Iran v. Barakat: Some Observations on the Application of Foreign Public Law by Domestic Courts from a Comparative Perspective

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I. Introduction

In its recent action to recover certain antiquities of its national heritage from the current possessor, the Barakat Galleries Ltd in London, the Government of the Islamic Republic of Iran found itself confronted with the contention that any claim depending on the legal effects of Iran's legislation to protect its national heritage must fail for the sole reason that domestic courts would not enforce foreign public law.[1] Whilst Iran reserved its right to argue to the contrary at a later stage of the proceedings, the court focused on other issues first and held that Iran had not discharged the burden of establishing its acquisition of title to the antiquities under the Iranian legislation. Nor could Iran successfully show the proprietary nature of its right of possession of the antiquities under the Iranian legislation – a necessary precondition to a successful claim for the recovery of the antiquities for wrongful interference with or conversion of them. Therefore, there was no need to address the issue whether a domestic court should enforce, apply or at least take notice of foreign public law such as the Iranian legislation on the protection of its national heritage. However, Gray J. amended his judgment "in case the proceedings go further"[2] and expressed his conclusions on the preliminary issue of the non-justiciability of Iran's claims: "Public laws, like penal laws, may not be enforced directly or indirectly in the English Court".[3]

A few observations on the doctrine and practice of the application of foreign public law in domestic courts from a comparative perspective will suffice to show that the English court's conclusions in this case do not precisely represent the international state of choice-of-law methodology.

II. The International State of Choice-of-Law Methodology

Already in its session of Wiesbaden in 1975, the Institut de Droit International in The Hague, an association of world-leading private and public international law scholars,[4] adopted a resolution on the issue of the application of foreign public law by domestic courts.[5] This 'Resolution on the Application of Foreign Public Law' articulates its primary principle as follows: "The public law character attributed to a provision of foreign law which is designated by the rule of conflict of laws shall not prevent the application of that provision, subject however to the fundamental reservation of public policy. The same shall apply whenever a provision of foreign law constitutes the condition for applying some other rule of law or whenever it appears necessary to take the former provision into considera-

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1 *Government of the Islamic Republic of Iran v. Barakat Galleries Ltd* [2007] E.W.H.C. 705 (Q.B.), para. 11: "Barakat submits that by this action Iran is seeking, directly or indirectly, to enforce in the domestic courts of this country an exercise of the sovereign power or authority of a foreign state". Therefore, Barakat contended that the claim must fail on grounds of non-justiciability. The Iranian laws at issue in this case were the Legal Bill regarding clandestine diggings and illegal excavations intended to obtain antiquities and historical relics which are according to international regulations made or produced 100 or more years ago ('1979 Legal Bill'); the National Heritage Protection Act 1930; Executive Regulations of the National Heritage Protection, dated 3 November 1930.

2 Id., at para. 77; the appeal is indeed pending at the time of going to press.

3 Id., at para. 81.

4 The Institute of International Law was founded on 8 September 1873 at the Ghent Town Hall in Belgium as an institution independent of any governmental influence in order to be able both to contribute to the development of international law and take action for its proper implementation. The Institute meets every two years. In between these sessions, scientific commissions study themes chosen by the Plenary Assembly which receives the work of the commissions, examines them attentively and if appropriate adopts resolutions. These Resolutions are then brought to the attention of governmental authorities, international organizations as well as the scientific community. In this way, the Institute seeks, as it explains on its website (see http://www.idi-iil.org/idiF/navig_historique.html, 22 June 2007), "to highlight the characteristics of the lex lata in order to promote its respect. Sometimes it makes determinations de lege ferenda in order to contribute to the development of international law". In 1904 the Institute of International Law was awarded the Nobel Peace Prize.

5 See http://www.idi-iil.org/idiE/resolutionsE/1975_wies_04_en.pdf (22 June 2007).

tion". Therefore, according to the Resolution there is no argument for excluding foreign public law a priori from being enforced, applied or taken into consideration by domestic courts. In order to eliminate even the slightest doubts about the scope of this principle, the Resolution adds that "the so-called principle of the inapplicability a priori of foreign public law, like that of its absolute territoriality, a principle invoked, if not actually applied, in judicial decisions and legal writings of certain countries a) is based on no cogent theoretical or practical reason, and b) often duplicates with the principles of public policy, c) may entail results that are undesirable and inconsistent with contemporary needs for international co-operation. The same applies for similar reasons to the inapplicability a priori of certain categories of provisions of foreign public law, such as provisions which do not concern the protection of private interests but primarily serve the interests of the State". Once more, the Resolution reinforces its effort to refute obsolete but widespread misconceptions in that it expressly observes: "The scope of the preceding rule and statements shall in no way be affected by the fact that foreign law which is regarded as public law is still applied less frequently for various reasons, and mainly: a) because the question does not arise owing to the nature of the social relationships referred to in the rule of conflict of laws or to the very subject of the foreign provision, or b) because the foreign provision is restricted in its scope to the territory of the legislator from whom it originates and because such restriction is in principle respected, or c) because authorities of the State of the forum often hold either that they have no jurisdiction to apply certain foreign laws which are regarded as public law, notably in giving administrative or constitutive judgments, or that they need not assist in the application of such provisions in the absence of treaties, of reciprocity or of a convergence of the economic or political interests of the States with which the situation is connected". The Resolution contains only one reservation to its primary principle of the applicability of foreign public law by domestic courts which relates to claims made by a foreign authority or a foreign public body and based on provisions of its public law – an issue left expressly open. Claims based on provisions of public law can be defined as claims of a nature that only States or other public entities can raise. The paradigmatic example is the claim for tax payments, i.e. a claim based on the (public) revenue laws of the claiming State. Another example is the prerogative of a State to punish an individual for the commission of crimes under the provisions of the criminal law of that State. Claims based on provisions of private law can be defined as claims any natural or legal person, including States or other public entities acting iure gestionis, can raise, for example a claim of the owner against the possessor for the recovery of the res in question or a claim to regain possession of that res. Consequently, the Resolution suggests a fundamental distinction between claims based on private law and public law. Its primary principle, the applicability of foreign public law by domestic courts, relates only to claims based on provisions of private law. If such a claim under private law is grounded on preliminary issues affected or even directly determined by foreign public law, domestic courts should not disregard a priori the legal effects of that foreign law on the preliminary issue. Such a preliminary issue could be, for example, the question of ownership of a movable antiquity in the framework of a claim for recovery of property based on an ownership title under private law.

