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**IMMUNITY FROM SEIZURE:****A LEGAL EXPLORATION**

The mobility of museum collections is a decisive factor in the dissemination of knowledge, experience, mutual inspiration and cooperation in the cultural sector.<sup>1</sup>

Early in 1963, American-French connections, fuelled by the friendship between Jacqueline Kennedy and the French Minister of Culture, André Malraux, led to some very exciting developments. It had been agreed that Leonardo da Vinci's masterpiece, the *Mona Lisa*, would be loaned to the United States,<sup>2</sup> where it arrived by ship on 19 December 1962. On 8 January 1963, the painting was unveiled at the Washington National Gallery, and on 7 February 1963, it went on show at the Metropolitan Museum in New York. This was an unprecedented event and one that had raised a number of issues: how to pack the *Mona Lisa* for travel in order to minimise vibration that might render fragile the preparatory layer of paint; how to handle and transport the packing case; how to make sure that the maritime law concerning salvage rights relating to property retrieved outside territorial waters would not allow the painting to be removed from the possession of France; how to secure the painting. However, there were no concerns about immunity from seizure. Nobody seemed to worry that an individual or a company might think of seizing the painting.

It would not be long, however, before such concerns arose. Only a few years later, the United States was pressed to enact immunity from seizure legislation.<sup>3</sup> Since then, the issue of immunity from seizure for travelling cultural objects has become a real concern for states and museums. This is mainly due to increasing legal disputes over the ownership of cultural objects, particularly as a result of claims made by heirs to those objects expropriated by communist regimes in Eastern Europe (including the Russian Federation), as well as Holocaust claims.

## WHAT IS IMMUNITY FROM SEIZURE?

Let us first determine what immunity from seizure is and why one would want to seize cultural objects.

The following description of immunity from seizure is quite adequate:

The legal guarantee that cultural objects on temporary loan from another state will be protected against any form of seizure during the loan period.<sup>4</sup>

In practice, there appear to be two main situations in which someone may wish to seize a cultural object that is temporarily on loan. Firstly, if there is an ownership dispute over a cultural object on loan (allegedly stolen or wrongfully appropriated). A claimant may attempt to file a claim in the borrowing state and to try to seize the object if he or she believes that his or her chances in the country where the cultural object is temporarily on loan are better, legally speaking, than in the country where the object is normally located. Secondly, if an individual or company is of the opinion that the owner of the cultural object on loan owes a debt (not necessarily related to the object) to the claimant, and this claimant has concerns regarding the enforcement of a judgment or arbitration award in the state of residence of the owner. However, there may be other situations. For instance, in the context of a criminal investigation, law enforcement officers may wish to seize certain cultural objects in order to preserve evidence.

Let me give some examples of the two first situations as described above. The first situation is relatively easy to imagine. An heir of a Holocaust victim, or an heir of a collector under Tsarist Russia, is of the opinion that the lending state expropriated a cultural object that belonged to his or her family. The heir may be of the view that the chances for restitution under the jurisdiction of the borrowing state are bigger than in the jurisdiction of a lending State. He or she, therefore, may try to seize the cultural object concerned, after which he or she will initiate legal proceedings for recovery. I shall highlight an 'early case': *Romanov vs. Florida International Museum*.<sup>5</sup> From January 1995 until June 1995, one of the largest collections of Romanov treasures ever was on display in the Florida International Museum in St. Petersburg, Florida. The exhibition *Treasures from the Czars: From the Moscow Kremlin Museums* consisted of 272 items from the reign of the Romanov tsars. Highlights included the Crown of Monomach<sup>6</sup> and a tercentennial Fabergé Easter Egg of gold, silver and diamonds that Nicholas II presented to his wife Alexandra on Easter 1913. In the course of the exhibition, an alleged heir of the Romanov dynasty, calling herself Princess Anastasia Romanov and stating that she was the surviving granddaughter of the Tsarevich, made an action against the Florida International Museum, claiming the Fabergé Egg. However, federal immunity had been granted to the exhibition; therefore, the court dismissed the claim on the grounds of the United States immunity legislation.

