

MOBILITY OF COLLECTIONS / Immunity from Seizure

Nout van Woudenberg & Hillary Bauer

Antwerp, 1-3 December 2010

To be assessed during the training:

A: Theoretical Introduction:

- 1) What is 'immunity from seizure'?
- 2) Why provide 'immunity from seizure'?
- 3) What forms of seizure may occur?
- 4) What is the difference between 'immunity from seizure' and 'immunity from suit'.

B: Limiting the chances of harm doing:

- 1) The need for proper provenance research.
- 2) What is Due Diligence?
- 3) The ICOM Code of Ethics.
- 4) Serving as an example: The Due Diligence Guidelines in the United Kingdom.

C: 'Immunity from seizure' in contradiction with other (return) obligations?

- 1) The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.
- 2) The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.
- 3) The 1993 European Union Directive on the Return of Cultural Objects Illegally Removed from the Territory of a Member State.

D: 'Immunity from seizure' in contradiction with human rights obligations?

- 1) Article 6 of the European Convention on Human Rights: The right of access to courts.
- 2) Article 1, First Protocol annexed to the European Convention on Human Rights: The right of peaceful enjoyment of one's possessions.
- 3) Case law of the European Court of Human Rights.

E: 'Immunity from seizure' in practice:

- 1) How is 'immunity from seizure' addressed in different Member States?
- 2) Which other States have addressed 'immunity from seizure' and to what extent?
- 3) The issuing of 'letters of comfort'.

F: 'Immunity from seizure' within the European Union:

- 1) How did it all start?
- 2) The "OMC" Expert Group on Mobility of Collections.
- 3) The Subgroup on Immunity from Seizure.

G: To conclude:

- 1) Conclusions of the subgroup Immunity from Seizure.
- 2) Is there a best way to address 'immunity from seizure'?
- 3) The possibility of a future Convention on 'immunity from seizure'.

Definitions and descriptions:

Immunity from seizure:

'Immunity from seizure' can be described as the legal guarantee that cultural objects on loan from another State will be protected against any form of seizure during the loan period.

The term 'seizure', is thereby used in an "overall catchall" sense; every process of attachment, execution, sequestration, requisition, foreclosure, replevin, detinue etc. is to be considered as falling within that term.

Immunity from jurisdiction:

'Immunity from jurisdiction' is also called 'immunity from suit'. It refers to exemption from the judicial competence of any court or tribunal in the borrowing State having power to adjudicate or settle disputes by adjudication.

The fact that cultural objects are immune from seizure does not automatically imply that it would be impossible to initiate legal proceedings with regard to these objects. Generally, this all depends on the law of the borrowing State (also called the '*lex sitae*').

Letter of comfort:

A 'letter of comfort' means a written confirmation from a governmental representative of the borrowing State 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'. However, sometimes such a confirmation may be sufficient for the lender. In other cases, concrete legislation may be necessary.

Due diligence:

'Due diligence' can be defined as undertaking every possible effort before acquisition or loan to ensure that any object offered for purchase, gift, loan, bequest or exchange 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 (including the museum's own country). Due diligence in this regard should establish the full history of the item from discovery or production.

However, no matter how 'due diligence' is defined, it all relates to the requirement for museums and galleries borrowing or acquiring items to be certain that they never acquire or exhibit any stolen or illegally exported works; that these have no uncertain ethical status and that they have been legally acquired and exported/imported legally at all stages in their

history, as far as this can reasonably be established. In short they should reject an item if there is any suspicion about it, or about the circumstances surrounding it.

‘Due diligence’ is deemed to involve five components: (1) initial examination of the item; (2) consideration of the type of item and its likely place of origin; (3) taking expert advice; (4) determining whether the item was lawfully exported to the country of (temporary) import; (5) evaluating the account given by the donor.

