

## The Safeguarding of Foreign Cultural Objects on Loan in Germany

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### I. Introduction

Treasures of the Sons of Heaven – The Imperial Collection from the National Palace Museum in Taipei:<sup>1</sup> this is the exhibition that triggered the enactment of the German anti seizure statute. In 1992, a diplomat of the Taiwanese consulate in Bonn and the directors of the Art and Exhibition Hall of the Federal Republic of Germany,<sup>2</sup> also in Bonn, developed the idea of this ambitious project. At the beginning it received little interest from Taiwan, and the negotiations took until 1996 to convince the National Palace Museum in Taipei to support it in principle. This museum is one of Taiwan's greatest attractions. It houses more than 650,000 pieces of Chinese bronze, jade, calligraphy, painting and porcelain. The collection is estimated to be one-tenth of China's cultural treasures. However, as is generally known, Taiwan is the main island of the Republic of China. Its government, the national government of all China during

a certain time, lost control over the Chinese mainland to the People's Republic of China as a result of the Chinese Civil War and moved the collection from the Forbidden City in Beijing in 1949 when it fled to Taiwan. Obviously, the National Palace Museum sought to ensure that the exhibition would not provide the People's Republic of China with an opportunity to gain possession of the treasures while on loan in Germany. The Museum made clear that any kind of declaration by the German Government to guarantee safe conduct for the treasures against claims raised by the People's Republic of China would not be considered sufficient.<sup>3</sup> In order to make the exhibition happen, an anti-seizure statute turned out to be *conditio sine qua non*.

### II. Legislative History

On the initiative of the directors of the Art and Exhibition Hall of the Federal Republic of Germany and on the occasion of the then occurring implementation of EEC Council Directive 93/7 of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State,<sup>4</sup> the German Government extended the bill's<sup>5</sup> article 2 – article 1 provided for the implementation legislature<sup>6</sup> – that was to amend the German Act on the Protection of German Cultural Goods against Loss,<sup>7</sup> in addition to certain adjust-

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1 Ursula Toyka-Fuong (ed.), Ausstellung Schätze der Himmelssöhne. Die Kaiserliche Sammlung aus dem Nationalen Palastmuseum, Taipeh, Die Großen Sammlungen, vom 18. Juli bis 12. Oktober 2003 im Alten Museum in Berlin und vom 21. November 2003 bis 15. Februar 2004 in Bonn in der Kunst- und Ausstellungshalle der Bundesrepublik Deutschland GmbH, Katalog, Ostfildern-Ruit (2003).

2 Kunst- und Ausstellungshalle der Bundesrepublik Deutschland GmbH, <http://www.kah-bonn.de>.

3 Ingrid Fuchs, Kulturaustausch: Schätze der Himmelssöhne – „Das Unmögliche machen wir wahr“, [www.gio.gov.tw/taiwan-website/5-gp/museum/kk23.htm](http://www.gio.gov.tw/taiwan-website/5-gp/museum/kk23.htm) (18. Feb. 2009).

4 Official Journal L of 27 March 1993, p. 74 *et seq.*

5 Entwurf eines Gesetzes zur Umsetzung von Richtlinien der Europäischen Gemeinschaften über die Rückgabe von unrechtmäßig verbrachten Kulturgütern und zur Abwanderung des Gesetzes zum Schutz deutschen Kulturgutes gegen Abwanderung (Kulturgutsicherungsgesetz – KultgutSiG), BT-Drucks. 13/10789 of 26 May 1998.

6 Gesetz zur Umsetzung der Richtlinie 93/7/EWG des Rates über die Rückgabe von unrechtmäßig aus dem Hoheitsgebiet eines Mitgliedstaates verbrachten Kulturgütern (Kulturgüterrückgabegesetz – KultGüRückG), BGBl. I 1998, 3162.

7 Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung, BGBl. I 1955, 501.

ments relating to the implementation, by a provision (section 20) that reads in translation:

- (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 – subject to consent by the Federal Central Authority – issue to the lender a guarantee of return in the moment of time as determined. 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 Rückgabeusage [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.”

### III. Conditions for Issuing a Return Guarantee

In its subsection (1), the provision empowers the competent authorities to issue a return guarantee for foreign cultural goods temporarily on loan in Germany and, at the same time, regulates the respective competencies between the federal level and the states (Länder).

#### 1. Application for Return Guarantee

The return guarantee will be issued only upon application. Both parties of the loan may submit an application. German authorities report that it is usually the borrower, upon the lender’s demand, that takes the initiative.<sup>8</sup> There is no formal requirement. However the applicant needs to ensure that all the necessary information, i.e. specification of the object to be loaned, place, time and duration of the exhibition is provided.