Therefore, the conclusion by Gray J. in Iran v. Barakat that "public laws, like penal laws, may not be enforced directly or indirectly in the English Court"[1] appears not to represent precisely the international state of choice-of-law methodology as laid down by the Wiesbaden Resolution of 1975 of the Institut de Droit International, in that it does not draw a distinction between claims based on public foreign law such as penal or revenue laws and claims based on private law whose preliminary issues might be affected by the application of public foreign law. To be sure, no legislator and no court would be bound by this Resolution. Rather, any law-producing entity is, in principle, free to expressly stipulate the rule that foreign public law must be fully ignored. However, the internationally leading conflicts lawyers of the Wiesbaden Resolution in 1975 could not identify any cogent theoretical or practical reason for such a rule,[2] and no such reasons seem to have emerged in the meantime. Any substantial conflict with the interests of one of the parties or of the State whose courts apply foreign public law when deciding upon a claim based on private law can, and should alone, be re-

1 *Government of the Islamic Republic of Iran v Barakat Galleries Ltd*, [2007] EWHC 705 (QB), para. 81.

2 See Pierre Lalive (rapporteur on this issue of the 1975 Wiesbaden session), *L'application du droit public étranger, Rapport définitif*, Institut de Droit International, Annuaire Vo. 56, Session de Wiesbaden 1975, Basel 1975, p. 219 *et seq.*, at p. 251 *et seq.* ; see also p. 258, summarising the work of the Institute on this issue by stating : « En condamnant le pseudo-principe de l'inapplicabilité *a priori* de 'droit public' d'une autorité étrangère, et en affirmant la possibilité et l'opportunité d'attitudes plus nuancées, plus conformes aux besoins de la société contemporaine, l'Institut ferait œuvre utile ».

solved by the public policy control of the particular provision of foreign public law in question on a case-to-case basis.

It must be conceded that the distinction between private and public law has always suffered from uncertainties even in legal orders that ascribe much importance to this distinction.[1] On the other hand, even though the legal orders of the common law do not pay a comparable degree of attention to this conceptual duality of law, there is good reason to argue that the distinction between private and public law applies a priori to any legal order[2] irrespective of the fact that the characterisation of a certain provision as private or public law might be uncertain.

In the context of the obiter dicta by Gray J. in his judgment in Iran v. Barakat, one may still raise two objections against the argument in favour of the application of foreign public law advanced on the basis of the 1975 Wiesbaden Resolution: the Resolution might not have restated the state of the choice of law methodology but might have formulated its own vision of what should be done. This objection will be at least challenged by a few comparative observations on examples of legislation and court practice that support the principle of the 1975 Wiesbaden Resolution (see below, section III). One may further hold that any arguments drawn from the Resolution are irrelevant for an English court because the English principles of the conflict of laws endorse the rule that foreign public law must never be applied. Again, only few observations will suffice to put this contention into question (see below, section IV).

III. Comparative Observations

The few comparative observations presented in this short case note cannot provide a comprehensive picture of the issue in question but will merely identify examples of legislation and court practice that are consistent with the concept of the 1975 Wiesbaden Resolution.

1. Germany

German courts do not have jurisdiction to hear claims based on public foreign law, but they will apply foreign public law if it is relevant to preliminary issues of a claim based on private law.[3] For example, the Higher Regional Court (Kammergericht) of Berlin recently had to decide upon a claim raised by the Arabic Republic of Egypt against an antiquities dealer in Germany.[4] Egypt sought to prevent the performance of a contract of sale under which several Egyptian antiquities with a value of US$2 million were to be exported from Germany to a buyer in the United States. Egypt applied for interim measures in order to protect the enforcement of a claim for recovery based on title and possessory rights under sections 985, 1007, 861 of the German Civil Code (Bürgerliches Gesetzbuch). To this end, Egypt was required to establish its title to the antiquities at issue with sufficient probability. Egypt relied on article 6 of the Egyptian Law no. 117/1983 on the Protection of Archaeological Objects that declares any archaeological object to be public property of the State of Egypt. The Court applied this foreign public law. The claim for interim measures ultimately failed nevertheless because Egypt could not establish with sufficient probability that the movables in question were in fact located in Egypt at the time of the enactment of article 6 of the aforementioned Egyptian Law – a necessary precondition to apply that foreign law according to German choice-of-law rules governing the legal status of movables, the lex rei sitae. However, the claim could only fail for evidentiary reasons because the German court examined in detail whether the conditions of the foreign law were fulfilled. Had the movables in fact been located in Egypt at the time of the enactment of article 6 of the aforementioned Egyptian Law, the German court would have considered Egypt to have acquired ownership by virtue of that foreign public law – subject of course to further conditions arising from the foreign law in question or German conflicts rules such as, inter alia, a public policy test of the foreign public law as to the conformity of its expropriating effects with German constitutional guarantees.[5]

