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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

Immunity of State Owned Cultural Property On Loan

46th meeting
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SUMMARY

Recent years have borne testimony to a number of legal disputes involving issues of immunity from seizure of cultural objects belonging to foreign States while on loan abroad. In many cases, cultural objects are seized in connection with a dispute over owners' rights. In other cases, seizure is sought as a means to secure rights that bear no relation to the seized object itself, such as, for instance, in an action brought by a creditor for payment of a debt owed either by the lender or the borrower. A recent case involving cultural artefacts of the Czech Republic in proceedings before Austrian Courts is briefly described in paragraph **I** of this document.

The immunity of cultural objects belonging to foreign States while on temporary loan is instrumental in facilitating the exchange of cultural property between States. As a means to promote mutual understanding between States, the mobility of collections is a key issue for many States.

The immunity of cultural State property is addressed by the 2004 *United Convention on Jurisdictional Immunities of States and Their Property* [Article 21, paragraph 1 (e)]. A growing number of States have adopted laws guaranteeing that cultural objects on loan to an exhibition in their jurisdiction will be returned to the lender, by granting immunity from seizure (paragraph **II** of this document).

The Czech delegation, supported by the Austrian and Dutch delegations, have elaborated a draft declaration, in support of the recognition of the customary nature of the relevant provisions of the 2004 UN Convention (paragraph **III** of this document).

In light of the various legal issues at stake and in line with its mandate, the CAHDI is invited to consider how it could contribute to the ongoing reflection aimed at increasing the level of protection for cultural objects on loan (paragraphs **IV, V** and **VI** of this document).

I. CASE-LAW: THE *DIAG HUMAN* CASE

In May 2011, a painting by avant-garde Czech master Emil Filla and one by Filla's contemporary Vincenc Benes as well as a sculpture by Otto Gutfreund, which were temporarily on loan by the Czech National Gallery and Moravian Gallery for an exhibition in Vienna, were distrained and placed in a court depository, in execution of an order of the Viennese District Court. The court order came in response to a claim by the Liechtenstein company *Diag Human* asking the Viennese District Court for a declaration of enforceability of an arbitral award of 2008 ordering the Czech Republic to compensate *Diag Human* for damages over a dispute involving the trade in blood plasma.

The court decision allowing the seizure of the works of art was later overturned by the Viennese District Court on the grounds that there exist a rule of customary international law, as reflected by the relevant provisions of the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (2004), that State owned artefacts not placed or intended to be placed on sale cannot be subject to any measure of constraint.

By a decision of 16 April 2013[1], the Austrian Supreme Court definitively halted the constraint proceedings involving the artefacts owned by the Czech Republic.

II. THE LEGAL FRAMEWORK

A. The international legal framework

i. The *United Nations Convention on Jurisdictional Immunities of States and Their Property* (2004)

State immunity from measures of constraint in connection with proceedings before a court is dealt with in Part IV of the 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property.*

Article 18 of the UN Convention, which regards State immunity from pre-judgment measures of constraint, reads:

"*No pre-judgment measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to*
the extent that:

a. the State has expressly consented to the taking of such measures as indicated:

i) by international agreement;
ii) by an arbitration agreement or in a written contract; or
iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

b. the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding".

[1] The decision of the Austrian Supreme Court appears in **Appendix I**.

Article 19 of the UN Convention, which regards post-judgment measures of constraint, foresees the same exceptions to immunity as listed in Article 18 to which it adds one further exception:

"*No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:*

[…]

c. it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed".

Article 21 of the UN Convention, however, limits the foregoing exception by stating that certain categories of property are excluded from the exception of Article 19 (c):

"1. 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):

a. property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;

b. property of a military character or used or intended for use in the performance of military functions;

c. property of the central bank or other monetary authority of the State;

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.

2. Paragraph 1 is without prejudice to article 18 and article 19, subparagraphs (a) and (b)".

ii. The *European Convention on State Immunity* (CETS No. 74)

The *European Convention on State Immunity* does not address the specific issue of immunity from execution of State-owned cultural property.

Article 23 of the Convention, which refers in general terms to "the property of a Contracting State", provides:

> "*No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case*."

Article 26 sets out the conditions under which enforcement of a judgment against a State may be sought:

> "*Notwithstanding the provisions of Article 23, a judgment rendered against a Contracting State in proceedings relating to an industrial or commercial activity, in which the State is engaged in the same manner as a private person, may be enforced in the State of the forum against property of the State against which judgment has been given, used exclusively in connection with such an activity, if:*
>
> *a. both the State of the forum and the State against which the judgment has been given have made declarations under Article 24;*
> *b. the proceedings which resulted in the judgment fell within Articles 1 to 13 or were instituted in accordance with paragraphs 1 and 2 of Article 24; and*
> *c. the judgment satisfies the requirements laid down in paragraph 1.b of Article 20*."[1]

B. The national legal framework

States take different approaches in pursuing the goal of protecting cultural objects on loan. Certain States have enacted their own specific immunity from seizure legislation, whilst others rely solely on a rule of customary international law. Mention should also be made of the practice of some States to issue guarantor's declarations in the form of so-called "letters of comfort". Certain States apply a combination of these approaches.

The situation in EU member States is well summarized in the conclusions reached by the subgroup on "Immunity from Seizure" of the OMC Expert Working Group "Mobility of Collections"[2], In its final report, the subgroup noted that EU Member States have made use of various options with regard to immunity from seizure (sometimes in combination):

"1. immunity from seizure legislation, specifically addressing cultural objects;

[1] The quoted Articles appear in **Appendix II**.

[2] The origin of this group is to be found in the EU Council of Ministers Resolution 13839/04 on the Work Plan for Culture 2005-2006, followed by the Work Plan for Culture 2008-2010, which identified as a priority area the mobility of works of art and collections and exhibitions. In relation to this priority, the Open Method Coordination (OMC) Expert Working Group on mobility of collections was set up, comprising of experts of EU Member States, for the mobility of collections and activities of museums. Within the Expert Working Group, a subgroup "Immunity from Seizure" was set up. It consisted of representatives from 13 member States (Austria, Belgium, Finland, France, Germany, Greece, Hungary, the Netherlands, Poland, Portugal, Romania, Spain, and the United Kingdom). Immunity from seizure is no longer explicitly mentioned in the Work Plan for Culture 2011-2014, which however continues to refer to the mobility of collections as a priority.

1.1 specifically addressing cultural objects of foreign States[3];
1.2 specifically addressing cultural objects of both foreign States and private individuals[4];

2. general immunity from seizure legislation, not specifically addressing cultural objects, but focusing on property of foreign States, intended for official/public use[5];

3. considering cultural objects of foreign States, temporarily on loan, immune from seizure on the basis of customary international law;

4. the issue of immunity from seizure guarantees in the form of "letters of comfort"[6]"

III. THE DRAFT DECLARATION ON JURISDICTIONAL IMMUNITIES OF STATE OWNED CULTURAL PROPERTY

In order to further strengthen the protection from seizure of cultural objects belonging to States and on temporary loan, the Czech delegation, supported by the Austrian and Dutch delegations, have undertaken an initiative consisting in promoting a draft declaration the text of which is reproduced below. The draft is based on the position expressed by several States and academic writers that Article 21 of 2004 UN Convention reflects a rule of customary international law, which implies that cultural objects on loan belonging to foreign States are protected against seizure even if the Convention is not yet in force.

The draft declaration intends to provide a tool for States allowing them to formally recognise the customary character of the relevant provisions of the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (2004).

Declaration on Jurisdictional Immunities of State Owned Cultural Property

"We, the undersigned,

Desirous to strengthen international cooperation in the field of culture;

Recognizing that the exchange of cultural property significantly contributes to the mutual understanding of nations;

Resolved to promote the mobility of State-owned cultural property through temporary cross-border loans for public display;

Aware of the need to reaffirm the international legal framework applicable to State-owned cultural property on public display in another State on the basis of the customary international law on State immunity, as codified in the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 (hereinafter the "Convention");

Jointly declare the following:

[3] France, Belgium.
[4] Germany, Austria, the United Kingdom.
[5] The Netherlands.
[6] 14 EU Member States (Cyprus, Estonia, Finland, Greece, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain and the United Kingdom) reported issuing letters of comfort. A "letter of comfort" has been described by the subgroup "Immunity of Seizure" as a written confirmation from a representative of the government that the borrower of the cultural object or the borrowing State will do everything within its power to safeguard the item from seizure. As a rule, such a "letter of comfort" cannot be considered as "hard law", contrary to immunity from seizure legislation, according to the subgroup.