#### 2. Competency

Competency is an important issue because lack of competency of the authority issuing the adminis-

<sup>8</sup> Sabine Boos, *Kulturgut als Gegenstand des grenzüberschreitenden Leihverkehrs*, Berlin 2005, p. 241.

trative decision “return guarantee” constitutes one of the very few possible ground for the invalidity (Nichtigkeit) of the decision under general rules of German administrative law.<sup>9</sup> In principle, the issue is easy to resolve: if the exhibition takes place in one of the Federal States, the highest administrative authority of that state is competent, i.e. a State’s Ministry (Landesministerium),<sup>10</sup> however subject to consent by the Federal Central Authority, i.e. the “Commissioner for Culture and Media”.<sup>11</sup> In case of doubts, for example if the exhibition is run by a legal person incorporated under private law having its seat in one of the states but is wholly owned by the Federal Republic of Germany,<sup>12</sup> it is the common practice of the state authority and the federal authority to each issue a return guarantee in order to avoid any uncertainty.

#### 3. “Cultural Good”

The provision does not provide for a definition, nor do the legislative materials. The scope of this term must therefore be deduced from the use of the term in other statutes and from the objective of the provision to foster the international cultural exchange<sup>13</sup> - an objective that would appear to advocate a broad interpretation.<sup>14</sup> However, the Federal Central Authority has been reported to have refused to consent to the issuing of a return guarantee for an exhibition that intended to display Adolf Hitler’s and Joseph Stalin’s jackets next to each other and to draw whatever insights from the immediate adjacency of representative clothes of the two dictators. The reason to refuse the issuing was that these objects did not count for “cultural goods”.<sup>15</sup>

<sup>9</sup> See section 44 (2) no. 3 German Act on Administrative Procedure (*Verwaltungsverfahrensgesetz*, VwVfG).

<sup>10</sup> In the Free State of Bavaria, for example, the Bavarian State Ministry of Science, Research and Art (*Bayerisches Staatsministerium für Wissenschaft, Forschung und Kunst*) is competent.

<sup>11</sup> *Beauftragter der Bundesregierung für Kultur und Medien*, having agencies in Bonn and Berlin, see German Official Journal (*Bundesgesetzblatt*) 1998 I, p. 3288.

<sup>12</sup> E.g. the Exhibition Hall of the Federal Republic of Germany is run by a Limited Liability Company situated in North Rhine Westphalia (*Nordrhein-Westfalen*), but owned by the Federal Republic of Germany.

<sup>13</sup> Explanatory Report of the German Government, BT-Drucks. 13/10789, at p. 10.

<sup>14</sup> Sabine Boos, *Kulturgut als Gegenstand des grenzüberschreitenden Leihverkehrs*, Berlin 2005, p. 248.

<sup>15</sup> Susanne Schoen, *Die rechtsverbindliche Rückgabeusage – Das “Freie Geleit” für Kulturgut*, in *Koordi-*

From a legal point of view, it might have been more convincing to simply deny the protection in exercising the discretion vested in the competent authorities because of a dubious concept of the intended exhibition, but politically it is of course easier to refer to a missing precondition for the application of the relevant statute.

#### 4. “Foreign”

Section (1) requires the cultural good to be “foreign”. Soon after the enactment doubts arose as to whether cultural objects removed from Germany by Soviet troops in the course and after the Second World War constitute “foreign” cultural goods in this sense.<sup>16</sup> However, according to the legislative materials, the anti-seizure statute empowers the competent authorities to issue a return guarantee for cultural goods “that are loaned from abroad to the Federal Republic, for example for exhibitions”.<sup>17</sup> Consequently, the only requirement is that the cultural object be situated abroad before it comes to Germany.<sup>18</sup> This understanding is supported by the Governmental Reply to the Parliamentary Interrogation demanded by certain Members of Parliament about the experiences with the new anti-seizure statute,<sup>19</sup> because the Government announced to exercise its discretion not to issue a return guarantee in respect to cultural goods removed from Germany by Soviet troops (“Beutegut”). If “foreign” were to be understood as requiring the cultural good to be of a “foreign nationality” or to be property of a foreign person, the provision would not grant any discretion to issue a return guarantee in the first place.<sup>20</sup>

nierungsstelle für Kulturgutverluste Magdeburg/Beauftragter der Bundesregierung für Kultur und Medien, Magdeburg 2007, p. 79, 85.

16 E.g. *Susanne Schoen*, Kulturgüterschutz bei – illegaler – Rückkehr kriegsbedingt verbrachter Kulturgüter aus Russland nach Deutschland, *Neue Juristische Wochenschrift* 2001, 537, at p. 541.