Since Egypt could not support its submission of ownership on the basis of article 6 of the Egyptian Law no. 117/1983 on the Protection of Archaeo-

1 Pierre Lalive, id., Rapport préliminaire, p. 157 *et seq.*, at p. 159; Rapport définitif, p. 219 *et seq.*, at p. 234 *et seq.*

2 E.g. Gustav Radbruch, *Rechtsphilosophie*, 3rd edn (Leipzig, 1932) § 16.

3 See e.g. Gerhard Kegel and Klaus Schurig, *Internationales Privatrecht* (Munich, 9th edn 2004), p. 1092, with further references; Christian von Bar/Peter Mankowski, *Internationales Privatrecht* Vol. I, (Munich, 2nd edn 2003), p. 235 *et seq.*

4 Higher Regional Court (*Kammergericht*) of Berlin, judgment of 16 October 2006 - 10 U 286/05, *Neue Juristische Wochenschrift* (NJW) 2007, p. 705 *et seq.*

5 Higher Regional Court (*Kammergericht*) of Berlin, judgment of 16 October 2006 - 10 U 286/05, Neue Juristische Wochenschrift (NJW) 2007, pp. 705 *et seq.*, at p. 706; for further reference on this issue see e.g Christian Armbrüster, ‚Privatrechtliche Ansprüche auf Rückführung von Kulturgütern ins Ausland', *Neue Juristische Wochenschrift* (NJW) 2001, p. 3581 *et seq.*, at p. 3583.

logical Objects, Egypt additionally relied on an earlier legislation on the protection of cultural property, Law no. 66/1963. The German court also examined this foreign public law of Egypt in detail rather than rejecting its application a priori, and eventually held that it did not contain any provisions that confer a title of ownership of archaeological objects upon the State. In particular, the court held that Law no. 66/1963, according to which the export of archaeological objects is a criminal offense, cannot be construed as conferring title to the protected objects on the State that has enacted that legislation. In its reasoning, the Court did not express any doubts concerning the applicability before the German courts of Law no. 66/1963 as a penal law . One may of course argue that the issue of applicability of foreign law was not relevant to the Court since it appeared clear from the outset that the 1963 Law does not confer title. However, it would have been presumably even more expeditious for the Court to simply argue that foreign (penal) law will not be applied. In not doing so the Court implies that Law no. 66/1963 would have been applicable in principle irrespective of the fact that it contains provisions of penal law.

In addition, German courts have repeatedly held that the expropriation of property under foreign public expropriation legislation or acts constitutes a valid transfer of title where the property was present on the territory when the expropriation legislation or act entered into force. For example, the Federal Court of Justice (Bundesgerichtshof) recently decided upon the expropriation of property by the Soviet occupation regime on the territory of the former German Democratic Republic and held that "the effects of an expropriation are, according to the recurrent caselaw of the Federal Court of Justice, limited by the principle of territoriality. Accordingly, only assets within the reach of power of a State are subject to that state's expropriation measures".[1] However, if assets are in fact subject to the foreign State's expropriation measures, the effect of theses measures will be recognised by German courts – subject again to further conditions, in particular a public policy control.[2] However, the public policy control is nothing special to foreign public law but applies to any application or recognition of effects of foreign laws by German courts. Judgments to the same effect have been handed down on several occasions,[3] and the Federal Constitutional Court (Bundesverfassungsgericht), the highest judicial authority in Germany, has expressly approved earlier decisions in this line of case law.[4]

Consequently, if property is located within the territory of a State which enacts expropriation laws or which takes the respective expropriation measures, German courts regard the previous title to the property as having been validly extinguished and the State as having validly acquired title. If subsequently a chattel is transferred to Germany and the foreign State now claims against the possessor for recovery based for example on its title under section 985 of the German Civil Code (Bürgerliches Gesetzbuch, BGB), the German court will hold that the claimant is the 'owner' in the sense of that section. The foreign expropriation – or any other change in title to the property under the foreign private law – that took place on the foreign territory while the movable property was present on that territory, 'imprints' the legal status of the movable.[5] Thus, the effects of foreign property law, for example an accomplished transfer of title to a chattel, may stem from foreign public law or foreign private law. German law does not draw a distinction between these two sources of legal effects on the title to a chattel under the lex rei sitae. One has to bear in mind, however, that under German private international law, such an 'imprint' occurs only if the transfer of title under the foreign lex rei sitae is fully completed while the chattel remains on the foreign State's territory. If the chattel leaves the territory prior to the comple-

1 Federal Court of Justice (*Bundesgerichtshof*), judgment of 22 March 2006 - IV ZR 6/04, at no. 21, *Neue Juristische Wochenschrift, Rechtsprechungsreport* (NJW-RR) 2006, p. 1091 *et seq.*

2 See e.g. Federal Court of Justice (*Bundesgerichtshof*), judgment of 28 April 1988 - IX ZR 127/87, *Neue Juristische Wochenschrift* (NJW) 1988, p. 2173 *et seq.*

3 Federal Court of Justice (*Bundesgerichtshof*), judgment of 4 June 2002 - XI ZR 301/01, *Neue Juristische Wochenschrift* (NJW) 2002, 2389 *et seq.*, at p. 2390, with further references.