In accordance with customary international law as codified in the Convention

- property of a State forming part of its cultural heritage or its archives or forming part of an exhibition of objects of scientific, cultural or historical interest, and not placed or intended to be placed on sale cannot be subject to any measure of constraint, such as attachment, arrest or execution, in another State; and

- therefore, such measures of constraint can only be taken if immunity is expressly waived for a clearly specified property by the competent national authorities of the State owning the property or if the property has been allocated or earmarked by that State for the satisfaction of the claim which is the object of the proceeding concerned.

In this context, we reaffirm our commitment to the rules of customary international law on State-owned cultural property as outlined above, in relation to any dispute that may arise in connection with cross-border loans of such property intended for public display."

IV. OPEN ISSUES

The determination of the exact scope of immunity from seizure for cultural State property on loan, whether based on the 2004 UN Convention or on a rule of customary international law, gives rise to a series of questions.

A first question concerns the notion of "State property", i.e. what is the definition of "State" and that of "property" for the purposes of this rule. The scope of immunity also can give rise to questions: while it is clearly established that Part IV of the 2004 UN Convention regarding immunity from measures of constraint applies only to civil proceedings, the question of whether immunity from seizure is available in criminal proceedings appears to have been dealt with differently in States' practice.

Another issue is that of the possible limitations of such immunity (cf. for instance cultural objects which are already subject to return obligations to a State other than the lending State under international law).

It should be noted in this regard that there is an on-going reflection on this subject within the International Law Association (ILA) which is currently examining the feasibility of an international instrument regarding immunity from seizure for all kinds of cultural property (either State or private) on loan[7].

V. POSSIBLE FUTURE ACTIVITY WITHIN THE CAHDI

Having regard to the long-established practice of the CAHDI to examine the issue of State immunity in accordance with its mandate, the CAHDI may wish to consider the possibility of further developing the issue of "Immunity of State Owned Cultural Property".

One option would be to include in its database on State practice regarding State Immunities a section specifically devoted to the issue of immunity from seizure of State owned cultural objects on loan abroad. Reference can be made to this end to the conclusion drawn - as regards EU member States - in the aforementioned report of the subgroup on "Immunity from Seizure" of the OMC Expert Working Group "Mobility of Collections" which recommended that "*the current sharing*

[7] The report of the ILA Sofia Conference (2012) on "Cultural Heritage Law" appears in **Appendix III**.

and exchanging of information and best practices should be sustained and continued, preferably in the form of a website (…)".

A further option, which could be resorted to in addition to the exchange of practices, is the elaboration of common standards which could come in support of States' efforts to promote the exchange of cultural property. The elaboration of common standards could focus on certain specific aspects of the temporary loan of State owned cultural objects, and consist for instance in the elaboration of a model "letter of comfort" (or "immunity declaration" or "guarantor declaration").

With this goal in mind, the CAHDI may wish to entrust a rapporteur or a limited number of Committee members with the specific task of examining the opportunity of engaging in such an activity, with the support, if necessary, of a specialist, in accordance with Article 14 of Appendix I to *Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods*[8].

VI. ACTION REQUIRED

CAHDI members are invited:

- to take note of and to comment the draft declaration reproduced in paragraph **III**;

- to exchange information regarding their laws and practice regarding the immunity of State cultural property on loan, on the basis of a questionnaire which will be prepared by the Secretariat;

- to examine whether the elaboration of common Council of Europe standards in relation to this topic would be appropriate;

- to appoint a limited number of Committee members, which would be tasked to examine this issue and report back to the Committee at its 47th meeting.

[8] Article 14 provides that:

a. *Committees may appoint a rapporteur, a drafting committee or both.*
b. *Where necessary, in order to expedite the progress of their work, committees may entrust a rapporteur or a limited number of committee members with a specific task to be fulfilled by their next meeting, using primarily information technologies.*

APPENDICES

APPENDIX I

DECISION OF THE AUSTRIA SUPREME COURT OF 16 APRIL 2013[1]

- THE *DIAG HUMAN* CASE -

Court
Supreme Court (OGH)

Date of decision
16.04.2013

Case No.
3Ob39/13a

Head
The Supreme Court, through the President of the Senate, Dr. Prückner, President, and Justices Univ.-Prof. Dr. Neumayr, Dr. Lovrek, Dr. Jensik and Dr. Roch as additional judges, has issued, in the case concerning a declaration of enforceability and enforcement between the applicant and complainant D***** SE, *****, Liechtenstein, represented by Salpius Rechtsanwalts GmbH, Salzburg, and the defendant and liable party, the Czech Republic (Ministry of Health), Palackeho namesti 4, Prague, Czech Republic, represented by Hasberger Seitz & Partner Rechtsanwälte GmbH, Vienna, in respect of 24,089,400 CKZ Sa, relating to the appeal on a point of law dated 29 October 2012 by the applicant and complainant against the decision of the Civil Court of the State of Vienna, as the appeal court, GZ 46 R 395/11w, 46 R 396/11t-50, accepting the defendant and liable party's appeal against the decision of 16 May 2011 of the District Court of the City of Vienna, GZ 72 E 1855/11z-6, the following **decision:**

Judgment
The appeal on a point of law is dismissed.
The applicant and complainant shall pay to the defendant and liable party, within 14 days, the costs of the appeal on a point of law, set at EUR 3,677.22 (including VAT of EUR 612.87).

Text

Reasons:

The applicant and complainant (hereunder "the complainant") requested in its rectified observations received by the court of first instance on 2 May 2011:

(a) a declaration of enforceability of the "final arbitral award" Rsp 06/2003 of the ad hoc arbitration tribunal of the Czech Republic, dated 4 August 2008, in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 9 June 1958, and

(b) authorisation of the attachment of movables for the collection of a partial claim of EUR 1,000,000. In the application for enforcement, the complainant referred to three works of art (two paintings and a bronze statue owned by the defendant and liable party (hereunder "the liable party"), which were on temporary display, until 29 May 2011, as exhibits in the "DYNAMIK! Kubismus/ Futurismus/KINETISMUS" exhibition in the Unteres Belvedere in Vienna.

In the application for a declaration of enforceability, the complainant, presenting a legal opinion by Dr. C***** (Enclosure D), pointed out that it had been agreed in the arbitration agreement (Enclosure A) of 18 September 1996 that the arbitral award would be subject to review by other arbitrators, insofar as an application for review by one party to the agreement was notified to the other party thereto within 30 days after the notification of the arbitral award. In fact, an application for review was made within the 30-day time limit by the Minister of Health and the Director General of the Office for Representation of the State in Property Matters (Representation Office); however, only an official of the responsible department of the Representation Office could legitimately lodge an application for review.

[1] Unofficial translation provided by the Secretariat of the Council of Europe.

In a decision of 16 May 2011 (ON 6), the court of first instance declared the arbitral award enforceable in Austria and authorised the attachment of movables without more detailed restriction to specific items.
Following receipt of the observations of 1 June 2011 of the Federal Ministry for European and International Affairs (BMeiA), according to which property "extra commercium" cannot, in accordance with international customary law, be the object of enforcement measures, and the Czech Republic therefore enjoys immunity from compulsory measures against the three works of art owned by it (ON 11), the court of first instance, in a decision of 21 June 2011 (ON 20), stayed the attachment of movables ex officio, in pursuance of § 39 Abs 1 Z 2 of the Enforcement Regulation (EO). The reason given for this decision was the immunity under customary international law of state-owned works of art on loan.

The liable party appealed against the declaration of enforceability and the authorisation of enforcement (ON 14); the complainant appealed against the decision to stay the attachment of movables (ON 22).

The liable party claimed in its appeal, referring to two legal opinions – of which, however, only that of Prof. Dr. M***** (Enclosure 2) was submitted in a German translation – and to a judgment of the Supreme Court of the Czech Republic of 14 October 2010, in an authenticated translation (Enclosure 4), that the arbitral award was not enforceable. It had – in accordance with part V of the arbitration agreement of 18 September 1996 (Enclosure A) – submitted its application for review of the arbitral award in good time. The Supreme Court of the Czech Republic had, for want of agreement between the arbitrators appointed by the parties (i.e. in the review procedure), called on a third arbitrator and reached the – binding – conclusion that responsibility for appointing the third arbitrator lay with the Prague City Court. The application for review of the arbitral award had been made in accordance with the law. The application for review had not been dismissed or declared inadmissible by the responsible – not yet validly appointed – arbitration tribunal, although it was only that tribunal which could verify whether there had been a valid and timely challenge to the arbitral award.