17 Explanatory Report of the German Government, BT-Drucks. 13/10789, at p. 10: “Die Bestimmungen ermöglichen die Zusicherung von ‘Freiem Geleit’ für Kulturgut, das aus dem Ausland zum Beispiel für Ausstellungen in die Bundesrepublik Deutschland ausgeliehen wird”.

18 *Sabine Boos*, Kulturgut als Gegenstand des grenzüberschreitenden Leihverkehrs, Berlin 2005, p. 249.

19 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 – Drucksache 14/6603, BT-Drucks. 14/6686 of 16 July 2001.

20 See also *Bernhard Kempen*, Internationaler Kulturgüterausaustausch: Die Bedeutung der “Rechtsverbind-

#### 5. “Exhibition”

The clear wording of the statute excludes its application to loans of cultural objects e.g. for the purpose of scientific research and study outside exhibitions – which supports the submission that the policy underlying the anti-seizure statute is the facilitation of public access to the cultural objects.<sup>21</sup> In turn, public access provides for the criterion whether or not the intended activity constitutes an “exhibition”.<sup>22</sup>

#### 6. “Temporarily”

Subsection (1) grants immunity only to cultural objects temporarily on loan from abroad. Permanent and presumably even long term loans are thus not covered.<sup>23</sup> By limiting the time during which a return guarantee is available, the statute takes account of the effect of the return guarantee on third party rights.<sup>24</sup>

#### 7. Discretion

If all the aforementioned requirements are fulfilled, section (1) grants the competent authorities discretion whether or not to issue a return guarantee. Any such discretion must be exercised, in light of the constitutionally guaranteed rule of law (Rechtsstaatsprinzip), in a rational and proportional way

lichen Rückgabeusage”, in *Michael Brenner et al.* (eds.), *Der Staat des Grundgesetzes – Kontinuität und Wandel*, Festschrift für Peter Badura zum siebzigsten Geburtstag, Tübingen 2004, p. 1079, at p. 1089; *Burkhard Hirsch*, Die Bedeutung der Zusage „freien Geleits“ für Kulturgüter, *Neue Juristische Wochenschrift* 2001, 1627.

21 On the importance and history of public access as one of the interests considered by anti-seizure statutes see e.g. *Erik Jayme*, *Globalization in Art Law: Clash of Interests and International Tendencies*, 38 *Vand.J.Transn'l L.* 928 (2005), at p. 929.

22 *Sabine Boos*, op.cit., at p. 250.

23 Section 2 of the Austrian Anti-Seizure Statute, Federal Act on the Temporary Immunity of Loans of Cultural Goods for Public Exhibitions (*Bundesgesetz über die vorübergehende sachliche Immunität von Kulturgut-Leihgaben zum Zweck der öffentlichen Ausstellung*), *Austrian Official Journal (BGBl.)* I No. 133/2003, as modified in *BGBl.* I No. 65/2006 – modelled along the lines of the German statute – expressly restricts the maximum time of a return guarantee to one year. Even though there is no such maximum time under the German statute, the competent authorities would presumably be hesitant to exercise their discretion to issue a return guarantee of a longer duration than one year.

24 *Sabine Boos*, op.cit., at p. 250.

that takes account of the objectives of the provision that grants the discretion, but also of all other relevant circumstances. In its Reply to the Parliamentary Interrogation on the relevant criteria,<sup>25</sup> the Government stated “political reasons” without any further specification, but also expressed its conviction that it is entitled to refuse to consent to or refuse to issue a return guarantee for evidently misappropriated property of private individuals or public entities, “like in the case of ‘Beutegut’ “. <sup>26</sup> Misappropriated property evidently covers property misappropriated in the Holocaust. One may expect, therefore, that no return guarantee would be issued or consented to in this case either. However, the critical point is, how the competent authorities acquire the necessary knowledge to exercise their discretion on the basis of these guidelines. Unfortunately, applications for return guarantees are not published prior to the issuing which would provide potential third party claimants with the opportunity to submit objections to the authorities.<sup>27</sup> The German legislator should consider introducing such opportunity because it would greatly enhance the legitimacy of the return guarantee once it is issued.