With in-depth provenance research, one could be able to trace the history of the cultural object, and one could possibly predict whether ownership claims are likely to be expected or not in individual situations. In addition, the *ICOM Code of Ethics for Museums*<sup>7</sup> states in Article 2.2 that ‘no object or specimen should be acquired by... loan... unless the acquiring museum is satisfied that a valid title is held.’ And Article 2.3 goes on by stating that ‘every effort must be made before acquisition to ensure that any object or specimen offered for... loan... has not been illegally obtained in or exported from its country of origin or any intermediate country in which it might have been owned legally. Due diligence in this regard should establish the full history of the item from discovery or production.’ Therefore, to a certain extent it could be calculated as to whether ownership claims may be expected, although this may not always be watertight.

The second category of cases is much more insecure, and this category has nothing to do with an ownership dispute or necessarily with the cultural object concerned. The *Noga* case in Switzerland illustrates quite well the second situation in which someone may wish to seize cultural objects that are temporarily on loan. In November 2005, the Swiss company Noga tried to seize a collection of 54 French masterpieces belonging to the Pushkin State Museum in Moscow, Russia.<sup>8</sup> The masterpieces had been exhibited from 17 June 2005 to 13 November 2005 in the Fondation Pierre Gianadda gallery in Martigny, Wallis, Switzerland. Noga claimed that the Russian Federation owed it hundreds of millions of dollars in alleged debts and compensation. In 1997, the Arbitration Institute of the Stockholm Chamber of Commerce ruled that the Russian government had to pay Noga USD 63 million. In order to execute that ruling, Noga obtained an order from the court in Wallis authorising the seizure; the paintings were subsequently seized as they were leaving Switzerland to return to Russia. On the initiative of the federal authorities, the Swiss Federal Council ruled on 16 November 2005 that the cultural objects would be allowed to leave the country and would be sent back to the Russian Federation.<sup>9</sup> The ruling went into immediate effect with no possibility for appeal. The ruling of the Swiss Federal Council emphasised that ‘in international law, national cultural treasures are public property and are not subject to confiscation’.

The claims in this category are more difficult to predict. When loaning objects from a certain state, it is unfeasible to (fully) investigate whether the lending state has unpaid debts and/or whether it would cross the mind of the creditor to try to execute its rights in a foreign state under the jurisdiction of that respective state.

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## WHY PROVIDE IMMUNITY FROM SEIZURE?

There are a number of international agreements relating to the topic of immunity from seizure. These include agreements aiming to promote the mobility of collections, agreements with anti-seizure provisions, or agreements aiming to guarantee the safe return of a cultural object to the state of origin. Many states have committed themselves through international legal instruments to supporting the exchange of cultural objects. In addition, the United Nations Charter<sup>10</sup> attaches importance to international cultural co-operation as helpful for the creation of conditions of stability and well-being, which are necessary for peaceful and friendly relations among nations.<sup>11</sup>

Basically, the reason for providing cultural objects with immunity from seizure is to provide security or assurance to lenders that cultural objects loaned by them will not be subject to judicial seizure while in the borrower's jurisdiction<sup>12</sup> and thereby to prevent cultural objects on loan from being used as 'hostages' in trade and/or ownership disputes. 'The effect of immunity from seizure would be to suspend a claimant's ability to be granted a particular form of relief<sup>13</sup> for a strictly limited period of time, rather than removing it. However, in practice, immunity legislation is likely to prevent claims being made on cultural objects that are temporarily in a particular jurisdiction while they are in the jurisdiction, when, from the point of view of a claimant, it would be most useful to bring such a claim.'<sup>14</sup>

As the issue of immunity from seizure for travelling cultural objects has only relatively recently become a real concern for states and museums, and the relevant legislation in various states is comparatively new. Immunity from seizure legislation facilitates the lending of cultural objects for temporary exhibition by guaranteeing that they cannot be seized when on loan abroad. The purpose of such legislation is to overcome the reluctance of lenders to send their cultural objects into a foreign jurisdiction where they might be subject to some form of judicial seizure.<sup>15</sup> It seems that the reason for this legislation is twofold: on the one hand, states simply do not want to risk any acts of seizure. Therefore, they try to act as pragmatically as possible. This implies safeguarding your position as a state by ensuring that you (and your institutions) are considered to be a safe and attractive location for international art loans. On the other hand, states seemingly also act in this way because they feel that there is a legal obligation to do so.

