcement measures more weakly restrict the claimant’s right of access to justice and will thus provoke milder concerns as to compatibility with constitutional and human rights. Other anti-seizure statutes protect the artwork on loan against any kind of judicial proceeding that may result in depriving the receiving museum of possession.¹⁴⁷ None of these anti-seizure statutes, however, protect either the lending or the receiving museum from being sued for damages.

144. See also, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 61.081(d) (“Subsection (a) does not apply if theft of the work of art from its owner is alleged and found to be proven by the court.”); Martha Lufkin, *Texas Allows Seizure of Stolen Art*, 100 THE ART NEWSPAPER, Feb. 2000, at 45.

145. See the almost identical key words in the anti-seizure statutes of France, Belgium, and Quebec. Law. No. 94-679 of Aug. 8, 1994, J.O., Aug. 10, 1994 (“Les biens culturels . . . sont insaisissables . . .”); Loi du 14 Juin 2004 modifiant le Code judiciaire en vue d’instituer une immunité d’exécution à l’égard des biens culturels étrangers exposés publiquement en Belgique [Law of June 14, 2004 modifying the legal code in order to institute an immunity of execution with regard to exposed foreign cultural goods publicly in Belgium] (Belg.) (“[L]es biens culturels . . . sont insaisissables . . .”); Code of Civil Procedure, R.S.Q., ch. C-25, § 553.1 (“Works of art . . . are . . . exempt from seizure . . .”).

146. See e.g., Council Regulation 44/2001, arts. 32–52, 2001 O.J. (L 12) 1–23 (EC).

147. E.g. 22 U.S.C. § 2459(a); German Act on the Protection of German Cultural Property Against Loss § 20(4); Loi fédérale sur le transfert international des biens culturels [LTBC] [Cultural Property Transfer Act] June 20, 2003, SR 444.1, art. 13 (Switz.).

Certain repercussions might result from anti-seizure statutes and their protective effects. In general, one should expect the protecting effect of the anti-seizure statute to exclude a legal order from considering the restitution of the protected artwork to the lender as being a tort, even if the third party claimant is held to be the owner of the artwork. Such an expectation is, however, subject to a more precise analysis of the applicable substantive law. Under German law, for example, a third party claim against the receiving museum as the actual possessor or against the lending museum as the constructive possessor will have to be based on Sections 987 *et seq.* of the German Civil Code, which conclusively regulate the relation between any owners seeking to recover possession from the possessor (*Eigentümer-Besitzer-Verhältnis*).¹⁴⁸ According to Section 20(3) of the German Act on the Protection of German Cultural Goods Against Loss, a return guarantee has the following effect: no rights of third parties to the cultural good can be raised against the lenders claim for recovery. One might well argue that this provision, whose regulatory intent remains dubious in light of the broad scope of Section 20(4) of the Act,¹⁴⁹ revokes the basis for any claims usually arising out of the relation between owner and possessor. This constitutes a side effect of the German anti-seizure statute that has neither been intended nor contemplated by the legislature.¹⁵⁰ At least, the issued guarantee should preclude accusations of bad faith or liability for negligent wrongdoing by restoring the artwork to the lending museum on the part of the receiving museum under Section 990(1) of the German Civil Code.¹⁵¹

IV. CONCLUSIONS

1. Immunity for artworks on loan can be reconstructed as a rule of customary international law. This rule protects artworks that a state has loaned to an exhibition in a foreign state for the purpose *de iure imperii* of cultural exchange as a contribution of fostering friendly foreign relations. Such immunity is grounded in the generally acknowledged principle in international law

148. German Act on the Protection of German Cultural Property Against Loss § 20(3).

149. *Id.*

150. BTDrucks 13/10789, *supra* note 6, at 10. Neither this report nor the academic literature, provides an explanation of that provision, as far as the Author could see.

151. See generally Martin Gebauer & Stefan Huber, *Schadensersatz statt Herausgabe?*, in 2005 ZEITSCHRIFT FÜR DAS GESAMTE SCHULDRECHT 103 (on file with author).

that sovereign immunity exists in enforcement measures where property is used by a state for purposes *de iure imperii*.

