

## Immunity for Works of Art and Cultural Property loaned by Foreign States under Customary International Law: Recent German Case Law

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### I. Introduction

From 17 October 2009 to 14 March 2010 the State Museum (*Landesmuseum*) of the Federal State (*Bundesland*) of Baden-Württemberg, Germany, hosted the exhibition „Treasures of the Ancient Syria – the Discovery of the Kingdom of Qatna“, to which the National Museum of Syria in Damascus lent two items from its collection. A victim of the terrorist attack of 27 August 1983 against the French “Maison de France” in Berlin took the occasion and instituted proceedings for attachment of these items in order to secure the successful enforcement of a future judgment about claims for compensation for pain and suffering. The court of first instance rejected the motion for pre-judgment attachment.<sup>1</sup> On appeal, the Court of Appeal of Berlin (*Kammergericht*) confirmed the decision.<sup>2</sup> Since neither the National Museum of Syria as the lender nor the State Museum of Baden-Württemberg as the borrower had applied for a return guarantee granting immunity from seizure by virtue of an administrative decision by the competent authorities, the turning point of the decision was whether the loans by Syria are protected against seizure under the rules of customary international law.

### II. Immunity from Seizure of property used for public purposes

The German Federal Constitutional Court (*Bundesverfassungsgericht*), exclusively competent to assess existence and scope of rules of customary international law under Article 100 (2) German Basic Law (*Grundgesetz*) for the German do-

mestic legal order, had previously ruled that seizure or any kind of attachment of property of a foreign state without that state’s consent is inadmissible, if and insofar the property in question serves public purposes of that state.<sup>3</sup> Property serves public purposes if the property is used for *acta iure imperii* including, in particular, the diplomatic representation of the foreign state,<sup>4</sup> but also other public acts.<sup>5</sup>

### III. Cultural Representation, in particular loans of cultural property, as *acta iure imperii*

The *Bundesverfassungsgericht* has acknowledged that the cultural representation of a foreign state in Germany constitutes a public purpose.<sup>6</sup> Therefore, the Federal Court of Justice (*Bundesgerichtshof*) held recently that the running of the “Russian House of Science and Culture” (*Russisches Haus der Wissenschaft und Kultur*) in Berlin by the Russian Federation may qualify as an *actus iure imperii* and that property used for the running of the House thus is used for public purposes, thereby immune from seizure or attachment by German authorities.<sup>7</sup> In an earlier case, the Court of Appeal of Berlin (*Kammergericht*) had also held that cul-

3 Bundesverfassungsgericht, decision of 13 December 1977 – 2 BvM 1/76, Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 46, 342, Ls. (*ratio*) no. 8 – *philippinisches Botschaftskonto*.

4 Bundesverfassungsgericht, decision of 12 April 1983 – 2 BvR 678/81, Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 64, 1, para. 130 – *National Iranian Oil Company*; Bundesgerichtshof, decision of 04 October 2005 – VII ZB 8/05, Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts (IPRspr) 2005, Nr 91, S. 220, Ls. (*ratio*) no. 1.

5 Recently Bundesgerichtshof, decision of 01 October 2009 – VII ZB 37/08, Neue Juristische Wochenschrift (NJW) 2010, p. 769, no. 20 – *Russisches Haus der Wissenschaft und Kultur*. On this decision see the case note by *Matthias Weller*, Kommentierte BGH-Rechtsprechung (LMK) 2010, 304719.

6 Bundesverfassungsgericht, decision of 06 December 2006 – 2 BvM 9/03, Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 117, 141, 155 – *Botschaftskontenpfändung, Argentinienanleihen*, para. 43.

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1 Landgericht Berlin, decision of 04 February 2010 – 13 O 48/10.

2 Kammergericht Berlin, decision of 05 March 2010 – 18 W 2/10.

tural representation of a foreign state in Germany is a public purpose in the sense of state immunity law barring any kind of seizure or attachment of property used for this public purpose. That decision involved again the loan of cultural property by a foreign state, in this case by the State of Libya for the exhibition of its cultural treasures "The Libyan Legacy" in Berlin in 2001. A victim of the terrorist attack against the discoteque "La Belle" in Berlin of 05 April 1986 had taken the opportunity to apply for pre-judgment measures in order to secure successful enforcement of a future judgment on his claims for compensation for pain and suffering.<sup>8</sup>

#### IV. Customary International Law

This case law is by no means a German peculiarity but in line with customary international law. Article 21 lit. d and e of the United Nations Convention on Jurisdictional Immunities of States and Their Property of 02 December 2004<sup>9</sup> provide: "The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c): (d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale; (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale".<sup>10</sup> However, this Convention is not yet in force.<sup>11</sup> But its adoption by the UN General