In 1965, the United States was the first country ever to enact immunity from seizure legislation. France was the first state within the European Union in 1994, followed by Germany (1999), Austria (2003), Belgium (2004) and the United Kingdom (2007). In addition, the Netherlands has immunity from seizure legislation, although not specifically referring to cultural objects but to objects intended for public service (which could include cultural objects as

well). Currently, legislation is in development in Finland, Hungary, Poland and Italy.

Although the number of states with immunity from seizure legislation is growing, there is as yet no uniform approach. Some states only immunise from seizure cultural objects belonging to foreign states, whereas other states have a broader approach and protect all foreign cultural objects, including privately owned, on loan for a temporary public exhibition. In addition, the procedural approaches differ: some legislations grant immunity from seizure automatically when established criteria are met, whereas other legislation requires advance application, after which the application is assessed by a government body. Moreover, some states provide ‘immunity from seizure declarations’ or ‘letters of comfort’, in which they state that in accordance with international law and domestic law they will do everything within their power to ensure that the cultural objects loaned by a foreign state or institution will not be encumbered at any time while they are located on its territory. However, whatever approach states have chosen, it goes without saying that the security, legal and otherwise, of international art loans has become a central issue for them.

#### **IMMUNITY FROM SEIZURE AND THE EUROPEAN UNION**

Since the beginning of this millennium, the notion of immunity from seizure (as an element of the overall theme mobility of collections) is on the European agenda. In the years 2003/2004, an extensive study was carried out on state indemnity systems at the request of the European Commission. On the subject of immunity from seizure, the study group stated that ‘it is better for both borrowers and lenders to be protected from any third party action. It therefore seems wise for each country to introduce a law ensuring immunity from seizure.’<sup>16</sup>

During the Dutch Presidency (which took place in the second half of 2004), the Netherlands proposed the issue of mobility of collections to be taken up in the working plan for culture for 2005–2006. Consequently, the Council of Ministers adopted resolution 13839/04 on the working plan for culture 2005–2006, which focused on five priority areas, amongst which was the mobility of collections and works of art. Within this context, the Council Presidency set up a working group of museum experts.<sup>17</sup> The mandate of the group was to prepare practical recommendations for improving the mobility of museum collections, with a special emphasis placed on questions related to insurance and indemnity, standards and guidelines and the role of the registrar.<sup>18</sup> The working group produced *Lending to Europe, Recommendations on collection mobility for European Museums* in the spring of 2005. Besides for

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the initial mandate, more subjects related to collection mobility had been discussed in this working group, e.g. the issue of immunity from seizure. The problems centred on the issue of immunity from seizure had been considered by the group to be the main obstacles or conducive to the mobility of museum collections on a wider scale. The complexity of the subject made it, in the view of the group, necessary to carry out a detailed comparative study of the various systems of immunity from seizure that were applied at that time. The group stressed the importance of establishing a good policy on immunity from seizure.

During the Austrian Presidency, in the first half of 2006, a team representing six successive presidencies (2004–2007)<sup>19</sup> met in Vienna to draw up an *Action Plan*<sup>20</sup> concerning loans for exhibitions between museums in the European Union. Six working groups were established to encourage the implementation of the *Action Plan*.<sup>21</sup> One of the working groups regarded the issue of immunity from seizure. The aim was, amongst others, to prepare a compendium of relevant international treaty obligations and the related international and European background, as well as to prepare recommendations on the possibility of introducing immunity from seizure legislation. However, the working group did not finalise its work at the time that the European Committee decided to set up an OMC Expert Group ‘Mobility of Collections’.<sup>22</sup> In the framework of the Expert Group, five subgroups were established; one of these subgroups was the ‘Immunity from Seizure’ subgroup.

One of the main conclusions that the ‘Immunity from Seizure’ subgroup drew in the course of its work in 2010 is that there is no best or preferred way to address immunity from seizure. It can be concluded that different states follow different approaches, which may work best for them individually. This all depends on their respective legal tradition and system, but also on the amount of international art loans that they are conducting, temporary exhibitions that they are hosting, or the demands of the lending states or museums. When considering immunity from seizure guarantees (including legislations), states should assess which approach would fit them best.