In this context the liable party discussed in extensive submissions the question of whether the "Ministry of Health" of the Czech Republic had legal personality of its own or was entitled to represent the Czech Republic – especially in the context of the setting in motion of a review procedure.

The liable party also referred in its appeal to the fact that the items included in the enforcement were cultural property of the Czech Republic which served sovereign purposes, and which – on the basis of customary international law – were excluded from enforcement because of their objective immunity. There was an obligation under international law to protect works of art on loan.

The complainant referred in its appeal against the decision to stay the attachment of movables, in summary, to the fact that the items concerned by the enforcement had been made available on the basis of a private-law art loan arrangement, and were not therefore excluded from the enforcement.

A decision of the Senate of 11 July 2012, AZ 3 Ob 18/12m, set aside the decision of the appeal court issued in the first instance procedure (ON 34), with which the appeal court set aside the decisions of the court of first instance (ON 6 and ON 20), declared void the whole of the procedure subsequent to the declaration of enforceability and dismissed both the application for a declaration of enforceability and the application for enforcement on the grounds of lack of domestic jurisdiction, as well as the liable party's application for a stay of enforcement, and instructed the appeal court to deal with the substance of the appeals.

In part I of its decision issued subsequently and now subject to challenge, the appeal court granted the liable party's appeal and amended the decision of the court of first instance on the declaration of enforceability of the arbitral award and on the authorisation of enforcement, in that it dismissed both the application for a declaration of enforceability and the application for enforcement. The appeal court referred the complainant, in respect of its appeal against the decision to stay the attachment of movables, to part I of the appeal decision (part II). In part III, the appeal court disallowed specified observations and submissions of official documents by the parties, submitted after rejection of the parties' appeals, referring to the principle that remedies may be used only once.

In summary, the appeal court took the view that the timely lodging of the application for review started the pending proceedings for the appointment of the arbitrators in the Czech Republic. The ground for refusal provided for by Article V.1.e of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereunder the "New York Convention") did apply.

The appeal court declared the appeal on a point of law admissible, on the grounds of a lack of Supreme Court case-law on the subject of the binding nature of an arbitral award in the event of the lodging of an application for review, if that application for review suffered from formal defects according to the entitled party.

With its appeal on a point of law, the complainant challenged the appeal court's decision in its entirety, through the (recognisable) application for an amendment in the form of a restoration of the decision of the court of first instance on the declaration of enforceability and the authorisation of enforcement. Subsidiarily, an application for setting aside and for the case to be sent back to the court below was made, in conjunction with an application for the appeal court to be instructed, "to take a decision on the complainant's applications of 26.7.2011 and 2.11.2012".
The liable party applied for dismissal of the complainant's appeal on a point of law. Subsidiarily, it requested that the appeal on a point of law not be granted.

Legal assessment

The appeal on a point of law is admissible on the ground stated by the appeal court; however, it is not justified.

In its appeal on a point of law, the complainant, in summary, argues that the appeal court, notwithstanding application of the rule prohibiting the submission of new grounds on appeal, took as its basis, without verification, the liable party's new statements of facts, but took no account of the complainant's statements of facts. No procedure for the taking of evidence took place. Consequently, the decision on the appeal is void. The liable party should have made its new statements of facts not in the appeal, but through an action for a stay of execution. The observations of the liable party of 23 October 2012 were not dismissed by the appeal court, and the corresponding application for dismissal made by the complainant was not dealt with. Moreover, the ground for refusal under Article V.1.e of the New York Convention accepted by the appeal court was not put into effect, since the liable party did not lodge a valid application for review.

Deliberations:

1. On the alleged violation of the rule prohibiting the submission of new grounds on appeal and the allegation that the decision on the appeal was void.

1.1 The Senate already, in its decision in this procedure of 11 July 2012 at AZ 3 Ob 18/12m, referred to the fact that, in accordance with the explicit provision in § 84 Abs 2 Z 2 EO, the prohibition of the submission of new grounds on appeal was breached: the procedure relating to a declaration of enforceability in a court of first instance in Austria takes the form of a unilateral document-based procedure in which the opposing party plays no part, but during which not only purely legal, but also factual questions have to be resolved. In order to offset the liable party's exclusion from the procedure in the court of first instance, that party may, in its appeal against the decision of the court of first instance, whereby the declaration of enforceability was issued, or in its reply to the creditor's appeal against the decision whereby the declaration of enforceability was refused, submit new grounds (*Jakusch* in *Angst*, EO^2 § 84 Rz 10).

1.2 This acceptance of new grounds, applicable only to the liable party, relates, if the court of first instance has declared enforceability, solely to appeals in the court of second instance (RIS Justiz RS0116742), and here, in accordance with § 84 Abs 2 Z 2 Satz 2 EO, the debtor is obliged, in order to avoid delays to the procedure, to put forward with its appeal all grounds for refusal not previously on the file (rule about raising no new material after a certain stage in the proceedings – cf *Jakusch* in *Angst*, EO^2 § 84 Rz 16; *Burgstaller/Höllwerth* in *Burgstaller/Deixler Hübner*, § 84 EO Rz 17).

1.3 Thus the facts submitted by the liable party in its appeal, which relate to the ground for refusal in Art V.1.e of the New York Convention, do not infringe the prohibition of the submission of new grounds. Therefore, the allegation in the appeal on a point of law that the decision on the appeal is "void" or defective on account of such an infringement is therefore unfounded.

1.4 It is nevertheless correct that the liable party, on the basis of the rule about raising no new material after a certain stage in the proceedings, may no longer put forward new grounds – at least in so far as they were already known to it – after the appeal has been decided (*Jakusch* in *Angst*, EO^2 § 84 Rz 18; *Burgstaller/Höllwerth* in *Burgstaller/Deixler-Hübner*, § 84 EO Rz 17).

It is immaterial whether the submission of documents of 23 October 2012 (ON 50), following the lodging of the appeal, the dismissal of which the complainant requested, in any way contravened the rule about raising no new material after a certain stage in the proceedings, because the appeal court did not make use of the document submitted – a letter from the Director General of the Office for Representation of the State in Property Matters. All the other observations and documents submitted after the lodging of the appeal by the liable party were in any case disallowed by the appeal court.

1.5 Nor did the infringement of the right to be heard objected to in the appeal on a point of law occur: the appeal proceedings against both the authorisation and the dismissal of the application for a declaration of enforceability involved both parties. The complainant was therefore free – and did make use of the possibility – to submit a reply to the appeal and to comment on the liable party's appeal procedure, in which context it also had freedom, for the sake of a fair trial, and notwithstanding the rule in principle applicable to it in the appeal procedure prohibiting the raising of new material after a certain stage in the proceedings, to respond to new allegations by the liable party by applying for evidence to be taken (*Burgstaller/Höllwerth* in *Burgstaller/Deixler-Hübner*, § 84 EO Rz 22; *Jakusch* in *Angst* EO^2 § 84 Rz 10).

2. On the facts:

The appeal court did not, as complained of in the appeal on a point of law, base its decision solely on facts alleged by the liable party, but not established through a procedure for the taking of evidence. It rather based itself on the following facts, which are not in dispute, even according to the complainant's submissions:

2.1 In part I of the arbitration agreement of 18 September 1996 (Enclosure A) presented by the complainant itself, the parties had agreed that a decision was to be taken in the arbitration procedure under (Czech) law No. 214/1994 GBl. on arbitration procedure and enforcement of arbitration findings (hereunder the Czech law on arbitration procedure).

The final sentence of part II of the arbitration agreement states that the court shall appoint the third arbitrator, at the request of any party to the agreement or of either of the arbitrators already appointed, if the appointed arbitrators have not agreed who the third arbitrator should be within 30 days after the expiry of the time limit for that appointment.

Part IV regulates certain procedural arrangements which deviate from the Czech law on arbitration procedure (principle of written proceedings; oral proceedings for the hearing of parties, witnesses and experts).

Part V reads as follows:

"The parties to the agreement have further agreed that the arbitration findings shall be subject to review by other arbitrators, chosen by the parties to the agreement in the same way, if the application for review is notified to the other party to the agreement within 30 days after the date on which the arbitration findings were notified to the party making the application. Articles II to IV of the agreement similarly apply to the review of the arbitration findings. If the application for review made by the other party to the agreement is not notified within that time limit, the findings acquire legal force, and the parties to the agreement freely undertake to implement these by the time limit set by the arbitrators, failing which they may be implemented by the responsible court".