Whereas at the time the Government had answered the follow-up question to the negative whether such a case had already arisen,<sup>28</sup> meanwhile the Federal Central Authority has been reported to have refused to grant a return guarantee at least once recently<sup>29</sup> when it was confronted with the request for protection by a return guarantee of the photo album of Karl Otto Koch, a high-ranking SS officer and commandant of the concentration camp Sachsenhausen at the time when the photos were taken. This album was to be loaned from Russia to

Germany for exhibition at the Brandenburg Memorials Foundation, Memorial and Museum Sachsenhausen, after it had reappeared in the archives of the so-called People’s Commisariat for Internal Affairs, the NKVD. However, since the Federal Republic of Germany, in its capacity as the state being identical with the German Reich of 1871 (including the period where it was called “Third Reich”),<sup>30</sup> claims to be entitled to the photo album, no return guarantee was issued, and digital copies of the album were displayed instead.<sup>31</sup>

### III. Legal Effects of the Return Guarantee

As the two distinct subsections in section 20 indicate, a return guarantee produces legal effects on two levels, subsection (3) on the level of substantive law and subsection (4) on the level of procedural law. The latter will be considered first, since the effects on this level are quite straight forward, whereas the effects under subsection (3) are difficult to assess.

#### 1. Procedural Law

Subsection (4) excludes any judicial proceedings on recovery, interim measures securing enforcement of claims for money (*Arrestverfügung*),<sup>32</sup> attachments and seizures. The term “seizure” includes those under criminal procedural law.<sup>33</sup> Interim measures other than those securing enforcement of claims for money (*einstweilige Verfügung*)<sup>34</sup> are not mentioned in subsection (4), although these measures could aim, inter alia, at the freezing of a chattel such as a cultural object on loan from abroad for a future enforcement of an action for recovery of possession of that object. However, the ratio of subsection (4) is understood to allow the extension of its effects to this type of interim measu-

25 See *supra* note 19, at p. 2, Question no. 7.

26 See already *supra* note 19 and accompanying text.

27 Compare the Swiss Federal Act on the International Transfer of Cultural Property (Cultural Property Transfer Act, CPTA) of June 20, 2003, 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, 1968, 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”.

28 See note 19, at p. 2, Question no. 9.

29 Telephone Conversation of 26 Sept. 2006 with ROAR Georg Goßler, Commission for Culture and Media.

30 German Federal Constitutional Court (*Bundesverfassungsgericht*), decision of 31 July 1973 – 2 BvF 1/73, *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 36, pp. 1 *et seq.*

31 *Regina Mönch*, Fotoausstellung: Das Album des Mörders, *Frankfurter Allgemeine Zeitung*, 12 September 2006 No. 212, p. 37.

32 See sections 916 *et seq.* German Code of Civil Procedure (*Zivilprozessordnung*, ZPO).

33 See sections 94 *et seq.* German Code of Criminal Procedure (*Strafprozessordnung*, StPO), *Bernhard Kempen* (*supra* note 20), p. 1091; *Sabine Boos*, p. 255; *Reinhard Mußnug*, *Kunstwerke und anderes Kulturgut*, in *Harald Hohmann/Klaus John* (eds.), *Kommentar zum Ausfuhrrecht*, München 2002, p. 1818, at p. 1828.

34 See sections 935 *et seq.* German Code of Civil Procedure (*Zivilprozessordnung*, ZPO).

re.<sup>35</sup> It is important to note that subsection (4) thus only excludes proceedings for recovery of the loaned object, however not proceedings on other issues such as e.g. damages for the unlawful retention of the object or unlawful use. The protection that is granted by the return guarantee is therefore simply to guarantee the return – no more, no less. Whether the presence of the loaned object protected by the return guarantee validly constitutes international jurisdiction of the German courts to hear actions for damages under section 23 German Code of Civil Procedure is unclear. According to this provision any foreign party may be sued in any matter in German courts as soon as any of his assets is present within Germany. Presumably, the return guarantee does not exclude the application of this ground of jurisdiction in actions other than for recovery. However, vis-à-vis defendants domiciled in other EU Member States, the application of this provision is pre-empted by the Brussels I-Regulation<sup>36</sup> according to its Article 3<sup>37</sup> in connection with Exhibit I as being generally exorbitant, even though actions relating to the res present on the territory cannot be considered to be grounded on exorbitant jurisdiction. Jurisdiction based on the presence of a chattel on the territory of the state whose courts have been seized with the matter is not available under the Brussels I-Regulation.<sup>38</sup>

## 2. Substantive Law

According to subsection (3) no third party rights can be invoked against the lender's claim for return of the loan. The nature of this claim is of no

<sup>35</sup> *Bernhard Kempen* (supra note 20), p. 1091.

<sup>36</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters („Brussels I Regulation“), Official Journal L 012 of 16 January 2001, p.1 – 23.

<sup>37</sup> Article 3 Brussels I-Regulation reads: “1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter. 2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them“.