### **THE DIFFERENCE BETWEEN IMMUNITY FROM SEIZURE AND IMMUNITY FROM JURISDICTION**

Immunity from seizure is essentially different from immunity from jurisdiction. The latter term refers to exemption from the judicial competence of the court or tribunal having power to adjudicate in disputes. On the other hand, immunity from measures of constraint or immunity from seizure relates more specifically to the immunity of states in respect of their property from pre-judgment attachment and arrest, as well as from the execution of a judg-



ment rendered.<sup>23</sup> The fact that a national court may have jurisdiction with regard to certain acts of a foreign state does not automatically mean that measures of constraint can be taken.<sup>24</sup> However, the reverse is also true: the fact that cultural objects are immune from seizure does not automatically imply that it would be impossible to initiate legal proceedings in which the objects in question play a leading role.

The *Malewicz* case<sup>25</sup> is a good illustration of the difference between immunity from jurisdiction and immunity from seizure.<sup>26</sup> In this case, immunity from seizure of cultural objects was not at stake. However, the case shows how closely linked immunity from seizure and immunity from jurisdiction are, not least because it became clear that the aim of the United States authorities was not only to provide immunity from seizure, but immunity from suit as well.

On 9 January 2004, a group of 35 heirs of the world-renowned Russian artist Kazimir Malevich<sup>27</sup> filed suit in the US District Court for the District of Columbia in Washington, D.C. against the City of Amsterdam.<sup>28</sup> The heirs sought the recovery of 14 Malevich artworks<sup>29</sup> loaned by the Stedelijk Museum Amsterdam for a special exhibition at the Solomon R. Guggenheim Museum in New York<sup>30</sup> and the Menil Collection in Houston.<sup>31</sup> The suit was filed two days before the exhibition in Houston closed.<sup>32</sup> On 11 April 2003, prior to the loan of the Malevich artworks to the US institutions, the US Department of State had issued a Public Notice<sup>33</sup> in which the US Department of State<sup>34</sup> declared that the objects to be included in the Malevich exhibitions at the Guggenheim Museum and the Menil Collection were of ‘cultural significance’ and that the exhibitions were ‘in the national interest’.<sup>35</sup> The heirs sued the City of Amsterdam for compensation, rather than trying to seize the objects. Such an action is in fact permissible, as the US Immunity from Seizure Act<sup>36</sup> precluded an attempt to seize the works, but did not prevent the foreign lender from being sued.<sup>37</sup> The very basis of the claim was that the heirs were of the opinion that the City of Amsterdam wrongfully acquired the Malevich artworks that are in the Stedelijk Museum Amsterdam when the City purchased them from the German architect Hugo Häring, a friend of Malevich, in 1958.

On 22 December 2004, the State Department and the Department of Justice filed a ‘Statement of Interest’<sup>38</sup> to inform the US District Court of their concerns as to the potential effects of the heirs’ lawsuit upon the interests that the US Immunity from Seizure Act is designed to foster. The US authorities pointed out that under the Immunity from Seizure Act, the artworks concerned were considered to be immune from seizure and other forms of judicial process while in the US and that, until the proceedings in question, the Act had served as an effective and efficient means for protecting these kinds of artworks from litigation. The authorities recalled in their Statement of

Interest that the US Congress' stated purpose in enacting immunity legislation was 'to encourage the exhibition in the United States of objects of cultural significance which, in the absence of assurances such as are contained in the legislation, would not be available'. The authorities expressed the fear that the 'unprecedented' approach of the heirs would introduce a great level of uncertainty as to whether sovereign lenders will be confronted with greater litigation risks, simply through loaning an exhibit subject to immunity to the United States. They also feared that this could result in friction in US relations with other countries. They considered it 'undisputed' that the heirs could not seek to seize the artworks while they were in the country and under a grant of immunity. In their view, it was also undisputed that if the heirs had filed their lawsuit prior to the importation of these works, or following their departure, the court would have had no jurisdiction over their claims. The heirs were using the window of opportunity afforded by the US exhibition, therefore, as the jurisdictional hook for their claims. On 17 March 2005, the US authorities filed a Supplemental Statement of Interest to emphasise that a finding of no jurisdiction in this case would merely prevent the claimants from transforming into a sword what was intended to be a shield.