2. International customary law does not, however, provide for a rule that protects non-state lenders or loans for commercial purposes. Whether state-owned museums fall under the rules of sovereign immunity is uncertain. The few municipal court decisions on that point do not, however, draw a distinction between the state and state-owned museums for the purposes of assessing the scope of sovereign immunity. Uncertainties about the scope of immunity could be eliminated by intergovernmental agreement.
3. If a state intends to enact an anti-seizure statute, it has to make sure that the statute complies with constitutional and human rights, in particular with a claimant's right of access to justice. Under the standards of European human rights law and according to the European Court of Human Rights in the *Liechtenstein* litigation, the exclusion of access to justice to the courts of the host state during the exhibition pursuant to an anti-seizure statute does not violate Article 6(1) of the European Convention on Human Rights if: (1) the statute serves a legitimate aim; and (2) the possibility of instituting proceedings in the courts of the host state is a remote and unlikely prospect, that is, if there is only a fortuitous connection between the factual basis of the claim and the jurisdiction of the host state. In the case of a *deni de justice*, where there is no other court available to the claimant other than one in the host state, there are good reasons to submit that excluding access to that court constitutes a violation of Article 6(1) of the European Convention on Human Rights.
4. In order to reduce the risk of violating the right of access to justice, a legislature could statutorily limit immunity enforcement measures, rather than also excluding court proceedings about the recovery of the *res*. Most of the existing anti-seizure statutes, however, bar such court proceedings. None of the existing anti-seizure statutes bar proceedings against the involved museums for damages on the basis of tort claims. The very existence of anti-seizure statutes or return guarantees issued pursuant to them should, however, exempt the museums from accusations of bad faith and liability for negligent wrongdoing under the applicable law.
5. Self-executing anti-seizure statutes bring about the danger of percussive public debate in cases where artworks turn out to be looted, which threatens the moral justification of anti-seizure statutes. It is more advisable to only issue specific return guarantees after an administrative proceeding that gives potential third party claimants the opportunity to raise claims in advance.

Appendix: Anti-Seizure Statutes

1. Alberta, Canada

Foreign Cultural Property Immunity Act, R.S.A. 2000, Chapter F-17

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definition

1. In this Act, “cultural property” means property belonging to any one or more of the following categories:
 - (a) collections and specimens of fauna, flora, minerals and objects of palaeontological interest;
 - (b) property relating to history, including the history of science and technology and military and social history, to national leaders, academics and scientists and to events of national importance;
 - (c) products of archaeological excavations or of archaeological discoveries;
 - (d) elements of artistic or historical monuments or archaeological sites that have been dismantled or dismembered;
 - (e) antiquities, including inscriptions, coins and engraved seals;
 - (f) objects of ethnological interest;
 - (g) property of artistic interest, including:
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material;
 - (ii) works of statuary art and sculpture in any material;
 - (iii) engravings, prints and lithographs;
 - (iv) artistic assemblages and montages in any material;
 - (h) manuscripts, books, documents and publications of special interest;
 - (i) postage, revenue and similar stamps;
 - (j) archives, including sound, photographic and cinematographic archives;
 - (k) articles of furniture and musical instruments.

2. Immunity from seizure of foreign cultural property

2(1) When any cultural property ordinarily kept in a foreign country is brought into Alberta pursuant to an agreement between the owner or custodian of the cultural property and the Government of Alberta or any cultural, educational or research institution for the purpose of the temporary exhibition or display of the cultural property or the

temporary use of the cultural property for research purposes by the Government of Alberta or the institution, no proceedings shall be taken in any court and no judgment, decree or order shall be enforced in Alberta for the purpose of, or having the effect of, depriving the Government of Alberta or the institution or any carrier engaged in transporting the cultural property into, within or out of Alberta of the custody or control of the cultural property if, before the cultural property is brought into Alberta,

- (a) the Lieutenant Governor in Council, by order, determines that the cultural property is of significance, and
- (b) the order is published in The Alberta Gazette.

2(2) Where the Lieutenant Governor in Council rescinds an order made under subsection (1), subsection (1) ceases to apply with respect to the cultural property referred to in the order.

2(3) Subsection (1) does not preclude any judicial action for or in aid of the enforcement

- (a) of any of the terms of an agreement referred to in subsection (1), or
- (b) of the obligation of a carrier under any contract for the transportation of the cultural property in the fulfilment of any obligation assumed by the Government of Alberta or the cultural, educational or research institution pursuant to an agreement referred to in subsection (1).