<sup>38</sup> However, it seems that section 23 German Code of Civil Procedure is well available for interim measures under Article 31 Brussels I-Regulation that refers to the ground of jurisdiction under national law. According to ECJ, Judgment of 17 November 1998, Case C-391/95 – *Van Uden*, a substantial connection to the Member State whose courts are seized is necessary – a precondition evidently met by interim measures in connection with a loan present on the territory of the respective Member State whose courts are seized.

relevance. Therefore, subsection (3) applies to contractual claims as well as to claims of unjust enrichment in the case of invalidity of the loan agreement. The wording of subsection (3) focuses on rights of third parties that can be raised as a defence against the lender's claim for return of the loaned object and thus might not fully exclude any third party rights arising from the status as owner, in particular not claims for damages that arise from the violation of the (alleged) ownership position of the third party by either the lender or the borrower or both. On the other hand, the Explanatory Report describes the effects of subsection (3) as follows: “The invoking of private rights to the loan must stand back for the time of the presence within the Federal Republic's territory”.<sup>39</sup> Arguably, this suspension of private rights includes damages substituting the loan or arising from its unlawful use by possessors in connection with the loan. The presence of the object in Germany under the protection of a return guarantee would then have to be considered rightful in its entirety and not constituting any tort or other violation of the rights of a potentially true owner other than the lender. Such interpretation would be in conformity with the ratio of the statute to encourage lenders to send their cultural objects to exhibitions abroad. Such interpretation would not cover torts already committed elsewhere. However, there is no court decision on this point so far. In addition, subsection (3) might be of relevance for claims raised in foreign courts for recovery while the loan is temporarily in Germany. For, under the *lex rei sitae*, the law of the place where the res is situated governs issues relating to title. If the foreign court adheres to this choice-of-law rule and thus applies German substantive law, then subsection (3) will have the effect to suspend any claim based on ownership that conflicts with the lender's claim for return of the loan. Potential claimants therefore will presumably be unable, even in foreign courts, to benefit from the change of the substantive rules brought about by the transfer of the cultural object to Germany.

<sup>39</sup> Entwurf eines Gesetzes zur Umsetzung von Richtlinien der Europäischen Gemeinschaften über die Rückgabe von unrechtmäßig verbrachten Kulturgütern und zur Abwanderung des Gesetzes zum Schutz deutschen Kulturgutes gegen Abwanderung (Kulturgutsicherungsgesetz – KultgutSiG), BT-Drucks. 13/10789 of 26 May 1998, p. 10.

## IV. Duration of the Legal Effects

### 1. Beginning

Subsection (2) expressly requires the return guarantee to be validly issued prior to the import of the cultural object. The issuing of a return guarantee after the object is present in Germany is therefore impossible. The policy underlying this restriction is dubious.

### 2. Withdrawal

As opposed to administrative decisions in general,<sup>40</sup> the return guarantee cannot be withdrawn, even if it turns out to be unlawful. The issuing authorities thus do not have any power to correct a decision once it assumed validity at the moment the addressee receives it. However, if the return guarantee is invalid for reasons of substantive law, no withdrawal is necessary because an invalid administrative decision does not assume any legal effects.<sup>41</sup> But invalidity only occurs in very limited, exceptional circumstances.

### 3. Suspension

A third party may nevertheless challenge the return guarantee in administrative court proceedings, and such action (*Anfechtungsklage*)<sup>42</sup> usually suspends the effects of the administrative decision under challenge until the final decision on the merits.<sup>43</sup> However, section 80(2) no. 4 German Act of Administrative Court Proceedings excludes the effect of suspension of actions to challenge administrative decisions in cases that warrant the immediate execution in the public interest or in the prevailing interest of the other part, and it is likely that section 20 German Act on the Protection of German Cultural Goods against Loss expresses an interest of the public as well as the prevailing of the interest of the lender in this sense. Even if so, it would have been more transparent if section 20 had expressly ordered the immediate executability of the return guarantee, as other statutes do in respect to other administrative decisions.<sup>44</sup> The lender may therefore be well advised to apply proactively to the issuing authority to expressly order the