Assembly may be taken, with all due care, as a certain sign of overall acceptance,<sup>12</sup> which, of course, does not mean that Articles 21 lit. d and e thereby are turned immediately into rules of customary international law. However, other incidents of state practice support the view that a rule of customary international law is in fact emerging. In 2005, Switzerland stopped the seizure of 54 paintings with an estimated value of 1.3 billion Swiss Francs on the application by a Swiss businessman who sought to enforce an arbitral award against the Russian Federation. The paintings had been lent by the State Pouchkine Museum in Moscow to the Fondation Pierre Gianadda in Martigny, Wallis, in Switzerland, to the exhibition "French Paintings from the Collection of the Pouchkine Museum". The Swiss Government declared: "State cultural property is deemed to be public property that, as a matter of principle, must not be seized or attached".<sup>13</sup> Further, the Tribunal de Grande Instance de Paris had already held in 1993 that victims of the Russian October Revolution cannot successfully apply for pre-judgment measures against the Russian Federation without a waiver of immunity by the Russian Federation when it comes to the attachment of works of art loaned by the State Pouchkine Museum Moscow and the State Eremitage of St Petersburg to the Centre

7 Bundesgerichtshof, decision of 01 October 2009 – VII ZB 37/08, *Neue Juristische Wochenschrift* (NJW) 2010, p. 769, no. 20 – *Russisches Haus der Wissenschaft und Kultur*. For further discussion of this case see Matthias Weller, *Kommentierte BGH-Rechtsprechung* (LMK) 2010, 304719, and Matthias Weller, *Vollstreckungsimmunität: Beweislast, Beweismaß, Beweismittel, Gegenbeweis und Beweiswürdigung*, *RIW* 2010, 599.

8 Kammergericht Berlin, decision of 26 June 2002 – 9 W 176/02, *Rechtsprechung des Kammergerichts* (KGR) Berlin 2002, 356.

9 GA Res. 59/38, UN Doc. A/59/49.

10 For more detailed information on these provisions see Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries, ILC-Yearbook 1991 Vol. II, Part II, pp. 12 *et seq.*, in particular pp. 58 *et seq.*

11 According to its Art. 30 (1), the Convention enters into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-

General of the United Nations. Currently, there are 28 signatory states and 10 contracting states, UN Treaty Collection, Status of the UN Convention on State Immunity and Their Property, (<http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20III/III-13.en.pdf> 31. October 2010).

12 *Kerstin Odendahl*, *Immunität entliehener ausländischer staatlicher Kulturgüter*, *Aktuelle Juristische Praxis/Pratique Juridique Actuelle* (AJP/PJA) 2006, 1175, 1180.

13 Swiss Government Department of Foreign Affairs (*Eidgenössisches Departement für Auswärtige Angelegenheiten*), Information of 16 November 2005, [www.admin.ch/cp/d/437b6673\\_1@fwsrvq.html](http://www.admin.ch/cp/d/437b6673_1@fwsrvq.html) (31 October 2010); see e.g. *Matthias Weller*, *Völkerrechtliche Grenzen der Zwangsvollstreckung – vom Botschaftskonto zur Kunstleihgabe*, *Der deutsche Rechtspfleger* (Rpfleger) 2006, 364, 370; *Kerstin Odendahl*, *Immunität entliehener ausländischer staatlicher Kulturgüter*, *AJP/PJA* 2006, 1175 ff.; *Hansjörg Peter*, *Les tableaux du Musée du Pouchkine de Moscou, Schuldbeitreibung und Konkurs* 70 (2006), S. 61 ff.; *Matthias Weller*, *Freies Geleit für die Kunst – die Schweiz setzt einen Maßstab für Leihgaben im Völkerrecht*, *Frankfurter Allgemeine Zeitung* (FAZ) of 25 November 2005, Nr. 275, p. 35.

George Poumpidou.<sup>14</sup> Finally, a growing number of states have enacted municipal anti-seizure statutes granting immunity to loans from abroad by states (and private lenders) to exhibitions.<sup>15</sup> The Belgium legislator, for example, expressly stated in the legislative materials that the enactment of the municipal statute only “confirms” and “reinforces” immunity as already granted by other sources of law.<sup>16</sup>

## V. Conclusion

Therefore, it seems possible by now to assume a rule of customary international law granting immunity for works of arts or cultural property by foreign states to exhibitions in the host state if the exhibition serves the purpose of cultural representa-

tion by the foreign state.<sup>17</sup> For, the new element of this rule merely lies in the acknowledgment that the loan of works of art and cultural property constitutes one of other modes of cultural representation by a foreign state in the host state.<sup>18</sup> Once this small step is taken, it is clear that property used for the purpose of cultural representation falls within the general rule of customary international law that property used for *acta iure imperii* of a state cannot be seized or attached while present on the territory of another state. The practical importance of this rule will continue to grow in the future.<sup>19</sup>

<sup>14</sup> Tribunal de Grande Instance (TGI) Paris, judgment of 05 March 1993, RG no. 6218/93; see e.g. *Leila Anglade*, Anti-Seizure statutes in art law – the influence of „La Danse“ on French law, in *Breen*, Liber memorialis Professor James C. Bradley, Dublin 2001, pp. 3 ff.; see also *Ruth Redmond-Cooper*, Art, Antiquity & Law 2006, 1 ff.