On 30 March 2005, the District Court emphasised that it was undisputed that the heirs could not seek to seize the artworks while they were in the US under a grant of immunity under the US Immunity from Seizure Act. As the heirs did not contend that they could have filed this suit prior to the importation of the works or following their departure, the court observed that the heirs were using the window of opportunity afforded by the Malevich exhibitions as the jurisdictional hook for their claims. Because the heirs were not seeking the judicial seizure of the artworks, the court considered the reliance on the Immunity from Seizure Act by the City of Amsterdam misplaced, as immunity from seizure is not the same as immunity from suit.

It goes too far to go into detail as to why the US Court was of the opinion that it had competence in hearing the case against the City of Amsterdam. It is important to know, however, that in June 2007 the district court set aside the argument of the City of Amsterdam that this lawsuit could deter further cultural exchanges. In view of the court, the loan of the artwork from the city to US museums was not a matter touching upon 'foreign relations'. It was a private transaction, admittedly with an altruistic public purpose, which had no far-reaching national or international implications, according to the court.

After intense deliberations between the heirs and the City of Amsterdam, an amicable settlement was reached on 23 April 2008. The settlement concerned not only the fourteen works that were the subject of the US suit, but also covered the entire group of Malevich works in the City's collection. Pursuant to the settlement, the artist's descendants received five important

paintings from the city's collection,<sup>39</sup> the remaining works in the collection will remain with the city, and the heirs' US suit was permanently withdrawn.

What happened in the *Malewicz* case might not necessarily occur in each state or under each jurisdiction. In private international law, the principle of 'lex rei sitae' (literally the law where the property is situated) generally prevails. In other words, it primarily depends on the legal system of the state to which the cultural objects are loaned.

## CONCLUSION

With legal disputes over the ownership of cultural objects on the rise, particularly as a result of claims made by heirs to cultural objects expropriated by communist regimes in Eastern Europe, as well as Holocaust claims, the issue of immunity from seizure for travelling cultural objects has become a real concern for states and museums. An important reason for providing cultural objects with immunity from seizure is to provide security or assurance to the lenders of cultural objects that such objects will not be subject to judicial seizure while in the borrower's jurisdiction. The second reason is to try to prevent cultural objects on loan from being used as hostages in trading and/or ownership disputes. However, immunity from seizure is essentially different from immunity from jurisdiction. Depending on the legislation of the borrowing state, the fact that cultural objects are immune from seizure does not automatically imply that it would be impossible to initiate legal proceedings in which the objects play a leading role.

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## ENDNOTES

- 1 Tanja Saarela, Finnish Minister of Culture, during the European Conference *Encouraging the mobility of collections*, Helsinki, 20 and 21 July 2006.
- 2 By way of a personal loan to President Kennedy.
- 3 The United States was the first country to introduce immunity from seizure legislation in 1965. The catalyst was an imminent exchange between a Soviet museum and the University of Richmond, in which the latter sought to import several artworks that had been appropriated by the Soviet government from art collectors. The Soviet Union made a grant of immunity from seizure as protection from former Soviet citizens claiming title to the cultural objects a condition of the loan.