2.2 Another matter not in dispute, and stated by the complainant itself in its application for a declaration of enforceability, accompanied by a legal report (Enclosure D), is that the defendant in the arbitration proceedings (now the liable party) did submit to the plaintiff (now the complainant) in the arbitration proceedings an application for review of the arbitral award within the 30-day time limit set in the arbitration agreement, that application for review bearing the signatures of the Minister of Health and the Director General of the Office for Representation of the State in Property Matters.

2.3 Attested through the presentation of a judgment of the Supreme Court of the Czech Republic dated 14 October 2010, and not disputed by the complainant, is the fact that the Supreme Court of the Czech Republic, in the said decision, designated the Prague City Court as the court responsible for appointing the third arbitrator for the review procedure relating to the arbitral award, for which a declaration of enforceability is here applied for, because the arbitrators appointed by the parties for the review procedure could not agree who the third arbitrator should be within the 30-day time limit set in the arbitration agreement.

2.4 The complainant referred in its application for a declaration of enforceability, submitting legal opinion Enclosure D, explicitly to §§ 27 and 28 of the Czech law on arbitration procedure, applicable in this case (I in the arbitration agreement). These provisions read as follows, according to the complainant's submission in its application initiating the procedure (Enclosure D), which is not challenged by the liable party:
§ 27 of the law on arbitration procedure:

"The parties may agree in the arbitration agreement that the arbitral award may, at the request of one or both parties, be reviewed by other arbitrators. If not otherwise provided in the arbitration agreement, the application for review shall be sent to the other party within 30 days after the applicant's notification of the arbitral award. Review of the arbitral award is a component part of the arbitration procedure, and the provisions of the law on arbitration procedure are applicable to the review."

§ 28 of the law on arbitration procedure:

“1) A copy of the arbitral award is to be served on the parties, and must following that service be confirmed as having binding effect.

2) An arbitral award which cannot be reviewed in pursuance of § 27, or in respect of which the time limit for an application for review of the arbitral award has expired without such application, becomes binding and enforceable on the date of service.

2.5 Since, as needs to be pointed out, this undisputed fact suffices to confirm the appeal court’s decision, obviating the need for findings that could only be based on facts submitted by the liable party and disputed by the complainant, the complainant’s allegation that the declaration of enforceability was decided on a defective basis, because of the lack of a procedure for the taking of evidence, to the advantage of the liable party is unfounded.

3. On the ground for refusal provided for by Article V.1.e of the New York Convention.

The complainant requested a declaration of enforceability in accordance with the New York Convention. The liable party referred solely to the ground for refusal provided for by Article V.1.e of the New York Convention.

3.1 It should be noted that, contrary to the opinion expressed in the appeal on a point of law, grounds for refusal certainly are to be subject to review in the procedure relating to a declaration of enforceability.

In this context it is for the liable party, within the sphere of application of the New York Convention, to state and to produce evidence of the existence of a ground for refusal of recognition, including the ground for refusal of recognition invoked in this case and set out in Article V.1.e of the New York Convention (*Schlosser*, Das Recht der internationalen privaten Schiedsgerichtsbarkeit[2] [1989] Rz 924; *Czernich* in B/N/G/S, Internationales Zivilverfahrensrecht, Art V NYÜ Rz 4).

Only in the event that, although an arbitral award is binding, a legal remedy has been used against it in its state of origin (e.g. an application has been made for it to be set aside) may the other country’s enforcing court suspend the recognition procedure “in so far as it considers this appropriate”, until the decision of the court in the state of origin has been taken (3 Ob 65/11x EvBl 2012/9 [*Öhlberger*] = ecolex 2012/94 [*Hausmaninger*]).

It is thus incorrect to say that, in order to claim a ground for refusal of recognition, an action for a stay of execution needs to be started.

3.2 The ground for refusal provided for by Article V.1.e of the New York Convention exists when the liable party proves that the arbitral award is not yet binding.

There is agreement in legal theory that the binding nature of an arbitral award does not mean its prior declaration of enforceability at the place of arbitration in the sense of a dual authority to enforce, but its exclusion from review in the case concerned, even by a national court or a second arbitration tribunal (*Torggler*, Praxishandbuch Schiedsgerichtsbarkeit [2007] 265; *Schlosser*, Schiedsgerichtsbarkeit[2] Rz 786; *Solomon*, Die Verbindlichkeit von Schiedssprüchen in der internationalen privaten Schiedsgerichtsbarkeit [2007] 93 mwN).

3.3 . Furthermore, the question of when an arbitral award is binding in accordance with the New York Convention is far from uncontroversial in legal theory:

3.3.1 . The predominant argument (*Czernich* in B/N/G/S, Internationales Zivilverfahrensrecht, Art V NYÜ Rz 47 mwN; extensive further evidence in *Solomon*, Verbindlichkeit von Schiedssprüchen 97 FN 206) is that an arbitral award is binding in accordance with the law applicable to the procedure. This view means that an arbitral award becomes binding if it meets all the conditions to be declared enforceable in the national law of the country concerned.

3.3.2 . Those who advocate an autonomous interpretation of the “binding” concept argue that only the admissibility of an appeal including review of issues of fact and law to a higher arbitration tribunal or to a national court (not meaning an action for setting aside, but a “complete appeal” on any aspect) excludes the binding force of the arbitral award (evidence in *Schlosser*, Internationale Schiedsgerichtsbarkeit Rz 786 FN 7). The advocates of the theory of autonomous interpretation argue that international enforcement of an arbitral award could again be made dependent on a dual authority to enforce, if the state where the arbitral award was issued makes binding force subject to dual authority to enforce.

3.4 Closer examination of this question would be superfluous, however, since both types of interpretation produce the same result:

3.4.1 When the “binding” concept is autonomously interpreted, binding force comes about when no further ordinary remedy is available in a higher arbitration tribunal or a national court with comprehensive review of issues of both law and fact.

3.4.2 That is, however, also precisely the result – as admitted by the complainant – of the applicable Czech law on arbitration procedure: according to §§ 27 and 28 of that law, quoted in 2.4, an arbitral award challenged by one of the parties through an application for review within the time limit, is not enforceable insofar as – as in the instant case – the arbitration agreement provides for such a possibility of review.

3.4.3 The arbitral award is thus formally binding (only) when all procedural actions have been taken for the arbitration tribunal’s final decision concluding the proceedings to be taken. If, within the arbitration procedure chosen by the parties, it is possible for an appeal to be made to a “second instance”, the dispute is not yet finally decided in accordance with the arbitration system chosen by the parties, and therefore applicable to them. The absence of binding force is quite clearly to be derived from part V of the arbitration agreement. If no application is made for review, “the findings acquire (i.e. the arbitral award acquires) legal force, and the parties to the agreement freely undertake to implement these by the time limit set by the arbitrators”. It is clear from this that the making of an application for review has suspensive effect.

The arbitration proceedings in the first and higher instance constitute a uniform procedure directed towards the production of a decision of the arbitration tribunal which concludes the arbitration proceedings as a whole. In the same way as a decision of a national court which is still able to be challenged is not final insofar as it may still be set aside within the national procedure by a higher instance, in this case, too, the “first instance” decision is subject to being set aside or amended within the arbitration system.

Accordingly, the first instance arbitral award is also, for as long as it may still be challenged in the higher arbitration tribunal, neither enforceable nor able to be set aside by a national court. Only when a remedy in a higher arbitration tribunal is no longer possible, particularly as a result of expiry of the time limit, is the arbitral award from the first instance “formally binding” (*Solomon*, Verbindlichkeit von Schiedssprüchen 390 to 392; in terms of result, also see *Torggler*, Praxishandbuch 265; *Czernich* in B/N/G/S, Internationales Zivilverfahrensrecht, Art V. NYÜ Rz 48).

3.4.4 It is clear from the reference in part V of the arbitration agreement to parts II to IV of the agreement (see, in particular, the reference to IV, which governs the form of the taking of evidence) that the application for review for which the arbitration agreement concerned provides leads to a “complete” review of the arbitration findings, including the question of facts.

3.4.5 On the basis of that, the undisputed facts that an application for review was made in the name of the liable party within the 30-day time limit, and that the Supreme Court of the Czech Republic determined the court in the Czech Republic responsible for appointing the third arbitrator, lead to the conclusion that the arbitral award is not binding:

Whether in fact the timely application for review was made by the thereto empowered representative of the liable party is a matter for decision solely by the higher arbitration tribunal. The same applies to the question of whether a possible defect concerning representation in the making of the application for review is accessible to a rectification procedure.