2. Australia

Section 14(3) Protection of Movable Cultural Heritage Act 1986, Act No. 11 of 1986 as amended by Act No. 8 of 2005

Division 2—Imports

14 Unlawful imports

- (1) Where:
 - (a) a protected object of a foreign country has been exported from that country;
 - (b) the export was prohibited by a law of that country relating to cultural property; and
 - (c) the object is imported;
 the object is liable to forfeiture.
- (2) Where a person imports an object, knowing that:
 - (a) the object is a protected object of a foreign country that has been exported from that country; and

(b) the export was prohibited by a law of that country relating to cultural property;
the person is guilty of an offence punishable, on conviction, by:

- (a) if the person is a natural person—a fine not exceeding \$100,000 or imprisonment for a period not exceeding 5 years, or both; or
- (b) if the person is a body corporate—a fine not exceeding \$200,000.

(3) This section does not apply in relation to the importation of an object if:

- (a) the importation takes place under an agreement between:
 - (i) the Commonwealth, a State, a Territory, a principal collecting institution or an exhibition co-ordinator; and
 - (ii) any other person or body (including a government); and
- (b) the agreement provides for the object to be loaned, for a period not exceeding 2 years, to the Commonwealth, State, Territory, principal collecting institution or exhibition co-ordinator, as the case may be, for the purpose of its public exhibition within Australia.

(4) In subsection (3):

exhibition co-ordinator means a body that arranges for the conducting in Australia of public exhibitions of objects from collections outside Australia, and that achieves this by, from time to time:

- (a) entering into an agreement with a person or body (including a government) for the importation of such objects on loan; and
- (b) entering into an agreement with the Commonwealth, a State or a Territory under which the Commonwealth, State or Territory agrees to compensate the person or body referred to in paragraph (a) for any loss of or damage to the objects arising from, or connected with, the carrying out of the agreement referred to in that paragraph or the public exhibition of the objects in Australia.

3. Belgium

14 Juin 2004 : Loi modifiant le Code judiciaire en vue d'instituer une immunité d'exécution à l'égard des biens culturels étrangers exposés publiquement en Belgique (1)

ALBERT II, Roi des Belges,

A tous, présents et à venir, Salut.

Les Chambres ont adopté Nous sanctionnons ce qui suit :

Article 1^{er}. La présente loi vise une matière visée à l'article 78 de la Constitution.

Art. 2. Dans le Code judiciaire, il est inséré un article 1412ter, rédigé comme suit :

« Art. 1412ter. § 1^{er}. Sous réserve de l'application des dispositions impératives d'un instrument supranational, les biens culturels qui sont la propriété de puissances étrangères sont insaisissables lorsque ces biens se trouvent sur le territoire du Royaume en vue d'y être exposés publiquement et temporairement.

§ 2. Pour l'application de cet article, sont considérés comme des biens culturels les objets qui présentent un intérêt artistique, scientifique, culturel ou historique.

Les biens culturels qui sont affectés à une activité économique ou commerciale de droit privé ne bénéficient pas de l'immunité visée au § 1^{er}.

§ 3. L'immunité visée au § 1^{er} s'applique également aux biens culturels qui sont propriété d'une entité fédérée d'une puissance étrangère, même si cette entité ne dispose pas de la personnalité juridique internationale.

Elle s'applique également aux biens culturels qui sont propriété d'un démembrement d'une puissance étrangère. Par démembrement d'une puissance étrangère, il faut entendre un organisme qui agit pour compte d'une puissance étrangère ou d'une des ses entités fédérées à la condition que cet organisme dispose d'une parcelle de souveraineté. L'immunité visée au § 1^{er} s'applique également aux biens culturels qui sont propriété des collectivités territoriales décentralisées ou d'autres divisions politiques d'une puissance étrangère.

L'immunité visée au § 1^{er} s'applique également aux biens culturels qui sont propriété d'une organisation internationale de droit public. »

Art. 3. La présente loi entre en vigueur le jour de sa publication au Moniteur belge.

Note

(1) Session 2003-2004

Chambre des représentants :

Doc 51-1051.

001 Projet de loi

002 Rapport fait au nom de la commission.

003 Texte corrigé par la commission.

004 Texte adopté en séance plénière et transmis au Sénat.

Compte rendu intégral n° 64, 13 mai 2004.

Senat

Doc 3-692.

001 Projet non évoqué par le Sénat.

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4. British Columbia, Canada

B.C. Statutes: Law and Equity Act

Art exempt from seizure

55 (1) A proceeding for possession or for a property interest must not be brought in respect of works of art or objects of cultural or historical significance brought into British Columbia for temporary public exhibit.