4 Federal Constitutional Court (*Bundesverfassungsgericht*), judgment of 23 April 1991 - 1 BvR 1170/90, 1 BvR 1174/90, 1 BvR 1175/90, Neue Juristische Wochenschrift (NJW) 1991, 1597 *et seq.*

5 The underlying theory in German private international law is known as the 'imprint theory' (*Prägungstheorie*): questions relating to title to a chattel are governed by the *lex rei sitae*, the law of the place where the chattel is situated. If it is situated in Germany at the time of the proceedings, German courts will apply provisions of German property law. German property law includes a claim of the owner against the possessor for recovery of possession in section 985 BGB. The claimant then has to show its title to the goods. It will succeed by referring to, as the case may be, foreign public laws and/or acts effecting the expropriation as the *lex rei sitae* at the time when the chattel was present on the territory of the foreign State's which enacted the relevant foreign public law, see e.g. Gerhard Kegel and Klaus Schurig, *Internationales Privatrecht* (Munich, 9th edn 2004), p. 771: '*fait accompli*'.

tion of the transaction, the effects of the foreign property law have not yet 'imprinted' the chattel.

Finally, German courts take account of factual as well as legal effects of foreign public law when they apply the applicable private law. Taking account of foreign public law does not amount to its immediate application but may nevertheless determine the result of the proceedings. In particular, openly framed conditions for the application of a certain provision may be affected by foreign public law in that the foreign public law concretises an open condition in the specific case such as e.g. 'good faith', 'legitimate interest', 'immorality' or 'public policy'. The landmark case on this issue[1] involved an insurance contract. This insurance contract related to three containers with African cultural goods to be transported from Nigeria to Germany. During the transportation, several of these goods disappeared. The insurer paid out in respect of the loss incurred, and sued the shipowner for compensation. The defendant argued, inter alia, that the insurance contract, governed by German law, was void for violation of a statutory law and for violation of public policy because the export of the Nigerian cultural objects violated Nigerian export control legislation. The court held that "in the interest of the safeguarding of the morality of the international trade in cultural goods, the export of cultural objects in violation of an export prohibition of the State of origin does not deserve the protection by private law including the protection by the insurance of the transportation of cultural goods from the territory of a foreign state in violation of that State's export control laws aiming at the protection of cultural goods". The Court relied on a provision in the standard terms of the insurance contract according to which the insurance contract is valid only if it relates to a 'legitimate' interest to be insured. In applying this flexible precondition of legitimacy to the case, the Court relied on foreign public law in order to evaluate the interest in question. It thus took account of foreign public law while applying German law. Presumably, this technique of taking account of foreign public law in the framework of the applicable private contract law to the effect that the foreign public law may render the contract invalid via openly framed conditions for the validity of the contract must be restricted to those foreign public laws that pursue a policy that is in conformity with the policies of the legal order that provides for the lex contractus.[2] In addition of course, the policy must not violate the ordre public of the lex fori. In the case of the Nigerian masks, German law provided both for the lex contractus and the lex fori. However, the Federal Court of Justice did not consider that an immediate public interest of Germany was affected by the violation of Nigerian export control law. Therefore, the court resorted to another line of reasoning and held that foreign public law should even be taken account of if the foreign law pursues policies about which the international community of States has reached consensus. Even though Germany had not ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property at the time,[3] the court inferred from the Convention a consensus of the international community of States on the necessity to protect cultural property. It further inferred from the Convention

1 Federal Court of Justice (*Bundesgerichtshof*), judgment of 22 June 1972 - II ZR 113/70, *Neue Juristische Wochenschrift* (NJW) 1972, 1575; see also the case note by Frederic Alexander Mann, *Neue Juristische Wochenschrift* (NJW) 1972, 2179, who approves this decision and takes the opportunity to criticise once more the "unfortunate doctrine of a special status of foreign public law", see also Frederic Alexander Mann, 'Conflict of Laws and Public Law', *Recueil des Cours* 132 (1971-I), 107 *et seq.*, at 182 *et seq.*; however, the case has triggered many comments, not all of which are affirmative; for an overview see e.g. Gerhard Kegel / Klaus Schurig, *Internationales Privatrecht*, 9th edn 2004, p. 1147; see also Werner Lorenz, 'Rechtsfolgen ausländischer Eingriffs-normen – Zur Lehre vom "Vernichtungsstatut"', in Heinz-Peter Mansel *et al.* [eds.], *Festschrift für Erik Jayme* Vol. I, Munich 2004, p. 549 *et seq.*, at pp. 555 *et seq.*

2 Federal Court of Justice (*Bundesgerichtshof*), judgment of 21 December 1960 - VIII ZR 1/60, *Neue Juristische Wochenschrift* (NJW) 1961, 822: contract under German law held invalid for immorality in the sense of section 138 BGB because it sought to circumvent US embargo legislation that was considered protecting not only the public interest of the USA but also that of Germany against states of the former Eastern Bloc.