Thus for as long as the higher arbitration tribunal, to which a timely application has been made, has neither dismissed the application for review made by the liable party nor wholly (or partly) upheld, following review of its substance, the first instance arbitral award, the arbitration procedure is not yet at an end, and therefore the arbitral award has not become binding.

3.5 It is not therefore necessary to consider in detail the extensive submissions by both sides on the subject of who was empowered to represent the liable party in making the application for review. That question is rather to be clarified by the reviewing arbitration tribunal.

4. Thus the decision of the appeal court is to be confirmed: because of the lack of enforceability of the arbitral award, the dismissal of the application for enforcement was legitimate.

The decision on the costs of the reply to the appeal on a point of law is based on §§ 41 and 50 ZPO in conjunction with § 78 EO.

APPENDIX II

QUOTED ARTICLES OF THE EUROPEAN CONVENTION ON STATE IMMUNITY (CETS NO. 74)

Chapter I – Immunity from jurisdiction

Article 1

1. A Contracting State which institutes or intervenes in proceedings before a court of another Contracting State submits, for the purpose of those proceedings, to the jurisdiction of the courts of that State.
2. Such a Contracting State cannot claim immunity from the jurisdiction of the courts of the other Contracting State in respect of any counterclaim:
    a. arising out of the legal relationship or the facts on which the principal claim is based;
    b. if, according to the provisions of this Convention, it would not have been entitled to invoke immunity in respect of that counterclaim had separate proceedings been brought against it in those courts.
3. A Contracting State which makes a counterclaim in proceedings before a court of another Contracting State submits to the jurisdiction of the courts of that State with respect not only to the counterclaim but also to the principal claim.

Article 2

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has undertaken to submit to the jurisdiction of that court either:

a. by international agreement;
b. by an express term contained in a contract in writing; or
c. by an express consent given after a dispute between the parties has arisen.

Article 3

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if, before claiming immunity, it takes any step in the proceedings relating to the merits. However, if the State satisfies the Court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it has taken such a step, it can claim immunity based on these facts if it does so at the earliest possible moment.
2. A Contracting State is not deemed to have waived immunity if it appears before a court of another Contracting State in order to assert immunity.

Article 4

1. Subject to the provisions of Article 5, a Contracting State cannot claim immunity from the jurisdiction of the courts of another Contracting State if the proceedings relate to an obligation of the State, which, by virtue of a contract, falls to be discharged in the territory of the State of the forum.
2. Paragraph 1 shall not apply:
    a. in the case of a contract concluded between States;
    b. if the parties to the contract have otherwise agreed in writing;
    c. if the State is party to a contract concluded on its territory and the obligation of the State is governed by its administrative law.

Article 5

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the forum.
2. Paragraph 1 shall not apply where:
    a. the individual is a national of the employing State at the time when the proceedings are brought;

b. at the time when the contract was entered into the individual was neither a national of the State of the forum nor habitually resident in that State; or
c. the parties to the contract have otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter.

3. Where the work is done for an office, agency or other establishment referred to in Article 7, paragraphs 2.a and b of the present article apply only if, at the time the contract was entered into, the individual had his habitual residence in the Contracting State which employs him.

Article 6

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it participates with one or more private persons in a company, association or other legal entity having its seat, registered office or principal place of business on the territory of the State of the forum, and the proceedings concern the relationship, in matters arising out of that participation, between the State on the one hand and the entity or any other participant on the other hand.
2. Paragraph 1 shall not apply if it is otherwise agreed in writing.

Article 7

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment.
2. Paragraph 1 shall not apply if all the parties to the dispute are States, or if the parties have otherwise agreed in writing.

Article 8

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate:

a. to a patent, industrial design, trade-mark, service mark or other similar right which, in the State of the forum, has been applied for, registered or deposited or is otherwise protected, and in respect of which the State is the applicant or owner;
b. to an alleged infringement by it, in the territory of the State of the forum, of such a right belonging to a third person and protected in that State;
c. to an alleged infringement by it, in the territory of the State of the forum, of copyright belonging to a third person and protected in that State;
d. to the right to use a trade name in the State of the forum.

Article 9

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to:

a. its rights or interests in, or its use or possession of, immovable property; or
b. its obligations arising out of its rights or interests in, or use or possession of, immovable property

and the property is situated in the territory of the State of the forum.

Article 10

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a right in movable or immovable property arising by way of succession, gift or *bona vacantia.*

Article 11

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which

occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

Article 12

1. Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to:

    a. the validity or interpretation of the arbitration agreement;
    b. the arbitration procedure;
    c. the setting aside of the award,

    unless the arbitration agreement otherwise provides.

2. Paragraph 1 shall not apply to an arbitration agreement between States.

Article 13

Paragraph 1 of Article 1 shall not apply where a Contracting State asserts, in proceedings pending before a court of another Contracting State to which it is not a party, that it has a right or interest in property which is the subject-matter of the proceedings, and the circumstances are such that it would have been entitled to immunity if the proceedings had been brought against it.

[…]

Chapter III – Effect of Judgment

Article 20

1. A Contracting State shall give effect to a judgment given against it by a court of another Contracting State:

    a. if, in accordance with the provisions of Articles 1 to 13, the State could not claim immunity from jurisdiction; and
    b. if the judgment cannot or can no longer be set aside if obtained by default, or if it is not or is no longer subject to appeal or any other form of ordinary review or to annulment.

2. Nevertheless, a Contracting State is not obliged to give effect to such a judgment in any case:

    a. where it would be manifestly contrary to public policy in that State to do so, or where, in the circumstances, either party had no adequate opportunity fairly to present his case;
    b. where proceedings between the same parties, based on the same facts and having the same purpose:
        i. are pending before a court of that State and were the first to be instituted;
        ii. are pending before a court of another Contracting State, were the first to be instituted and may result in a judgment to which the State party to the proceedings must give effect under the terms of this Convention;
    c. where the result of the judgment is inconsistent with the result of another judgment given between the same parties:
        i. by a court of the Contracting State, if the proceedings before that court were the first to be instituted or if the other judgment has been given before the judgment satisfied the conditions specified in paragraph 1.b; or
        ii. by a court of another Contracting State where the other judgment is the first to satisfy the requirements laid down in the present Convention;
    d. where the provisions of Article 16 have not been observed and the State has not entered an appearance or has not appealed against a judgment by default.

3. In addition, in the cases provided for in Article 10, a Contracting State is not obliged to give effect to the judgment:

a. if the courts of the State of the forum would not have been entitled to assume jurisdiction had they applied, *mutatis mutandis*, the rules of jurisdiction (other than those mentioned in the annex to the present Convention) which operate in the State against which judgment is given; or
b. if the court, by applying a law other than that which would have been applied in accordance with the rules of private international law of that State, has reached a result different from that which would have been reached by applying the law determined by those rules.

However, a Contracting State may not rely upon the grounds of refusal specified in sub-paragraphs a and b above if it is bound by an agreement with the State of the forum on the recognition and enforcement of judgments and the judgment fulfills the requirement of that agreement as regards jurisdiction and, where appropriate, the law applied.

[…]

Chapter IV – Optional provisions

Article 24

1. Notwithstanding the provisions of Article 15, any State may, when signing this Convention or depositing its instrument of ratification, acceptance or accession, or at any later date, by notification addressed to the Secretary General of the Council of Europe, declare that, in cases not falling within Articles 1 to 13, its courts shall be entitled to entertain proceedings against another Contracting State to the extent that its courts are entitled to entertain proceedings against States not party to the present Convention. Such a declaration shall be without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority *(acta jure imperii).*

2. The courts of a State which has made the declaration provided for in paragraph 1 shall not however be entitled to entertain such proceedings against another Contracting State if their jurisdiction could have been based solely on one or more of the grounds mentioned in the annex to the present Convention, unless that other Contracting State has taken a step in the proceedings relating to the merits without first challenging the jurisdiction of the court.

3. The provisions of Chapter II apply to proceedings instituted against a Contracting State in accordance with the present article.

4. The declaration made under paragraph 1 may be withdrawn by notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect three months after the date of its receipt, but this shall not affect proceedings instituted before the date on which the withdrawal becomes effective.