(2) Subsection (1) does not apply

(a) to proceedings in respect of a contract for transportation, warehousing or exhibition in British Columbia of the work or object, or

(b) to a work or object that is offered for sale.

5. France

Loi no 94-679 du 8 août 1994 portant diverses dispositions d'ordre économique et financier

Art. 61. – Les biens culturels prêtés par une puissance étrangère, une collectivité publique ou une institution culturelle étrangères, destinées à être exposés au public en France, sont insaisissables pour la période de leur prêt à l'État français ou à toute personne morale désignée par lui. Un arrêté conjoint du ministre de la culture et du ministre des affaires étrangères fixe, pour chaque exposition, la liste des biens culturels, détermine la durée du prêt et désigne les organisateurs de l'exposition.

6. Germany

Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung (KultgSchG), § 20

(1) Soll ausländisches Kulturgut vorübergehend zu einer Ausstellung im Bundesgebiet ausgeliehen werden, so kann die zuständige oberste Landesbehörde im Einvernehmen mit der Zentralstelle des Bundes dem Verleiher die Rückgabe zum festgesetzten Zeitpunkt rechtsverbindlich zusagen. Bei Ausstellungen, die vom Bund oder einer bundesunmittelbaren juristischen Person getragen werden, entscheidet die zuständige Behörde über die Erteilung der Zusage.

(2) Die Zusage ist vor der Einfuhr des Kulturgutes schriftlich und unter Gebrauch der Worte "Rechtsverbindliche Rückgabezusage" zu erteilen. Sie kann nicht zurückgenommen oder widerrufen werden.

(3) Die Zusage bewirkt, daß dem Rückgabeanspruch des Verleihers keine Rechte entgegengehalten werden können, die Dritte an dem Kulturgut geltend machen.

(4) Bis zur Rückgabe an den Verleiher sind gerichtliche Klagen auf Herausgabe, Arrestverfügungen, Pfändungen und Beschlagnahmen unzulässig.

Translation [provided by the author]:

German Act on the Protection of German Cultural Goods against Loss

(1) If foreign cultural property is to be loaned temporarily to an art exhibit in the Federal Republic of Germany, the competent highest state authority may - in consultation with the Federal Central Authority - issue to the lender a guarantee of return in a fixed moment of time. In the case of art exhibits instituted by the Federal Republic or a Federal Agency, the competent federal authority decides upon the issuing of the guarantee.

(2) The guarantee is to be issued in writing prior to import of the cultural good and by using the term "Rechtsverbindliche Rückgabezusage [Legally Binding Return Guarantee]". The guarantee cannot be withdrawn or cancelled.

(3) The guarantee has the effect that no rights of third parties to the cultural good can be raised against the lender's claim for recovery.

(4) Until recovery by the lender judicial proceedings on recovery, interim measures, attachments and seizures are inadmissible.

7. Ireland

Section 5(12) National Monuments (Amendments) Act, 1994

5.—(1) No person shall have in his possession or under his control an archaeological object which has been found in the State after the coming into operation of the Principal Act unless it has been reported under section 23 (as amended by the Act of 1987) of the Principal Act or under this section within three months of the coming into operation of this section.

(2) No person shall purchase or otherwise acquire, sell or otherwise dispose of an archaeological object which has been found in the State after the coming into operation of the Principal Act, unless, at the time of purchase, acquisition, sale or disposal or within 30 days thereof he makes a report under *subsection (3)* of this section to the Director or a designated person of the purchase, acquisition, sale or disposal.

(3) A person who makes a report under *subsection (1)* or *(2)* of this section shall—

- (a) state his name and address, the nature and description of the archaeological object which he wishes to report,
 - (b) the circumstances in which he has come into possession or control of that object, and
 - (c) such other information within his knowledge concerning the object as may be requested by the Director or a designated person,
- and, on making that report and providing such information, shall be furnished with a prescribed form.

(4) On being furnished with a prescribed form under *subsection (3)* of this section, a person shall complete and return it by personal delivery or by pre-paid registered post within seven days of its being so furnished.

(5) The Minister may by regulations prescribe the form to be furnished under *subsection (3)* of this section and, without prejudice to the generality of the foregoing, such regulations may make provision for ascertaining—

- (a) insofar as it can be reasonably ascertained, when the object was found,
- (b) the circumstances of the acquisition of the object, and
- (c) insofar as it can be reasonably ascertained, where the object was found.