immediate execution of its return guarantee, which is possible under general administrative law. The third party can still react by applying for interim measures against the order of immediate executability.<sup>45</sup> This decision turns on the prospects of success in the main proceedings about the challenge of the return guarantee that are considered to be very limited. The only possible grounds for success in the main proceedings of setting aside the return guarantee are conflicting claims under the European Directive on the return of cultural objects unlawfully removed from the territory of a Member State<sup>46</sup> and under public international treaty law for foreign states to recover illegally removed cultural property.<sup>47</sup> Although this matter is not fully settled, there is reason to argue that the prospects of success in the main proceedings are so small that a court asked for interim measures against the return guarantee would not grant it – at least until a court decision has been handed down to the effect that the claims of foreign states under public international treaty law and the European Directive as implemented in Germany do in fact conflict with a return guarantee. Another situation in which the prospects of success in the main proceedings may prevail is that the third party claimant does not have access to justice anywhere else in the world. In this case, the constitutionally guaranteed right to access of justice assumes more weight than usually,<sup>48</sup> and it cannot be excluded that a court might decide under such scenario that the third party claimant should succeed in the main proceedings in setting aside the return guarantee, thus ordering interim measures against the return guarantee already during the loan. Therefore, even though a third party action to challenge the return guarantee will hardly ever have success, it can

44 See section 80 (2) no. 3 German Code of Administrative Court Proceedings (*Verwaltungsgerichtsordnung*, VwGO).

45 Sections 80a (3), 80 (5) German Code of Administrative Court Proceedings (*Verwaltungsgerichtsordnung*, VwGO).

46 Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, Official Journal L 74 of 27 March 1993, p. 74 – 79; for a detailed discussion of its interrelation with the return guarantee see below sub V.

47 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of Paris, 14 November 1970; for the detailed discussion of its interrelation with the return guarantee see below sub VI.

48 See *Matthias Weller*, Die rechtsverbindliche Rückgabebzusage, in *Uwe Blaurock et al (eds.)*, Festschrift zum 70. Geburtstag, Berlin 2009, forthcoming.

40 See sections 48, 49 German Act on Administrative Procedure (*Verwaltungsverfahrensgesetz*, VwVfG).

41 See section 44 German Act on Administrative Procedure (*Verwaltungsverfahrensgesetz*, VwVfG).

42 Section 42 German Code of Administrative Court Proceedings (*Verwaltungsgerichtsordnung*, VwGO).

43 Section 80 (1) German Code of Administrative Court Proceedings (*Verwaltungsgerichtsordnung*, VwGO).

cause some litigation on the occasion of the loan – to the detriment of the objective of the anti-seizure statute to encourage foreign lenders. The legislator should consider eliminating this danger.

#### 4. Termination

According to subsection (4) the legal effects of the return guarantee in respect to the protection against enforcement measures expire at the moment when the lender receives the cultural object. Evidently, the statute imagines the scenario that the lender receives the object outside Germany. However, the wording covers the interpretation that the legal effects expire already if the lender receives, for example through his agents, the object within Germany. The lender should therefore ensure that the organization of the transport does not give rise to the argument that the object was returned to the lender already in Germany and that enforcement measures was no longer barred by the return guarantee.

#### V. European Community Law

According to Article 5 Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State,<sup>49</sup> any Member State of the European Union may, in the courts of the Member State where the object is present, initiate proceedings against the possessor of a cultural object unlawfully removed from its territory with the aim of securing the return of that object. Such a claim conflicts with a return guarantee issued under an anti-seizure statute, and several arguments have been put forward in order to resolve this conflict. On the one hand, EC law including secondary legislation such as Directives as implemented in the national legal orders pursuant to Article 249 (3) EC takes priority over national law, and national law must be interpreted in light of EC law. Therefore, even if section 20 (4) of the German Act on the Protection of German Cultural Property applies to claims under public law of other Member States such as the one under EC Directive 93/7/EEC,<sup>50</sup> such interpretation must

still be in conformity with Directive 93/7/EEC.<sup>51</sup> 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 well 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.<sup>52</sup> In as much as immunity for artworks on loan from abroad is to be conceptualized as a rule of customary international law,<sup>53</sup> such rule forms part of EC law on the level of EC primary law<sup>54</sup> and thus reinforces the argument of a teleological reduction of Directive 93/7/EEC. In addition, one may argue that temporary loans are outside the competence of the EC to regulate the internal market because it falls within title XII of the EC Treaty (“Culture”) that merely grants a competency to support non-commercial cultural exchange but no competency to enact directives.<sup>55</sup> To sum up: it is almost certain that a return guarantee, once issued, cannot be set aside by administrative proceedings during the loan on the grounds that it violates Community law.

49 Official Journal L 74 of 27 March 1993, p. 74 – 79.

50 Such interpretation is put forward by *Julia El-Bitar*, Das Verhältnis zwischen „Freiem Geleit“ und gemeinschaftsrechtlicher Rückgabeklage, *Zeitschrift für europäisches Wirtschaftsrecht* (EuZW) 173, at p. 176; but see Explanatory Report of the Government to the Draft of the German Act on the Protection of German Cultural Property, BT-Drucks. 13/10789, p. 10: „private Rechte“ [private rights], i.e. not those of states.