3 Germany is in the process of implementing the 1970 UNESCO Convention, see Gesetz zu dem Übereinkommen vom 14. November 1970 über Maßnahmen zum Verbot und zur Verhütung der rechtswidrigen Einfuhr, Ausfuhr und Übereignung von Kulturgut vom 20. April 2007, Bundesgesetzblatt (BGBl.) 2007 Teil II Nr. 12 of 25. April 2007, S. 626. This act of the German Parliament entered into force on 26 April 2007 and will transform the UNESCO treaty into domestic law once Germany has acceded to the treaty. On the same date, the implementation legislation, the Gesetz zur Ausführung des UNESCO-Übereinkommens vom 14. November 1970 über Maßnahmen zum Verbot und zur Verhütung der rechtswidrigen Einfuhr, Ausfuhr und Übereignung von Kulturgut (Ausführungsgesetz zum Kulturgutübereinkommen – KGÜAG) entered into force, Bundesgesetzblatt (BGBl.) 2007 Teil 1 Nr. 21 of 23 April 2007, p. 757; for a first assessment of the implementation legislation see Matthias Weller, Zur Umsetzung der UNESCO Konvention von 1970 in Deutschland, in Gerte Reichelt (ed.), Rechtsfragen der Restitution von Kulturgütern, Symposium of the Ludwig Boltzmann Institute for Euopean Law, 11 October 2007, Vienna, forthcoming.

that a contract that violates foreign export control legislation on the protection of foreign cultural property is invalid for 'immorality' under section 138 BGB. If this approach meets with approval,[1] it applies a fortiori to States that have ratified and, as the case may be, implemented the 1970 UNESCO Convention in their domestic laws.

In conclusion, German courts make a clear distinction between claims based on foreign public law and claims based on private law. German courts do not have jurisdiction to hear claims based on foreign public law such as claims for money based on foreign revenue or penal laws, but they do hear claims based on private law such as a claim for the recovery of chattels, and they apply foreign public law in order to determine the preliminary issues relating to such claims, such as the question of ownership. In addition, German courts take account of foreign public law in the framework of the applicable contract law in order to concretise openly framed conditions for the validity of the contract such as 'immorality' under section 138 BGB. German courts thus follow rather precisely the conceptual principles laid down in the 1975 Wiesbaden Resolution of the Institut de Droit International.

2. Switzerland

In Switzerland, the rules of private international law are comprehensively codified in the Federal Act on Private International Law 1987 (IPRG).[2] Article 13(1) IPRG prescribes that the selection of a foreign law by the choice-of-law rules of the IPRG comprises all provisions of that foreign law that are applicable to the situation in question. In order to eliminate any doubts, subsection (1) makes clear that "the applicability of a provision of the foreign law is not excluded by the mere fact that it is characterized as public law".[3] The provision does not apply to claims based on foreign public law.[4] At the same time, claims based on private law by foreign States can be raised in Swiss courts.[5] Whereas no case law seems to exist on the application of foreign public law on the protection of cultural property in actions to recover property on the basis of a foreign lex rei sitae, the Zurich Court of Commerce (Handelsgericht Zürich) has held that a contract to smuggle goods for money contrary to Italian customs law was invalid for 'immorali-ty' (Sittenwidrigkeit) under the applicable Swiss contract law.[6] In addition, commentators provide the example of an Italian art dealer selling a work of art under Italian contract law but without the necessary export permission according to Italian public law and they infer from article 13 IPRG that such a contract would be declared void by Swiss courts.[7] One reservation, however, is raised against the application of foreign public law in the case that such law exclusively serves the purposes and policies of the foreign State.[8] Yet, this reservation appears to be limited to the issue of the invalidation of contracts by foreign public law as part of the law chosen by the parties and would thus presumably not apply to the applicable law to the preliminary issue of ownership in an action to recover movable property. In addition and along the lines of the judgment of the German Federal Court of Justice in the case of the Nigerian masks,[9] the protection of cultural property might not count as a policy exclusively serving the purposes of the foreign State in a State like Switzerland that has ratified and transformed into domestic law the 1970 UNESCO Convention. To sum up, Swiss private international law follows the principal distinction between claims based on foreign public law and claims based on private law; moreover, it is expressly provided by legislation that Swiss courts should not exclude the application of foreign public law a priori when hearing claims of the latter type. Thus, Swiss private international law, like German private international law, follows rather precisely the conceptual principle laid down in the 1975 Wiesbaden Resolution of the Institut de Droit International.[10]

1 See e.g. Werner Lorenz, 'Rechtsfolgen ausländischer Eingriffs-normen – Zur Lehre vom "Vernichtungsstatut"', in Heinz-Peter Mansel *et al.* [eds.], *Festschrift für Erik Jayme* Vol. I, Munich 2004, p. 549 *et seq.*, at p. 555.