APPENDIX III

REPORT OF THE INTERNATIONAL LAW ASSOCIATION SOFIA CONFERENCE (2012)
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Cultural Heritage Law

INTERNATIONAL LAW ASSOCIATION
SOFIA CONFERENCE (2012)
CULTURAL HERITAGE LAW

Members of the Committee:
Professor James Nafziger (USA): *Chair*
Professor Robert Paterson (Canada): *Rapporteur*

Thomas Adlercreutz (Sweden)
Dr Kaare Bangert (Denmark)
Professor Margaretha Beukes (South Africa)
Mr Kevin John Chamberlain CMG (UK)
Alternate: Ms Viviane Contin-Williams
Dr Patricia Conlan (Ireland)
Mrs Marie Cornu Volatron (France)
Mr Piers Davies (New Zealand)
Mr James Ding (Hong Kong)
Professor Talia Einhorn (Israel)
Professor Manlio Frigo (Italy)
Alternate: Dr Federico Lenzerini
Ms Sabine M Gimbrere (Netherlands)
Professor Toshiyuki Kono (Japan)
Professor Shigeru Kozai (Japan)
Mr P B Mauleverer (UK)
Alternate: Ms Kristin Hausler
Mr Guilherme Mendonca (Brazil)
Professor Patrick J O'Keefe (Australia)
Alternate: Dr Ana Vrdoljak
Professor Lyndel V Prott (Australia)
Alternate: Dr Craig Forrest
Jorge Sanchez Cordero (Mexico)
Alternate: Ernesto Becerril Miro
Dr Beat Schonenberger (Switzerland)
Alternate: Professor Marc-Andre Renold
Professor Kurt Siehr (Germany)
Dr Abhishek M Singhvi (India)
Dr Anastasia Strati (Hellenic)
Alternate: Professor Elina Moustaira
Dr Nout van Woudenberg (Netherlands)
Mrs Arlette Verkruyssen (Belgium)
Alternate: Mr Maarten Vidal
Professor Jelena Vilus (HQ)
Dr Sabine von Schorlemer (Germany)

I. Project on Export and Import Controls over Trade in Cultural Material

In October 2011 the Committee met in Kohunlich, Quintana Roo, Mexico, over a period of four days. The agenda largely involved a review of 14 national reports and one global report on export and import controls over trade in cultural material, all of them prepared by committee members. The reports added commentary on import controls to reports on export controls that had been prepared for the 2010 ILA Conference in The Hague. Together with several other reports in preparation and a comprehensive introduction, they will form the core of a book on trade in cultural material, to be published in 2013. Specifically, the committee reviewed reports on control systems in Australia, Canada, China, Germany, Ireland, Israel, Italy, Japan, New Zealand, South Africa, Sweden, Switzerland, United Kingdom, and the United States. Since the Kohunlich meeting, several other national reports have been added.

The committee reviewed a global report entitled, "What Do Export Controls Accomplish?" and will include other global reports in the book that are related to human rights, the European Union, and export controls over third-state-of-origin material. It is expected that the entire collection of reports will form a substantial addition to the literature, particularly in focusing on administrative processes, issues, and problems of implementation. The Committee expects to complete its work on this project at the ILA's Seventy-Fifth Conference, in Sofia.

To conclude the Mexico meeting, committee members Marc-André Renold and Jorge Sánchez Cordero presented the UNESCO-UNIDROIT Draft Model Provisions on State Ownership of Undiscovered Cultural Objects, which they had helped prepare as members of the drafting committee. Lively discussion followed.

II. Project on Immunities from Seizure and Suit Involving Cultural Material

At the Kohunlich meeting, the Committee decided to focus its attention at the Seventy-Fifth Conference on a consideration of immunities from seizure and suit involving cultural material. Specifically, the Committee plans to review a draft report, which follows, prepared by Th. M. de Boer and committee member Nout van Woudenberg:

International protection of cultural objects from seizure and/or other forms of judicial process

1. Introduction

Seizure and forfeiture of property are generally accepted means of law enforcement. In civil law, property may be seized either to establish (*in rem* or *in personam*) jurisdiction, or to assure a creditor's recovery on a judgment through the sale of the seized property. In criminal law, forfeiture of goods is a means to deprive a person of property that was acquired as a result of, or in connection with, criminal activity. Objects of cultural significance are not protected from seizure or forfeiture, unless they are privileged under the doctrine of sovereign immunity or specifically exempted by national legislation. While the terms 'seizure' and 'forfeiture' are different legal concepts, in the context of the protection of cultural objects the term 'seizure' is usually meant to cover all kinds of measures of constraint, including pre-judgment and post-judgment attachment, arrest, garnishment, sequestration, execution, forfeiture, requisition, foreclosure, replevin, detinue, etc. In this paper, the term 'seizure' will be used to denote all possible measures of constraint.

In an international context, the temporary presence of cultural objects in a foreign jurisdiction may occasion legal proceedings that would not be available (or might not lead to the result desired) in the jurisdiction from which they were moved. Consequently, owners and custodians may be reluctant to loan cultural objects in their possession for exhibition in a foreign jurisdiction, for fear of their being seized and thus taken hostage in disputes over ownership or financial claims. To alleviate such fears, several States have adopted statutes guaranteeing that cultural objects on loan to an exhibition in their jurisdiction will be returned to the lender, usually by granting immunity from seizure. As to the conditions to be met, the statutes widely vary. In some States, immunity is granted automatically, without any action being required on the part of the lender or the borrower. Other statutes require an application to a governmental authority for approval of the intended loan, while some of them allow third parties to raise objections. In some cases, the statute's scope is limited to cultural property belonging to the State, whereas other statutes also grant immunity with regard to cultural objects belonging to private institutions or individuals. Some statutes provide for immunity in civil proceedings only, whereas other laws also cover immunity for cultural objects subject to criminal investigation. Finally, some of the immunity from seizure laws explicitly state that their provisions are without prejudice to State obligations under international or European law.

Both to narrow such disparities and to increase the level of protection for cultural objects on loan, an international initiative is called for, providing for a wider protection than the one afforded by the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. The Cultural Heritage Law Committee of the International Law Association would seem to be an appropriate body to study the need for, and the feasibility of, an international instrument intended to protect cultural objects from seizure and/or other forms of judicial process, thereby furthering cultural exchange and collection mobility. This paper is meant to give a short survey of existing anti-seizure protection under international and national law (Part I), and to explore the major issues that will have to be resolved if the Committee is prepared to support this suggestion (Part II)

Part I: A short survey of cultural immunity law

2. International law

Until the end of the nineteenth century, it was believed that sovereign immunity from the jurisdiction of foreign courts was absolute, and therefore left no room for exceptions. The doctrine of absolute immunity has gradually given way to a doctrine of restricted immunity, under which a State is immune from the exercise of judicial jurisdiction by another State in respect of claims arising out of governmental activities (*acta jure imperii*); it is not immune, however, from the exercise of such jurisdiction in respect of claims arising out of activities of a kind carried on by private persons (*acta jure gestionis*). With the adoption of a restrictive doctrine in respect of immunity from jurisdiction came also a more critical approach to immunity from seizure (also known as immunity from execution). Although the notion of immunity from seizure is still much more firmly established than the notion of immunity from jurisdiction, there seems to be a trend also in respect of immunity from seizure whereby absolute immunity is likely to change to a more restrictive approach. The case law of many States may be said to have begun an upward trend in favour of allowing seizure in respect of State property in use, or intended for use, in commercial transactions, or for commercial purposes. Many States consider cultural objects belonging to States and on temporary loan as goods in use or intended for use for governmental, non-commercial purposes. Under that approach and interpretation, those cultural objects, on loan abroad, would still be immune from seizure under international law.

This theme can also be approached from a different angle, with similar results, however. On 2 December 2004, the UN General Assembly adopted without a vote resolution A/Res/59/38 regarding the UN Convention on Jurisdictional Immunities of States and Their Property. Article 18 of the 2004 UN Convention states that no pre-judgment measures of constraint [the Convention uses the term ‘measures of constraint’, not ‘seizure’] against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that the State has expressly consented to the taking of such measures or the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding. With regard to post-judgment measures of constraint, Article 19 has the same content as Article 18 with regard to pre-judgment measures of constraint, but it provides for an extra exemption: no post-judgment measures of constraint against property of a State may be taken unless it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum (provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed). Article 21 of the 2004 UN Convention lists five categories of State property which according to the convention shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes. The fifth category is property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale. State-owned exhibits for industrial or commercial purposes are not covered by this Article.

Article 21 does not only seem to focus on exhibited cultural objects *owned* by foreign States, but also on objects which have a connection with the lending State through possession and control. However, the provision’s exact scope has not yet been determined in practice.