- 4 Based on the description of immunity from seizure in the *Action Plan for the EU Promotion of Museum Collection Mobility and Loan Standards*, Helsinki 2006. Available: [http://www.ne-mo.org/index.php?id=104&STIL=0&C\\_PID=&C\\_UID=7](http://www.ne-mo.org/index.php?id=104&STIL=0&C_PID=&C_UID=7).
- 5 *Romanov vs. Florida International Museum*, No. 95-001285-CI-008 (Cir.Ct. Pinellas City, FL 1995). See also Stephen J. Knerly, Jr., *International Loans, State Immunity and Anti-Seizure Laws*, Ali-AbaCours of Study – Legal Issues in Museum Administration, 1–3 April 2009, Boston, Massachusetts, 11.
- 6 An Eastern-styled, sable-trimmed and jewel-studded headdress worn by Peter I at the age of 10 in 1682.
- 7 *ICOM Code of Professional Ethics*, adopted by the 15<sup>th</sup> General Assembly of ICOM in Buenos Aires, (Argentina) on 4 November 1986, amended by the 20<sup>th</sup> General Assembly in Barcelona (Spain) on 6 July 2001, renamed *ICOM Code of Ethics for Museums*, revised by the 21<sup>st</sup> General Assembly in Seoul (Republic of Korea) on 8 October 2004. <http://icom.museum/ethics.html#intro>.
- 8 Among the works were paintings by Pierre-August Renoir, Claude Monet, Édouard Manet, Edgar Degas, Vincent Van Gogh and Paul Gauguin.
- 9 This decision was based on Article 184, paragraph 3 of the Swiss Constitution, which allows for ‘necessary measures to protect national interests’.
- 10 Signed in San Francisco, the United States, on 26 June 1945.
- 11 Article 55:  
 ‘With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:  
 a. [...];  
 b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and  
 c. [...]’
- 12 Norman Palmer ‘Comments on the DCMS consultation paper on anti-seizure legislation for cultural objects on loan’ (on file with me). Palmer uses the phrase ‘... not be subject to judicial seizure or other hindrance from courts...’; however, as immunity from seizure should be distinguished from immunity from jurisdiction, it is in my view not possible to say that immunity from seizure can prevent any form of hindrance from the court. As a matter of fact, if the court has jurisdiction to assess a case, that may be considered by the lender as a form of hindrance as well.
- 13 Relief: remedy sought by a claimant in a legal action. *Dictionary of Law*, Third Edition, Middlesex 2000.
- 14 ‘Consultation Paper on anti-seizure legislation’, United Kingdom Department for Culture, Media and Sport, 8 March 2006, paragraph 1.16. However, as shown below, this kind of prevention is not always possible, as claims are still sometimes made.
- 15 O’Connell, A. (January 2006) ‘Immunity from seizure: an overview’, *Art Antiquity and Law*, Vol. XI, issue 1, 2. See also <http://www.artlossreview.com/legal/legalarchive.php?id+3>.
- 16 Study No. 2003–4879: An inventory of the national systems of public guarantees in 31 European countries (June 2004), Reunion des Musees Nationaux, Etablissement Public a Caractere Industriel et Commercial (EPIC) Paris (France) in collaboration with Staatliche Museen zu Berlin Preussischer Kulturbesitz Berlin (Germany).
- 17 Under the chairmanship of Ronald de Leeuw, at that moment Director General of the Rijksmuseum, Amsterdam, the Netherlands.
- 18 *Lending to Europe, Recommendations on collection mobility for European Museums*, A report produced by an independent group of experts, set up by Council resolution 13839/04; April 2005. Available [http://www.museumcollectionsonthemove.org/references/Lending\\_to\\_Europe.pdf](http://www.museumcollectionsonthemove.org/references/Lending_to_Europe.pdf).
- 19 The Netherlands, United Kingdom, Luxembourg, Austria, Finland and Germany.
- 20 *Action Plan for the EU Promotion of Museum Collections’ Mobility and Loan Standards*, Helsinki 2006. Available [http://www.ne-mo.org/index.php?id=104&STIL=0&C\\_PID=&C\\_UID=7](http://www.ne-mo.org/index.php?id=104&STIL=0&C_PID=&C_UID=7). The draft of the *Action Plan* was discussed in the conference titled *Encouraging the Mobility of Collections*, in Helsinki on 21 July 2006, and endorsed by the EU Cultural Affairs Committee on 17 October 2006. The aim of the *Action Plan* was to facilitate the access to Europe’s cultural heritage, make it available for all citizens and find new ways to improve co-operation, trust and good practice for lending between museums.
- 21 These working groups are: immunity from seizure; state indemnity schemes; non-insurance, self-insurance and valuation of cultural objects; loan fees and long-term loans; building up trust and networking; loan administration and loan standards. There was a 7<sup>th</sup> theme, being ‘digitalisation’. That area is promoted by the National Representatives Group for the EU co-ordination of the digitalisation of cultural and scientific content.
- 22 *The EU Council Work Plan for Culture 2008–2010* firmly included the follow-up schedule of the *Action Plan* agreed under the Finnish Presidency. In addition, one of the central objectives of the

Culture Programme 2007–2013 of the European Commission is to encourage the circulation of works of art.