2 Bundesgesetz über das internationale Privatrecht vom 18. Dezember 1987.

3 Article 13 IPRG reads: "Die Verweisung dieses Gesetzes auf ein ausländisches Recht umfasst alle Bestimmungen, die nach diesem Recht auf den Sachverhalt anwendbar sind. Die Anwendbarkeit einer Bestimmung des aus-ländischen Rechts ist nicht allein dadurch ausge-schlossen, dass ihr ein öffentlichrechtlicher Charakter zugeschrieben wird".

4 Anton Heini, in Anton Heini *et al.* (eds.), *IPRG Kommentar, Kommentar zum Bundesgesetz über das internazionale Privatecht (IPRG) vom 1. Januar 1989* (Zurich 1993), Article 13 no. 13, p. 107.

5 *Ibid.*, Article 13 no. 14, p. 107.

6 Handelsgericht Zürich, judgment of 9 May 1968, *Schweizerische Juristen-Zeitung* 1968, p. 354; see also Kurt Siehr, *Das Internationale Privatrecht der Schweiz* (Zurich 2002), p. 456.

7 Kurt Siehr, *Internationales Privatrecht, Deutsches und europäisches Kollisionsrecht für Studium und Praxis* (Heidelberg, 2002), p. 377.

8 Heini, *op. cit.* note 4, Article 13 no. 28, p. 111.

9 Federal Court of Justice (*Bundesgerichtshof*), judgment of 22 June 1972 - II ZR 113/70, *Neue Juristische Wochenschrift* (NJW) 1972, 1575.

10 Siehr, *op. cit.* note 7, p. 377.

3. United States of America

Whereas US choice-of-law doctrine excludes, like the German and the Swiss doctrine, claims based on foreign penal law or foreign revenue laws,[1] the issue of the application of foreign public law, in particular foreign laws on the protection of cultural property law, has arisen in the context of the National Stolen Property Act.[2] According to its sections 2314, 2315, a person who in interstate or foreign commerce of any goods, including cultural property transports, transmits, transfers, receives, possesses, sells, etc., is guilty of a criminal offence if, inter alia, he knew that the goods had been 'stolen'. The latter requirement has repeatedly been interpreted as being fulfilled if the person knows that the objects in question were removed from the State of origin in violation of that State's public laws on the protection of cultural property.[3] The technique to deal with foreign public law resembles the approach found in German and Swiss jurisprudence: openly framed conditions of the applicable law, in this case the requirement that the goods should have been 'stolen', are concretised by taking account of foreign public law. Therefore, case law of United States courts also supports at least the primary principle of the 1975 Wiesbaden Resolution that foreign public law is not excluded a priori from its application by foreign courts.

In sum, one may note that several examples from various States mirror the doctrinal concept of the 1975 Wiesbaden Resolution on the application of foreign public law by domestic courts. On these grounds, it appears difficult to uphold any objection to the effect that the Resolution promotes visions rather than restating the internationally accepted choice-of-law methodology.

IV. English choice of law methodology

From an outsider's perspective, the English approach does not appear to be far away, if at all distant, from these principles either: Rule 3 of Dicey Morris & Collins states that English courts have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue, or other public law of a foreign State.[4] According to this rule, 'direct enforcement' occurs where the foreign State raises a claim based on its rules of public law[5] - a case well known from the 1975 Wiesbaden Resolution and the comparative observations made above. 'Recognition' of foreign public law occurs if, for example, a contract is invalidated e.g. in light of foreign public customs rules that the parties of the contract intend to violate by the execution of that contract.[6] The latter occurrence has equally been observed in the legal orders analysed above and has been described there as a 'taking account' or 'into consideration' of foreign public law within the framework of the applicable private law, in particular via openly framed conditions for the validity of a contract under the lex contractus such as e.g. 'immorality'. 'Indirect enforcement' is defined as a case where the foreign State "seeks a remedy, not based on the foreign rule in question, but which in substance is designed to give extra-territorial effect".[7] The concept of such indirect enforcement is difficult to grasp.[8] Its essence seems to be a caveat for the court not to allow evasions of the basic rule that direct enforcement is excluded, in particular not by the engagement of (private) agents that raise claims based on a prerogative right of the foreign State on behalf or at least to the benefit of that State.[9] In case the foreign State raises a claim itself, the issue of such indirect enforcement seems not to arise, and in cases like Iran v. Barakat the primary task therefore appears to be to correctly distinguish between (direct) enforcement and recogni-

1 See e.g. Eugene F. Scoles/Peter Hay *et al.*, *Conflict of Laws*, 3rd edn (St. Paul, Minn. 2000), § 3.17, p. 142.

2 18 U.S.C. §§ 2314, 2315.

3 *United States v. Hollinshead*, 495 F. 2d 1154 (9th Cir. 1974) in respect to Guatemalan public law purporting to establish State ownership of all pre-Columbian artifacts located in the Guatemala; *United States v. McClain I*, 545 F. 2d 988 (5th Cir. 1977); *United States v. McClain II*, 593 F. 2d 658 (5th Cir. 1979) in respect to the violation of Mexican public export prohibition laws, the latter judgment imposing certain due process requirements prior to the application of the foreign laws in question in order to protect the acting persons and restricting the application of section 2314 to those foreign public laws that confer title to the state; *United States v. Schultz,* 333 F.3d 393 (2nd Cir. 2003), cert. den. *Schultz v. United States*, 540 U.S. 1106, in respect to to the Egyptian Law 117/1983 that also was relevant in the case of the Higher Regional Court (*Kammergericht*) Berlin discussed above; see generally e.g. Adam Goldberg, 'Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects', 53 *U.C.L.A. L. Rev.* 1031 (2006); Jennifer Anglim Kreder, 'The Choice between Civil and Criminal Remedies in Stolen Art Litigation', 38 *Vanderbilt J. Trans'l L.* 1199 (2005).