Several States and academic writers are of the opinion that Article 21 of the 2004 UN Convention reflects a rule of customary international law, which implies that cultural objects on loan belonging to foreign States are protected against seizure even if the Convention is not yet in force. And indeed, a lot can be said in favor of that view. The Convention has not yet entered into force, as it currently has been ratified by 11 of the necessary 30 State Parties.

3. National law

In 1965, the United States of America was the first State that enacted specific immunity from seizure legislation for cultural objects on loan. A few individual US States have adopted such legislation as well. Five Canadian provinces followed in the 1980s. In Europe, France was the first State that enacted immunity from seizure legislation for cultural objects on loan, followed by Germany, Austria, Belgium, Switzerland, United Kingdom, Liechtenstein, and Finland. The Netherlands has adopted immunity from seizure legislation for objects intended for public service, which could include cultural property belonging to the State. Furthermore, Israel and Taiwan enacted immunity from seizure legislation for cultural objects on loan. Finally, Guatemala has enacted a provision to the extent that its own loaned cultural objects should receive immunity from seizure from borrowing States.

Part II. Issues to be resolved in an international instrument on cultural immunity

4. Policy issues
4.1. State immunity included or excluded?

As noted in § 2, it can be argued that Article 21 of the UN Convention on Jurisdictional Immunities of States and Their Property reflects a rule of customary international law. This would imply that state immunity need not be covered by an international instrument on cultural immunity, as it is covered already by customary international law and – in relations between State Parties – by the Convention as soon as it enters into force.

Hence, an instrument on cultural immunity would only need to guarantee immunity in regard of cultural property owned, possessed or controlled by private parties, to the exclusion of State-owned, possessed or controlled cultural objects.

However, even after the UN Convention enters into force, it will not be binding on States that have chosen not to become parties. Under a rule of customary international law, differences in interpretation may arise that could be eliminated in an international instrument specifically designed to address various aspects of cultural immunity, including immunity for cultural objects owned, possessed or controlled by States. On the other hand, such an inclusive instrument might be difficult to draft, as it would have to combine two rather different approaches: one based on public international law, the other on private international law.

4.1. Model law or treaty?

An international instrument for the protection of cultural objects from seizure and/or other forms of judicial process could take the form of a model law or a treaty. However, a model law does not seem to be an appropriate format for an instrument addressing both public and private international law issues (which implies that State immunity is *not* excluded from its scope). The choice between a model law and a convention only presents itself if the instrument would only cover cultural immunity in connection with privately owned, possessed or controlled cultural objects.

A model law would afford States the freedom to adopt its rules with or without modification. While such freedom might be conducive to the introduction of anti-seizure legislation in non-immunity States, it might also cause further disparities between national laws. It should also be borne in mind that a model law is hardly effective if immunity is conditional on reciprocity. The disadvantage of national legislation is that it may be set aside by conflicting obligations under international law, whereas a newly drafted treaty may supersede earlier commitments of the State Parties (along the lines of Article 30 of the Vienna Convention on the Law of Treaties). On the other hand, for a number of States some of the choices that need to be made in drafting a binding instrument might be a barrier to ratification. Yet, States in which anti-seizure law is already in force are more likely to accede to a treaty than to adapt their legislation to a model law.

A compromise may be found in a convention allowing a State to exclude or modify the legal effect of some of its provisions by entering reservations. Furthermore, the convention could contain a provision to the effect that it lays down minimum standards for immunity, which would allow a contracting States to grant immunity on more liberal grounds.

4.2. Regional and/or international cooperation?

There is no reason to assume that the protection of cultural objects from seizure and/or other forms of legal process abroad is a regional problem, or that there are significant regional differences in the approach to the relevant legal issues. Most of the case law on the seizure of cultural objects on loan shows that the loan of

the seized object was arranged by institutions in very different regions. As borrowed cultural objects can originate from all regions of the world, it stands to reason that efforts at increasing the level of protection should be based on international rather than regional cooperation.

4.3. Immunity from seizure and/or immunity from suit?

The seizure of a person's property may serve distinct purposes. In most cases, the property is taken into custody to secure a judgment or to be sold in satisfaction of a judgment. In this sense, seizure serves the *enforcement* of judgments. It could also serve, however, as a basis of *adjudicatory jurisdiction*: under the rules of (international) civil procedure, the mere presence of the defendant's property in the court's jurisdiction may be sufficient to empower the court to adjudicate a dispute as *forum arresti*. In such cases, seizure could either support *in rem jurisdiction* (empowering the court to determine the status of, or title to, the seized object), or *in personam jurisdiction* (empowering the court to determine personal claims against the defendant, not necessarily related to the seized object). Therefore, immunity from seizure would not only preclude seizure for enforcement purposes but it would also be a bar to the assumption of jurisdiction on the basis of seizure.

This does not mean, necessarily, that lenders of cultural objects cannot be sued in a State guaranteeing immunity from seizure. The assumption of jurisdiction may be based on other grounds than attachment, notably on the fact that the lender was 'present' in the forum State, or deemed to be 'doing business' or carrying out 'commercial activities' in that State, merely by carrying out the obligations stipulated in the loan agreement. To the extent that lenders of cultural objects may be subject to a court's jurisdiction on grounds that would not be present but for the loan agreement and its execution, immunity from seizure may not be sufficient to afford lenders the level of security that will persuade them to enter into loan agreements with cultural or educational institutions abroad. It should be a point of debate, therefore, whether or not the immunity from seizure regime should be extended to immunity from jurisdiction ('immunity from suit') in situations in which personal jurisdiction could only be based on facts directly or indirectly related to a loan of cultural property.

It should recalled that States generally enjoy immunity from jurisdiction under international law, as long as they act *jure imperii*. It is debatable whether a loan of State-owned cultural property for exhibition abroad can be considered as an *actum jure imperii*, or an *actum jure gestionis*. An instrument on cultural immunity, in which State immunity is not excluded, could make it clear that a State cannot be sued on a jurisdictional basis that is related to cultural property it owns, possesses or controls.

4.4. The basis of protection: non-profit arrangements and/or commercial transactions?

Most national laws providing for immunity for cultural objects are premised on the condition that a loan agreement is concluded between a foreign lender and a domestic borrower, with a view to temporary exhibition of one or more cultural objects in the borrower's home State. It is sometimes stipulated that the borrower should be a cultural or educational institution, and/or that the loan agreement should not be for profit. Consequently, the immunity regime in those States does not apply in situations in which the import of cultural objects is motivated by commercial purposes, or if it is based on consignment rather than a loan. That approach is also followed under the afore-mentioned 2004 UN Convention. Objects on loan for exhibits for industrial and/or commercial purposes are not covered by the Convention's immunity provisions. As a result, immunity would not extend to cultural objects on display at international art fairs or shown in commercial galleries. Yet, one might ask why commercial motives should be, by definition, a bar to protection, and if so, according to which standards the line between commercial and non-commercial transactions should be drawn. It may be assumed, however, that an international cultural immunity regime will meet with fewer objections if it is premised on there being a loan agreement for non-commercial purposes.

4.5. The nature of the claim and the object of protection

Another policy issue pertains to the nature of the claim. In many cases, cultural objects are seized in connection with a dispute over owners' rights. Seizure may also be a means to secure rights that bear no relation to the seized object itself, as *e.g.* in an action brought by a creditor for payment of a debt owed either by the lender or the borrower. Furthermore, third parties handling the cultural object before, during or after the exhibition (such as carriers, insurers or restorers) might have a lien on the object until they are paid for their services. Finally, in the context of a criminal investigation, law enforcement officers may seize certain cultural objects in order to preserve evidence.

This raises the question of whether immunity should be granted in any situation in which a cultural object is seized or retained with a view to the enforcement of *in personam* or *in rem* rights or in which its temporary presence in a particular jurisdiction is used as a means to hail a foreign defendant into court, or whether it should only be granted in disputes over owner's rights and/or over the payment of a debt which is not related to the object of the loan agreement, and/or in criminal proceedings.

In view of the objectives of an international set of rules on cultural immunity – primarily: the promotion of international collection mobility and cultural exchange – it would seem that, with regard to immunity from seizure, the nature of the claim or the identity of the claimant does not bear any relevance to the basis of protection: cultural immunity is meant to protect cultural objects from seizure and/or other forms of judicial process, not to protect lenders of cultural objects from being sued. In this respect, immunity from jurisdiction in relation to the import of cultural property rests on a different basis: while it is geared to the same objectives as anti-seizure legislation is meant to achieve – the promotion of international collection mobility and cultural exchange – its focus is on shielding owners of cultural property from being sued rather than on protecting their property from being seized.