51 Doubts are expressed by *Isabel Kühn*, *Internationale Leihverkehr*, Köln 2004, p. 25; *Angelika Fuchs*, Kulturgüterschutz im Kulturgutsicherungsgesetz, *Praxis des internationalen Privat- und Verfahrensrechts* (IPRax) 2000 281, at p. 286; but compare *Julia El-Bitar*, 2005 *Zeitschrift für europäisches Wirtschaftsrecht* (EuZW) p. 173, at p. 176.

52 *Erik Jayme/Alexander Geckler*, *Internationale Kunstausstellungen: „Freies Geleit“ für Leihgaben*, 2000 IPRax 156, at p. 157.

53 See *Matthias Weller*, Immunity for Artworks on Loan? A Review of International Customary Law and Municipal Anti-seizure Statutes in Light of the Liechtenstein Litigation, *Vanderbilt Journal of Transnational Law* 2005, 997 – 1039.

54 European Court of Justice, Case 21 – 24/72, ECR (1972), 1219 - *International Fruit Company*; *Werner Schroeder* in *Rudolf Streinz*, *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaften*, Munich 2003, Art. 249 EGV no. 19; *Rudolf Geiger*, *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft*, Munich, 3rd ed. 2000, Article 220 EGV no. 23; *Astrid Epiney*, *Zur Stellung des Völkerrechts in der EU*, 1999 EuZW 5, at p. 11.

55 *Bernhard Kempen*, op.cit., note 20, at p. 1096.

## VI. UNESCO Convention of 1970

Germany has recently ratified the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of Paris, 14 November 1970<sup>56</sup> and has already implemented it in German law,<sup>57</sup> entering into force on 29 February 2008.<sup>58</sup> Claims granted to Contracting States under the implementation legislation are considered to be covered by the return guarantee. However, discretion to issue the return guarantee has to be exercised to the effect that no rule of law is violated. If the claim under the implementation legislation also applies to loans in Germany, a return guarantee must not be issued in order to avoid conflicts. If it is issued nevertheless, it might be subject to successful challenge. However, no court authority is available on the issue whether and if so to what extent the implementation legislation also covers loans. German academic writing has so far argued that Article 7 a Sentence 2 and Article 13 b of the UNESCO Convention only creates obligations of notification and general co-operation in respect to illegally removed objects, but no claim for recovery, whereas Article 7 b UNESCO Convention provides for a claim for the recovery of certain stolen objects but does not expressly extend to loaned objects although it might well be interpreted to this effect.<sup>59</sup> Even if so, Germany has only implemented a claim in respect to illegally exported cultural property, not to stolen property.<sup>60</sup> This might violate Germany's treaty obligations but would not af-

fect the legality within the domestic legal system of Germany of any return guarantee in respect to stolen cultural property. In respect to the claim for the recovery of illegally exported cultural property, Germany is anyway free under the UNESCO Convention to curtail this claim for return guarantees. To put it differently: the return guarantee, once issued, cannot be set aside by administrative proceedings during the loan on the grounds of the Convention.

## VII. European Convention on Human Rights

Since anti-seizure statutes often do not merely grant immunity from seizures but also block any court proceedings about claims for restitutions,<sup>61</sup> they clearly interfere with a claimant's right to access of justice as guaranteed e.g. by Article 6 § 1 European Convention on Human Rights.<sup>62</sup> However, such limitation may be justified if the infringing measure pursues a legitimate aim.<sup>63</sup> In the Liechtenstein case that involved a loan from the Czech Republic to Germany (prior to the enactment of the anti-seizure statute) protected against any court proceedings in Germany under international treaty law in connection with reparations for World War II,<sup>64</sup> the European Court of Human Rights 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 unli-

56 10 I.L.M. 289.

57 Gesetz zu dem Übereinkommen vom 14. November 1970 über die Maßnahmen zum Verbot und zur Verhütung der rechtswidrigen Einfuhr, Ausfuhr und Übereignung von Kulturgut, German Official Journal (BGBl.) 2007 II No. 12 of 25 April 2007, p. 626 et seq.; 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, BGBl. 2007 I Nr. 21 of 23 May 2007, p. 757 et seq. For an in-depth account from a comparative perspective see *Matthias Weller et al.* (eds.), *Kulturgüterschutz – Künstlerschutz*, Tagungsband des II. Heidelberger Kunstrechtstags am 5. und 6. September, Baden-Baden 2009, pp. 206.