4 Dicey, Morris and Collins *The Conflicts of Laws*, Vol. I, 14th edn, (London, 2006), no. 5R-019, p. 100.

5 E.g. *Attorney General of New Zealand v. Ortiz*, [1984] A.C. 1, 32 (C.A.), *per* Ackner L.J.

6 E.g. *Foster v. Driscoll*, [1929] 1 K.B. 470 (C.A.).

7 Dicey, Morris and Collins *op. cit.* note 34, no. 5-025, p. 103.

8 See also Dicey, Morris and Collins, *op. cit.* note 34, no. 5R-023, p. 102: "Indirect enforcement is, however, easier to describe than to define".

9 *Ibid.*, no. 5-025, p. 103, with reference to *Peter Buchanan Ltd v. McVey*, [1954] I.R. 89, [1955] A.C. 516n, as explained in *Williams & Humbert Ltd v. W&H Trade Marks (Jersey) Ltd*, [1986] A.C. 368, and *Banco de Vizcaya v. Don Alfonso de Borbon y Austria*, [1935] 1 K.B. 140.

tion of foreign public law – a distinction that was drawn by the 1975 Wiesbaden Resolution and that appeared constitutive for all legal orders under observation here.

When it comes to drawing this distinction in practice, however, differences arise. Whereas both English and, for example, German courts would enforce claims of a State for the recovery of a movable situated in the forum state based on a purely possessory title,[1] English courts would apparently not enforce a claim by a foreign State for recovery of a chattel situated in England based on an assertion of title if this title was acquired by an act of State of that State, for example, an expropriation of the chattel while the chattel was present within that State's territory, "because the courts will not countenance a claim by the foreign State ... based on an exercise of sovereign power".[2] In contrast, German courts would enforce such a claim – provided of course that the expropriation or other measures in question passes the public policy control. The rationale for doing so is that the claim remains based on private law even if preliminary issues such as title might be validly affected by foreign public law according to the applicable lex rei sitae and irrespective of the fact that the State that enacted the foreign law in question now seeks to benefit from its own legislation or acts of State. To allow the foreign State to benefit from its own acts of State in the domestic court might be surprising at first sight but appears to be no more than the logical consequence of the 'recognition' of the effects of the foreign (public) law on the preliminary issue of title as a necessary precondition to a claim for recovery of the chattel in question under provisions of private law on the basis of the claimant's ownership. From the perspective of German choice-of-law methodology, the mere fact that the State itself now seeks to rely on its title does not alter the characterization of the claim as being one raised under private law, and the State's action does not amount to an attempt to 'enforce' its own acts of State in a foreign forum, neither directly nor indirectly. Rather, the State still relies on and frames its claim under the conditions of private law. The State is held to act iure gestionis, i.e. in its capacity as a private owner like any other owner of a chattel. To characterize a claim in this scenario as one based on public foreign law seems to blur a widely accepted line between 'recognition' and 'enforcement' of foreign public law and there appears to be no justification for doing so.

Yet, on a closer look at the nature or quality of the property in question it may also be correct and in tune with the concept of the 1975 Wiesbaden Resolution to characterize the claim of a foreign State to recover possession of its property as enforcement of foreign public law. If the lex fori distinguishes between private and public property and considers the foreign State to hold such 'public property', i.e. property of a distinct quality, rather than 'ordinary' or private property, a claim to recover possession of such public property may be characterized as one based on public law. Not every legal order draws this distinction. Under German law, for example, the State and other public entities acquire title to movables (and immovables) under the same rules and conditions as any private individual, and the law does not separately categorize private and public property.[3] Public prerogatives in respect to property are conceptualized as a kind of lien on the property (Dienstbarkeit) to the benefit of public purposes under public law created by declaration of the public entity (Widmung),[4] and the property as such remains governed by the provisions of private law. There is no 'public property', no res extra commercium.[5] Possession therefore can be claimed on the basis of the same provisions that any private individual can rely on. This does not exclude the possibility that special claims may arise based on the lien in addition to the claims based on private law, for example, for the recovery of possession in order to execute the lien for the implementation of the public purposes 'secured' by that lien. These claims based on public law may even supersede the

1 See *Attorney General of New Zealand v. Ortiz*, [1984] A.C. 1, 24, *per* Lord Denning: "If this notice of levy [scil. by the US Government served on a US shipowner whose ship transported movable property of US delinquent tax payers] had been effective to reduce the goods into the possession of the United States Government, it would, I think, have been enforced by these courts, because we would then be enforcing an actual possessory title"; for Germany see e.g. Kegel and Schurig, *op. cit.* note 10, p. 767: *lex rei sitae* governs, *inter alia*, possession and claims arising thereof.