(6) A person who has in his possession or under his control or who purchases or otherwise acquires or sells or otherwise disposes of an archaeological object which has been found in the State since the coming into operation of the Principal Act shall not—

- (a) fail to make a report under *subsection (1)* or *(2)* of this section, or
- (b) wilfully withhold information concerning that archaeological object, or

(c) fail within the period specified in *subsection (1) or (2)* of this section to return the prescribed form to the Director, or
 (d) make a report under this section which is to his knowledge false or misleading in a material respect, or
 (e) in contravention of this section, fail or refuse to give to the Director or a designated person information within his knowledge in relation to the archaeological object concerned, or
 (f) give to the Director or a designated person information in relation to the archaeological object concerned which is to his knowledge false or misleading in a material respect.

(7) Where in a prosecution for an offence under *subsection (1) or (2)* of this section possession or control of an archaeological object is proved it shall be presumed until the contrary is proved that the object was found in the State after the coming into operation of the Principal Act.

(8) This section shall not apply to the Director or a designated person.

(9) *Subsection (1)* of this section shall not apply to persons to whom a licence has been granted under section 26 of the Principal Act in respect of any archaeological object found in pursuance of that licence.

(10) A reference to an offence under the National Monuments Acts, 1930 to 1987, in sections 20, 21 and 22 of the Act of 1987 shall be construed as including an offence under this section.

(11) Notwithstanding section 10(4) of the Petty Sessions (Ireland) Act, 1851, summary proceedings for an offence under this section may be instituted within two years from the date of the offence.

(12) This section shall not apply to any archaeological object which has been imported into the State for a period not exceeding two years for the purpose of exhibition, research or restoration, in pursuance of an agreement made between a person outside the State who claims to be the owner of the object and a person in the State who intends to exhibit, carry out research in respect of, or restore the object:

Provided, however, that no such contract may be performed in the State in relation to any object to which this section would otherwise apply unless the terms and conditions of that contract have been approved of in writing by the Director.

8. Manitoba, Canada

Manitoba Statutes, The Foreign Cultural Objects Immunity From Seizure Act, R.S.M. 1987, c. F140 s. 1

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:
Immunity from seizure of foreign cultural objects

1 When any work of art or other object of cultural significance from a foreign country is brought into Manitoba pursuant to an agreement between the foreign owner or custodian thereof and the Government of Manitoba or any cultural or educational institution, providing for the temporary exhibition or display thereof, in Manitoba by the Government of Manitoba or the cultural or educational institution, no proceeding or action shall be taken or permitted in any court and no judgment, decree or order shall be enforced in Manitoba for the purpose of, or having the effect of depriving the Government of Manitoba or the institution or any carrier engaged in transporting the work or object within Manitoba, of the custody or control thereof, if, before the work or object is brought into Manitoba the Lieutenant Governor in Council where the agreement is with the Government of Manitoba, on the recommendation of the member of the Executive Council who executed the agreement for and on behalf of the Government of Manitoba and where the agreement is with a cultural or educational institution, on the application of the institution determines

(a) that the work or object is of cultural significance; and

(b) that the temporary exhibition or display thereof in Manitoba is in the interest of the people of Manitoba;
and the Order in Council is published in the Manitoba Gazette.

Enforcement of agreement not precluded

2 Section 1 does not preclude any judicial action for or in aid of the enforcement of any of the terms of an agreement referred to in that section or the enforcement of the obligation of a carrier under any contract for the transportation of the work or object in the fulfilment of any obligation assumed by the Government of Manitoba or the cultural or educational institution pursuant to the agreement.

9. New York, USA

New York State Consolidated Laws: Arts and Cultural Affairs Law, Chapter 11-C, Article 12: Artist-Art Merchant Relationships

Section 12.03. Exemption from seizure. No process of attachment, execution, sequestration, replevin, distress or any kind of seizure shall be served or levied upon any work of fine art while the same is en route to or from, or while on exhibition or deposited by a nonresident exhibitor at any exhibition held under the auspices or supervision of any museum, college, university or other nonprofit art gallery, institution or organization within any city or county of this state for any cultural, educational, charitable or other purpose not conducted for profit to the exhibitor, nor shall such work of fine art be subject to attachment, seizure, levy or sale, for any cause whatever in the hands of the authorities of such exhibition or otherwise.