<sup>15</sup> See e.g. *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* 38 (2005), 997. For the German anti-seizure statute in section 20 Kulturgüterschutzgesetz (KultGSchG) see e.g. *Weller*, Die rechtsverbindliche Rückgabebezugung, in Uwe Blaurock et al. (Hrsg.), Festschrift für Achim Krämer zum 70. Geburtstag, DeGruyter-Verlag Berlin 2009, 721 ff.; *Matthias Weller*, The Safeguarding of Foreign Cultural Objects on Loan in Germany, *Art, Antiquity & Law* 2009, 63 – 77 = *Aedon – Rivista di Arte e Diritto* online 2/2009, [www.aedon.mulino.it](http://www.aedon.mulino.it) = *KunstRSp* 2009, 182 ff.; *Erik Jayme*, Neue Entwicklungen im internationalen Kunstrecht, in *Pauger* (Hrsg.), Kunst im Recht – 4. Fakultätstag der Rechtswissenschaftlichen Fakultät am 16. Mai 2003, Graz 2003, S. 13, 17 ff.; *Erik Jayme*, Das Freie Geleit, Vorlesungen und Vorträge im Ludwig-Boltzmann-Institut für Europarecht Bd. 11, Wien 2001.

<sup>16</sup> *Chambre des Représentants de Belgique*, 27 avril 2004, Projet de Loi modifiant le Code judiciaire en vue d’instituer une immunité d’exécution à l’égard des biens culturels étrangers exposés publiquement en Belgique, Exposé des Motifs, DOC 51 1051/001, p. 4 : « Rien ne fait obstacle à ce que cette immunité soit consacrée et renforcée dans une disposition de droit positif » ; see also *Frédéric Dopagne*, Immunité d’exécution et biens culturels étrangers : à propos de l’article 1412ter du Code judiciaire, *Journal des Tribunaux* 2005, 2.

<sup>17</sup> See also e.g. *Andrea Gattini*, Immunity from Measures of Constraint for State Cultural Property on Loan, in *Buffard* et al. (Hrsg.), *International Law between Universalism and Fragmentation*, Festschrift in Honour of Gerhard Hafner, Leiden/Boston 2008, S. 421, 437; *Kerstin Odendahl*, Immunität entliehener ausländischer staatlicher Kulturgüter, *Aktuelle Juristische Praxis/Pratique Juridique Actuelle (AJP/PJA)* 2006, 1175, 1182; *Sabine Boos*, Kulturgut als Gegenstand des grenzüberschreitenden Leihverkehrs, Berlin 2006, p. 240; *Matthias Weller*, Völkerrechtliche Grenzen der Zwangsvollstreckung – vom Botschaftskonto zur Kunstleihgabe, *Der deutsche Rechtspfleger (Rpfleger)* 2006, 364, 370; *Matthias Weller*, *Vand.J.Transn'l. L.* 38 (2005), 997, 1023; *Erik Jayme/Matthias Weller*, *IPRax* 2005, 391, 392 f.; *Jerôme Candrian*, L’immunité des Etats face aux Droits de l’Homme e à la protection des biens culturels, Zurich 2006, p. 739; but compare *Isabel Kühn*, *Der internationale Leihverkehr der Museen*, Cologne 2004, p. 28; as a matter of his PhD thesis the issue is being analysed by *Nout van Woudenberg*, *Is the Cultural Property of State Immune from Seizure Under Customary Law?*, *American Society of International Law, Cultural Heritage & Arts Review* 1 (2010), p. 36.

<sup>18</sup> See also Article 3 (1) (e) of the Vienna Convention on Diplomatic Relations of 18 April 1961, UNTS Vol. 500, pp. 95 et seq.: “The functions of a diplomatic mission consist, inter alia, in promoting friendly relations between the sending State and the receiving State, and developing their ... cultural ... relations”. See also Article 4 (2) (d) of the Resolution of the Institut der Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, Session of Basel 1991: “The following categories of property of a State in particular are immune from measures of constraint: property identified as part of the cultural heritage of the State, or of its archives, and not placed or intended to be placed on sale”.

<sup>19</sup> See e.g. International Court of Justice, Case Concerning Jurisdictional Immunities (*Federal Republic of Germany v. Italian Republic*), Application of FRG 2008, p. 12.