- 23 ‘Seventh report on jurisdictional immunities of States and their property’, by Sompong Sucharitkul, ILC Special Rapporteur, in Document A/CN.4/388, Yearbook of the International Law Commission 1985, Volume II, Part One, documents of the thirty-seventh session, para. 16.
- 24 In its Explanatory Memorandum to the amendment of the Bailiffs’ Act, dated 5 April 1993 (Parliamentary Papers 23081, no. 3) the Dutch government stated: ‘Both in treaties and in customary international law, immunity from execution is more readily accepted than immunity from jurisdiction. Although the matter is not absolutely clear, and opinions differ, it can be said that, in accordance with both customary and codified international law, it should be assumed that the property of a foreign State enjoys immunity from execution.’
- 25 *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298 (D.D.C. 2005); *Malewicz v. City of Amsterdam*, 2006 U.S. App. LEXIS 615 (D.C. Cir., Jan. 10, 2006); *Malewicz v. City of Amsterdam* 517 F. Supp. 2d 322 (D.D.C. June 27, 2007).
- 26 See also my article ‘Declarations of Immunity from Seizure of Foreign Artworks and the Legal Position of Sovereign Art Lenders before US Courts: the *Malewicz* Case’, in: *The Netherlands in court; essays in honour of Johan G. Lammers*, 2006, 223–245.
- 27 When speaking of the artist, I use the spelling ‘Malevich’; when speaking of the legal proceedings, I use the spelling ‘Malewicz’.
- 28 Under the 1976 US Foreign Sovereign Immunity Act, the City of Amsterdam is a political subdivision of the Kingdom of the Netherlands.
- 29 13 paintings and one drawing. I use the term ‘artworks’ here, as this is the term used in the suit.
- 30 This exhibition ran from 22 May 2003 to 7 September 2003.
- 31 This exhibition ran from 2 October 2003 to 11 January 2004.
- 32 The 14 artworks were part of a larger collection of some 84 paintings, gouaches, drawings and theoretical cards (technical drawings) that were purchased by the Stedelijk Museum Amsterdam (a museum owned by the City of Amsterdam) in 1958.
- 33 Public Notice no. 4335. The notice carried the title ‘Culturally Significant Objects Imported for Exhibition Determination: “Kazimir Malevich: Suprematism”’. This Notice was published in the Federal Register on 11 April 2003, Volume 68, Number 70, 17852–17853. The Malewicz heirs had filed an objection to the issue of the declaration, but the Department of State decided to stick to its determination.
- 34 Patricia S. Harrison, Assistant Secretary for Educational and Cultural Affairs, Department of State.
- 35 ‘I hereby determine that the objects to be included in the exhibition “Kazimir Malevich: Suprematism” imported from abroad for temporary exhibition within the United States, are of cultural significance. These objects are imported pursuant to loan agreements with foreign lenders. I also determine that the exhibition or display of the exhibit objects at the Solomon R. Guggenheim Museum, New York, New York, from on or about May 22, 2003, to on or about September 7, 2003, the Menil Collection, Houston, Texas, from on or about October 2, 2003, to on or about January 11, 2004, and at possible additional venues yet to be determined, is in the national interest.’
- 36 22 U.S.C. § 2459. Public Law 89–259. (S.2273), 79 Stat. 985, approved 19 October 1965.
- 37 See also Yin-Shuan Lue, Polly Clark and Marion R. Fremont-Smith, *Countering a Legal Threat to Cultural Exchanges of Works of Art: The Malewicz Case and Proposed Remedies*, The Hauser Center for Nonprofit Organizations, December 2007, Working Paper No. 42.
- 38 This is possible based on US legislation and has the aim to inform the court of the US administration’s view on certain legal issues as presented by a particular case.
- 39 The five paintings concerned are: *Desk and Room* (1913), *Suprematist Composition (Blue Rectangle over Purple Beam)* (1916), *Suprematism (Football player)* (1915), *Suprematism, Eighteenth Construction* (1915) and *Mystic Suprematism (Black Cross on Red Oval)* (1920–1922). *Suprematist Composition* was auctioned at Sotheby’s New York in November 2008, and sold for USD 60 million.