10. Ontario, Canada

Foreign Cultural Objects Immunity from Seizure Act, S.O. 1990, CHAPTER F.23, s. 1

Immunity of certain foreign cultural objects from seizure while in Ontario

1. (1) When any work of art or other object of cultural significance from a foreign country is brought into Ontario pursuant to an agreement between the foreign owner or custodian thereof and the Government of Ontario or any cultural or educational institution in Ontario providing for the temporary exhibition or display thereof in Ontario administered, operated or sponsored by the Government of Ontario or any such cultural or educational institution, no proceeding shall be taken in any court and no judgment, decree or order shall be enforced in Ontario for the purpose or having the effect of depriving the Government of Ontario or such institution, or any carrier engaged in transporting such work or object within Ontario, of custody or control of such work or object if, before such work or object is brought into Ontario, the Minister determines that such work or object is of cultural significance and that the temporary exhibition or display thereof in Ontario is in the interest of the people of Ontario and notice of the Minister's determination is published in *The Ontario Gazette*. R.S.O. 1990, c. F.23, s. 1 (1); 2002, c. 18, Sched. F, s. 1 (1).

Subs. (1) not to preclude enforcement of agreements, etc.

(2) Subsection (1) does not preclude any judicial action for or in aid of the enforcement of the terms of any such agreement or the enforcement of the obligation of any carrier under any contract for the transportation of any such work or object or the fulfilment of any obligation assumed by the Government of Ontario or such institution pursuant to any such agreement. R.S.O. 1990, c. F.23, s. 1 (2).

Definition of Minister

(3) In this Act,

“Minister” means the Minister of Culture or such other member of the Executive Council to whom the administration of this Act may be assigned under the *Executive Council Act*. 2002, c. 18, Sched. F, s. 1 (2).

11. Quebec, Canada

Code of Civil Procedure, Book IV Execution of Judgments, Title II Compulsory Execution, Chapter I Preliminary Provisions, Division III Exemptions from Seizure, R.S.Q., chapter 25

553.1. Works of art or historical property brought into Québec and placed or intended to be placed on public exhibit in Québec are also exempt from seizure, if the Government declares them so, and for such time as it determines. Such works or property must not have been originally conceived, produced or created in Québec.

The order in council passed in virtue of the first paragraph comes into force on its publication in the Gazette officielle du Québec.

Exemption from seizure as prescribed in this article does not prevent the execution of judgments rendered to give effect to service contracts relating to the transportation, warehousing and exhibition of the works and property referred to in the first paragraph.

12. Rhode Island, United States of America

State of Rhode Island General Laws, Title 5 – Businesses and Professions, Chapter 5-62, Works of Art – Artists' Rights

§ 5-62-8 Exemption from seizure. – No process of attachment, execution, sequestration, replevin, distress or any kind of seizure shall be served or levied upon any work of fine art while the work is en route to or from, or while on exhibition or deposited by a nonresident exhibitor at any exhibition held under the auspices or

supervision of any museum, college, university or other nonprofit art gallery, institution or organization within any city or county of this state for any cultural, educational, charitable or other purpose not conducted for profit to the exhibitor, nor shall the work of fine art be subject to attachment, seizure, levy or sale, for any cause whatever in the hands of the authorities of the exhibition or otherwise.

13. Switzerland

Federal Act on the International Transfer of Cultural Property (Cultural Property Transfer Act, CPTA) dated June 20, 2003:

[Official English version]

Section 4: Return Guarantee

Article 10 Request

Should cultural property of one contracting state be on temporary loan for an exhibition in a museum or another cultural institute in Switzerland, the institution loaning the cultural property may request that the specialized body issue a return guarantee to the loaning institution for the period of the exhibition as stipulated in the loan agreement.

Article 11 Publication and Procedures for Objections

1 The request is published in the Federal Bulletin. The publication contains a precise description of the cultural property and its origin. 2 If the request clearly fails to fulfill the conditions for issuing a return guarantee, the request will be denied and not published. 3 Parties pursuant to provisions of the Federal Act on Administration Procedure from December 20, 19684, may file an objection in writing to the specialized body within 30 days. The deadline commences with publication. 4 Failure to file an objection, precludes the parties from further action.

Article 12 Issuance

1 The specialized body decides on the request for issuing a return guarantee. 2 The return guarantee may be issued in the event that:

- a. no person claims ownership to the cultural property through an objection;
- b. the import of the cultural property is not illicit;
- c. the loan agreement stipulates that the cultural property will be returned to the contracting state of origin following the conclusion of the exhibition.