4.6. Scope

A 'law-making treaty' (*traité-loi*) usually contains one or more provisions demarcating its scope, i.e. (a) the subject matter to which its rules apply (substantive scope), (b) its application in time (temporal scope) and (c) its application in relation to contracting and non-contracting States (territorial scope). With regard to the substantive scope of an instrument on cultural immunity, some elements are discussed separately in §§ 4.3 (extent of immunity) , 4.4 (basis of protection), 4.5 (nature of the claim), 5.1 (identity of the lender), 5.2 (identity of the borrower) and 5.4 (nature of the loan).

4.6.1. Substantive scope: definition of 'cultural objects'

It should not be too difficult to find a workable description of 'cultural objects' or 'cultural property' or 'cultural goods'. The term 'cultural property' was first used in an international legal context in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The phrases 'cultural property', 'cultural goods' and 'cultural objects' are used interchangeably, as exemplified by the titles of the 1970 UN Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995, Council Regulation (EC) no. 116/2009 of 18 December 2008 on the export of cultural Goods, and European Council Directive (EEC) no. 93/7 of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.

However, since an instrument on cultural immunity serves quite different purposes from those pursued by the instruments just mentioned, a more succinct definition might suffice, *e.g.* along the lines of the definition laid down in the American federal Law on Cultural Objects, or the approach of the British Tribunals, Courts and Enforcement Act of 2007, in which the meaning of the phrase 'cultural objects on loan' is linked to the fact the object will be temporarily exhibited in a museum or gallery.

4.6.2. Substantive scope: definition of 'immunity'

The concept of immunity should be defined as well. In the first place, it should be decided whether or not immunity from seizure will be available in civil, administrative and/or criminal proceedings, and to which measures of constraint the term 'seizure' refers. National laws provide for all kinds of actions, remedies and measures that could fall under this heading, such as: pre-judgment and post-judgment attachment, arrest, garnishment, sequestration, execution, forfeiture, requisition, foreclosure, replevin, detinue, etc. Secondly, the possibility of immunity from jurisdiction should be contemplated: should lenders of cultural objects be granted immunity from suit if the sole basis of jurisdiction is the fact that (part of) the loan agreement was carried out in, or otherwise connected with, the forum State.

4.6.3. Temporal scope: application ex nunc or ex tunc?

In general, legislative instruments do not affect acts or facts that occurred before the instrument enters into force. Their effect is usually prospective rather than retroactive. This could be different if the instrument is meant to codify customary law.

Since an international instrument on cultural immunity is likely to create a regime that – at least with regard to private parties – is not yet universally accepted, it might violate fundamental principles of law if it were to be given retroactive effect.

4.6.4. Territorial scope: reciprocity or universal application?

It should be asked whether or not an international instrument on cultural immunity should be based on reciprocity. From a public international law perspective, it could be argued that State immunity (including immunity for State-owned cultural property) does not depend on *quid pro quo* considerations, as, under the rules of customary international law, one State is bound to grant immunity to another State anyway, regardless of whether they are bound by treaty to do so. From a private international law perspective, however, reciprocity would be a valid option, as States are not required to guarantee immunity from seizure to *private* parties in the absence of a bilateral or multilateral treaty.

If an instrument on cultural immunity were to be based on reciprocity – if only with regard to private parties rather than States or State agencies – it would only apply in cases in which there are relevant connections with two or more contracting States. It should be made clear, then, against which standards the relevance of such connections should be tested, *e.g.* by reference to the domicile or residence of the lender, or to the country in which the object on loan is normally kept.

On the other hand, it could be contemplated to extend the immunity regime to situations in which a non-contracting State is involved, *e.g.* when a cultural object on loan is imported from a non-contracting State. In that case, the territorial scope of the instrument would be universal. It should be noted, however, that most international agreements on aspects of civil procedure are based on a *quid pro quo* rationale, which implies that their territorial scope is limited to reciprocal situations.

5. Other policy issues

5.1. Identity of the lender

A choice will have to be made as to the identity of the lender. Should the lender be a governmental institution or a separate State agency, such as a State-controlled museum, or should the immunity regime extend to cultural objects in the possession of private parties, such as private collectors, foundations and commercial art galleries? As many exhibitions depend on loans by private lenders, international cultural exchange would benefit, it would seem, from an immunity regime that does not distinguish between public and private lenders.

Furthermore, it might be wise to avoid terms like ‘owner’ or ‘ownership’, as the question who can claim title to (or control over) the object might be at issue, particularly in case of theft. But ‘ownership’ and ‘owner’ would also be inapposite terms in situations in which an object is on permanent loan to a museum and the museum is entitled to make arrangements for its exhibition abroad. In such cases, the museum should be considered as a custodian or holder rather than owner of the cultural object.

It should be reiterated that immunity with regard to State-owned cultural property, or property held by the State acting as a custodian, may be covered already by (customary) international law. It would seem, therefore, that the value of an international instrument on cultural immunity is greatly increased by the inclusion of cultural objects owned or held by private parties.

5.2. Identity of the borrower

Another choice will have to be made with regard to the identity of the borrower. Does the immunity regime extend to all situations in which a cultural object is on loan for exhibition abroad, regardless of the public or private status of the borrower? Or should it be restricted to situations in which the borrower is a public institution? If so, how should a ‘public institution’ be defined? Should it be a government-approved institution, as required by the British Tribunals, Courts and Enforcement Act 2007? Should its main function be cultural and/or educational, or could it be any borrower acting under the supervision of a State or governmental agency?

5.3. Automatic immunity or immunity upon application?

In some States, cultural immunity is granted automatically if a loan agreement meets the terms of the immunity legislation, without the need for an application to an administrative body. Other States require that

the loan be approved by a government agency, which implies that immunity must be requested by advance application. Governmental approval may depend on various factors, notably the supply of sufficient information on the provenance and ownership of the objects to be loaned and/or the observance of due diligence guidelines. It may also depend on whether temporary exhibition is in the interest of the borrowing State. A choice will have to be made, therefore, between automatic immunity and immunity upon application. In the latter case, it should be decided whether or not it should be left to national legislation to determine the criteria to be satisfied for a successful application.

5.4. The nature of the loan

In some States, anti-seizure legislation only applies to situations in which cultural objects are imported for temporary non-profit exhibition. In practice, however, some cultural institutions do negotiate the payment of a certain amount of money in exchange for their cooperation. Such payments could be justified, perhaps, as a reimbursement of 'administrative costs' incurred by the lender. Yet, the fact that the loan is subject to a financial obligation on the part of the borrower could run counter to the 'nonprofit' condition on which a grant of immunity may depend. Considering the objectives of cultural immunity legislation, it may be hard to defend that a grant of immunity should depend on the presence or absence of a financial *quid pro quo*. If this condition were to be included in an international instrument on cultural immunity, it might be wise to define the phrase 'non-profit'.

6. Legal issues

Some academic writers have suggested that a rule granting 'cultural immunity' may be in violation of various provisions laid down in multilateral conventions and European regulations, notably the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Objects, the European Council Directive 93/7 EEC on the return of cultural objects unlawfully removed from the territory of a Member State, the European Convention on Human Rights, the Brussels I Regulation and the Lugano Convention. While their objections did not prevent a number of Contracting States and EU Member States from adopting anti-seizure legislation, their arguments should be taken in consideration and, possibly, rebutted.

7. To conclude

This paper only purports to facilitate the discussion on the feasibility of an instrument on the international protection of cultural objects from seizure and/or other forms of judicial process. It should serve as a rough guide to the main issues to be resolved if the members of the Cultural Heritage Law Committee of the International Law Association decide to pursue this project.

Working on this paper, the authors became aware of the complexity of the subject-matter. As cultural immunity may extend to property owned or held by States *and* to private property, both public and private international law issues would have to be addressed. Also, as can be gathered from the policy issues listed in §§ 4 and 5, some pivotal choices would have to be made as to the scope of an immunity regime. And last but not least, careful consideration should be given to the question if, and to what extent, cultural immunity can be reconciled with the requirements imposed by multilateral treaties and EU instruments already in force. Nevertheless, an instrument on cultural immunity will serve a purpose that is well worth the intellectual effort it requires. International lawyers supporting cultural exchange and collection mobility should be keen to meet the challenge this project presents.

James A.R. Nafziger, Chair - Robert K. Paterson, Reporter