2 *Don Alonso v. Cornero*, (1613) Hob. 212; *Princess Paley Olga v. Weisz*, [1929] 1 K.B. 718 (CA); question reserved in *Carl Zeiss Stiftung v. Rayner and Keeler Ltd (No. 2)*, [1967] 1 A.C. 853, at pp. 924-925, 941, 962; see generally Dicey, Morris and Collins, *The Conflicts of Laws*, Vol. I, 14th edn, (London, 2006), no. 5-033, p. 108, and no. 5-053, at p. 119.

3 See e.g. Hans-Jürgen Papier in Hans-Uwe Erichsen *et al.* (eds.), *Allgemeines Verwaltungsrecht*, 12th edn (Berlin, 2002, § 40 II 4, pp. 594 ff. Rz. 11 ff.

4 E.g. Hans-Jürgen Papier, *Recht der öffentlichen Sachen*, Berlin, 3rd ed. 1998, p. 10.

5 Certain very limited exceptions exist, see *Marc Weber*, Unveräußerliches Kulturgut im nationalen und internationalen Rechtsverkehr, Berlin 2002, p. 48.

claim based on private law for recovery of possession by the owner based on ownership.[1] Be that as it may, as long as the claimant, be it a State or a private individual, rests the claim for recovery of possession on the issue of title, i.e. on 'private property', the claim remains one based on private law. Therefore, under German law, any claim based on property for the recovery of possession of a chattel is one based on private law, even if the property in question was acquired by a State under its own property law (including that State's acts of State) irrespective of the fact that this foreign property law characterizes the property in question as public. In this latter case, such public property, unknown in the German legal system, is transposed into the most similar legal structure, which is (private) property.[2]

Another legal order may well adhere to the contrary approach according to which privately acquired property is of an entirely different nature and quality from property held by the State. One consequence of the latter approach is that claims based on such 'public property', e.g. for the recovery of possession, would have to be characterized as based on that public law relating to public property and therefore as 'enforcement' of public law. Property of a foreign State acquired by way of expropriation or legislation on the protection of cultural property might then, depending on the rules on characterization under the lex fori,[3] have to be characterized as 'public property' and could not be claimed in a forum whose choice of law-rules exclude enforcement of claims based on foreign public law.

English judgments that exclude claims by foreign States to recover property if the claim relies on foreign acts of State at the time when the res was situated there can theoretically be conceptualized under this approach only in case that (1) the English lex fori distinguishes between public property and private property, (2) that the property on which the foreign State bases its claim is to be characterized, either by the English lex fori alone or additionally by the foreign lex rei sitae, as such 'public property', and (3) that the claim of a foreign State for recovery of possession of a chattel on the grounds of such public property is characterized by the English lex fori as one based on public law – a somewhat unlikely scenario. Even then, exceptions from the exclusion of an enforcement of foreign public law may exist.[4]

V. Conclusion

The application of foreign public law by domestic courts forms part of the internationally accepted choice-of-law methodology. A provision of foreign law cannot be excluded from its application for the sole reason that foreign public law will not be applied a priori. Only claims that are based on foreign public law such as claims for money on the basis of foreign revenue laws will not be heard for lack of jurisdiction. Foreign public law that affects preliminary issues relevant to claims based on private law will be applied – subject to a public policy control of the particular foreign rule in question. English choice of law follows this approach by distinguishing between 'enforcement' and 'recognition' of foreign public law. Claims by a State for the recovery of possession of chattels based on that State's title to the goods may well ground in private law even if title has been acquired by an act of State while the chattel was present on the territory of that State. In this case, 'recognition' occurs. The claim of a foreign State for the recovery of possession based on property may theoretically also ground in public law if the property in question is to be charaterised as 'public property' and if several additional conditions are met cumulatively. Only in this case 'enforcement' occurs. The reasoning of Gray J. in Iran v. Barakat remains silent on this distinction.[5] There may well be binding authority "to the effect that public laws, like penal laws, may not be enforced directly or indirectly in the English Court".[6] However, this conclusion does not touch upon the crucial issue: whether in fact 'enforcement' or 'recognition' occurs if the English court applies the Iranian legislation on the protection of cultural property. German courts would hold that recognition occurs.

1 See e.g. Marc Weber, Unveräußerliches *Kulturgut im nationalen und internationalen Rechtsverkehr*, Berlin 2002, p. 46.

2 On this doctrine of transposition in German conflicts law see e.g. Gerhard Kegel and Klaus Schurig, *Internationales Privatrecht*, 9th ed. 2004, p. 772.

3 The issue can either be characterised according to the *lex fori* or the *lex causae*, e.g. the *lex rei sitae*.

4 See e.g. *Kingdom of Spain v. Christies, Manson & Woods Ltd*, [1986] 1 W.L.R. 1120, held that the Kingdom of Spain had an arguable case that it had an equitable right to bring an action in England to protect the property of the State and that of its people from damage or to protect them from pecuniary loss.

5 See also Mara Wantuch, 'Iran v. Barakat Galleries: Eigentum an Kulturgut, dass aufgrund eines öffentlich-rechtlichen Gesetzes and den Staat fällt, kann nicht vor einem englischen Gericht eingeklagt werden kann', *Kunstrechtsspiegel* (KunstRSp) 2007 (www.ifkur.de, sub 'Kunstrechtsspiegel'), in this Issue, see below.

6 *Government of the Islamic Republic of Iran v Barakat Galleries Ltd*, [2007] EWHC 705 (QB), para. 81.