3 The Federal Council may establish additional requirements.

Article 13 Effect

The return guarantee means that neither private parties nor authorities may make legal claims to the cultural property as long as the cultural property is located in Switzerland.

14. United States of America**22 U.S.C. Section 2459. Immunity from seizure under judicial process of cultural objects imported for temporary exhibition or display****(a) Agreements; Presidential determination; publication in Federal Register**

Whenever any work of art or other object of cultural significance is imported into the United States from any foreign country, pursuant to an agreement entered into between the foreign owner or custodian thereof and the United States or one or more cultural or educational institutions within the United States providing for the temporary exhibition or display thereof within the United States at any cultural exhibition, assembly, activity, or festival administered, operated, or sponsored, without profit, by any such cultural or educational institution, no court of the United States, any State, the District of Columbia, or any territory or possession of the United States may issue or enforce any judicial process, or enter any judgment, decree, or order, for the purpose or having the effect of depriving such institution, or any carrier engaged in transporting such work or object within the United States, of custody or control of such object if before the importation of such object the President or his designee has determined that such object is of cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest, and a notice to that effect has been published in the Federal Register.

(b) Intervention of United States attorney in pending judicial proceedings

If in any judicial proceeding in any such court any such process, judgment, decree, or order is sought, issued, or entered, the United States attorney for the judicial district within which such proceeding is pending shall be entitled as of right to intervene as a party to that proceeding, and upon request made by either the institution adversely affected, or upon direction by the Attorney General if the United States is adversely affected, shall apply to such court for the denial, quashing, or vacating thereof.

(c) Enforcement of agreements and obligations of carriers under transportation contracts

Nothing contained in this section shall preclude

(1) any judicial action for or in aid of the enforcement of the terms of any such agreement or the enforcement of the obligation of any carrier under any contract for the transportation of any such object of cultural significance; or

(2) the institution or prosecution by or on behalf of any such institution or the United States of any action for or in aid of the fulfillment of any obligation assumed by such institution or the United States pursuant to any such agreement.

15. Texas, United States of America

Civil Practice & Remedies Code, Title 3 – Extraordinary Remedies, Chapter 61 Attachment, Subchapter E – Works of Fine Art

Sec. 61.081. Exemption when en route to or in an exhibition.

(a) Subject to the limitations of this section, a court may not issue and a person may not serve any process of attachment, execution, sequestration, replevin, or distress or of any kind of seizure, levy, or sale on a work of fine art while it is:

(1) en route to an exhibition; or

(2) in the possession of the exhibitor or on display as part of the exhibition.

(b) The restriction on the issuance and service of process in Subsection (a) applies only for a period that:

(1) begins on the date that the work of fine art is en route to an exhibition; and

(2) ends on the earlier of the following dates:

(A) six months after the date that the work of fine art is en route to the exhibition;

or

(B) the date that the exhibition ends.

(c) Subsection (a) does not apply to a work of fine art if, at any other time, issuance and service of process in relation to the work has been restricted as provided by Subsection (a).

(d) Subsection (a) does not apply if theft of the work of art from its owner is alleged and found proven by the court.

(e) A court shall, in issuing service of process described by Subsection (a), require that the person serving the process give notice to the exhibitor not less than seven days before the date the period under Subsection (b) ends of the person's intent to serve process.

(f) In this section, 'exhibition' means an exhibition:

(1) held under the auspices or supervision of:

(A) an organization exempt from federal income tax under Section 501(a), Internal Revenue Code of 1986, as amended, by being listed as an exempt organization in Section 501(c)(3) of the code; or

(B) a public or private institution of higher education;

(2) held for a cultural, educational, or charitable purpose; and

(3) not held for the profit of the exhibitor.

Added by Acts 1999, 76th Leg., ch. 1043, Sec. 1, eff. Aug. 30, 1999.

Sec. 61.082. Handling and Transportation. A court may not issue any process of attachment, execution, sequestration, replevin, or distress or of any kind of seizure, levy, or sale on a work of fine art unless the court requires, as part of the order authorizing the process, that the work of fine art is handled and transported in a manner that complies with the accepted standards of the artistic community for works of fine art, including, if appropriate, measures relating to the maintenance of proper environmental conditions, proper maintenance, security, and insurance coverage.