58 Bekanntmachung über das Inkrafttreten des Übereinkommens über Maßnahmen zum Verbot und zur Verhütung der rechtswidrigen Einfuhr, Ausfuhr und Übereignung von Kulturgut of 28 March 2008, BGBl. 2008 II Nr. 7, p. 235, of 8 April 2008.

59 *Sabine Boos*, *Kulturgut als Gegenstand des grenzüberschreitenden Leihverkehrs*, Berlin 2006, p. 52 et seq.

60 See section 6 (2) 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, BGBl. 2007 I Nr. 21 of 23 May 2007, pp. 757 et seq.

61 E.g. section 20 (4) German Act on the Protection of Cultural Property: "Until recovery by the lender judicial proceedings on recovery, interim measures, attachments and seizures are inadmissible"; 22 U.S.C. Section 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“.

62 ECHR July 12, 2001, Case of Prince Hans-Adam II of Liechtenstein v. Germany, Application no. 42527/98, no. 52.

63 ECHR July 12, 2001, Case of Prince Hans-Adam II of Liechtenstein v. Germany, Application no. 42527/98, no. 53.

64 For a more in-depth account of the background of this case see *Matthias Weller*, *Immunity for Artworks on Loan? A Review of International Customary Law and Municipal Anti-seizure Statutes in Light of the Liechtenstein Litigation*, *Vanderbilt Journal of Transnational Law* 2005, 997 – 1039.

kely prospect".<sup>65</sup> In light of such a "fortuitous connection between the factual basis of the applicant's claim and German jurisdiction",<sup>66</sup> the Court finally, in weighing the conflicting interests involved here, came to the conclusion that the German measure was justified. The relevant ratio 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 European Convention on Human Rights. This ratio 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 any court proceedings will probably be held justified in light of the reduced weight of the claimant's guarantees and of the legitimate purpose of cultural exchange which many of the member states of the Council of Europe as well as the European Union endorse.<sup>67</sup> Whether such holding deserves support is not self-evident: the Prince as well as regularly the claimants in international art loan cases factually do not have access to justice at the "genuine forum",<sup>68</sup> i.e. at 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. In addition, third party claims for recovery of artworks on loan from abroad may arise in states whose courts do in fact have closer connections to the ownership dispute and would perhaps not be regarded as a remote forum. In the French *Shchukin* litigation,<sup>69</sup> for example, the claimant was a French national.

65 ECHR July 12, 2001, Case of Prince Hans-Adam II of Liechtenstein v. Germany, Application no. 42527/98, no. 67.

66 ECHR July 12, 2001, Case of Prince Hans-Adam II of Liechtenstein v. Germany, Application no. 42527/98, no. 68.

67 See *supra* note 23 and accompanying text.

68 ECHR July 12, 2001, Case of Prince Hans-Adam II of Liechtenstein v. Germany, Application no. 42527/98, no. 66.

69 Tribunal de Grande Instance, Paris, judgment of 05 march 1993; see e.g. *Ruth Redmond-Cooper*, *Art, Antiquity & Law* 1996, 1 ff.

Although nationality is, if at all, a weak connecting factor in the context of international jurisdiction,<sup>70</sup> the case grounds 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, i.e. to guarantee the return of artworks on loan from abroad which might also be taken into account in the weighing of interests to be carried out by the European Court of Human Rights in comparable cases.

### VIII. Conclusion

The safeguarding of foreign cultural objects on loan in Germany grounds on an administrative decision, the "legally binding return guarantee (*rechtsverbindliche Rückgabeusage*)", that bars the access of any third party claimants to the courts raising claims that conflict with the lender's claim for the recovery of the loan. Claims for damages are not barred. The competent authorities will only exercise their discretion to issue a return guarantee if the loaned object has not been misappropriated in the Holocaust and is no "Beutekunst". The authorities will further take into account whether the return guarantee would conflict with claims of foreign states under the implementation legislation for the 1970 UNESCO Convention and the European Directive 93/7/EEC. Once issued the return guarantee is safe under almost any scenario, even if challenged in proceedings before administrative courts with interim measures during the loan. The only conceivable exception is the case where the third party claimant does not have access to justice anywhere else in the world. However, no court authority to this point is available so far. In sum, it seems that the return guarantee provides for a balanced approach acceptable to both lenders and third party claimants. However, the effectiveness of the return guarantee would be improved if administrative proceedings to challenge the issuing of the return guarantee were excluded. And the legitimacy of it would be greatly enhanced if third parties had the opportunity to raise objections against the issuing prior to the loan upon timely publication of the application by the lender. The German legislator should consider amending the German anti-seizure statute along these lines.

70 See again Article 3 (2) and Annex I (Articles 14 and 15 of the French Civil Code) of the Brussels I Regulation and *supra* note 36.