Different roads towards ‘immunity from seizure’:

A) Convention based solutions:

1. Considering the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (esp. Article 19) as the basis for acknowledging immunity from seizure.
2. Developing a multilateral treaty, providing immunity from seizure for State property, private property, or both kinds of property.
3. Concluding bilateral Agreements between lending State and borrowing State on a case-by-case basis.

B) Other solutions based on public international law:

1. Considering cultural objects belonging foreign States, temporarily on loan, immune from seizure on the basis of customary international law.

C) National legislation based solutions:

1. Immunity from seizure legislation, specifically addressing cultural objects, either cultural objects belonging to foreign States or cultural objects both belonging to foreign States and private institutions / individuals.
2. General immunity from seizure legislation, not specifically addressing cultural objects, but focusing on property of foreign States, intended for official/public use.

D) Non-legal solutions:

1. The issuing of immunity from seizure guarantees in the form of ‘letters of comfort’.

Recommended literature:

A) Related to the ‘Mobility of Collections’:

S. Petterson, M. Hagedorn-Saupe, T. Jyrkkiö, A. Weij (eds.), *Encouraging Collections Mobility – A Way Forward for Museums in Europe*, 2010
Esp. pp. 184 – 196: N. van Woudenberg, ‘Immunity from seizure: A legal exploration’
http://www.lending-for-europe.eu/fileadmin/CM/public/handbook/Encouraging_Collections_Mobility_A4.pdf

Final Report and Recommendations to the Cultural Affairs Committee on improving the means of increasing the Mobility of Collections, OMC Expert Working Group on the Mobility of Collections, June 2010

(Esp. pp. 20 – 23)

http://ec.europa.eu/culture/our-policy-development/doc/library/OMC_mobility_collections_reportRome_07_10.pdf

Report, Expert Group ‘Mobility of Collections’ / Subgroup ‘Immunity from Seizure’, Brussels, June 2010

http://ec.europa.eu/culture/our-policy-development/doc/mobility_collections_report/reports/immunity_seizure.pdf

Conclusions and Recommendations, Expert Group ‘Mobility of Collections’ / Subgroup ‘Immunity from Seizure’

http://ec.europa.eu/culture/our-policy-development/doc/mobility_collections_report/conclusions/immunity_seizure.pdf

B) Related to ‘Due Diligence’:

ICOM Code of Ethics for Museums (esp. Articles 2.2 and 2.3)

<http://icom.museum/ethics.html>

Combating Illicit Trade: Due diligence guidelines for museums, libraries and archives on collecting and borrowing cultural material, United Kingdom Department for Culture, Media and Sport, Cultural Property Unit, October 2005.

http://www.culture.gov.uk/NR/rdonlyres/721E9365-38BE-4AF8-BF8D-BE5B4BF8B21C/0/CombatingIllicitTrade_v5.pdf.

Or: http://www.culture.gov.uk/reference_library/publications/3697.aspx.

C) Other relevant literature:

Consultation Paper on Draft Regulations for the Publication by Museums and Galleries of Information for the Purposes of Immunity from Seizure Under Part 6 of the Tribunals, Courts and Enforcements Act 2007, United Kingdom Department for Culture, Media and Sport, September 2007

http://www.culture.gov.uk/images/publications/draftregulations_immunityfromseizure_PDF.pdf

United Kingdom Consultation Paper on Anti Seizure Legislation

http://webarchive.nationalarchives.gov.uk/+/http://www.culture.gov.uk/images/consultations/Consultation_paper_on_antiseizure_legislation.pdf

A. O’Connell, ‘Immunity from Seizure Study’, *Report commissioned by Ronald Lauder, Chairman Emeritus of the Museum of Modern Art in New York*, September 2005.

S. J. Knerly Jr., ‘International Loans, State Immunity and Anti-Seizure Laws’, *Ali-Aba Cours of Study - Legal Issues in Museum Administration*, April 1-3, 2009, Boston, Massachusetts.

Relevant International Legal Documents:

European Union Council Directive on the Return of Cultural Objects Illegally Removed from the Territory of a Member State

No. 93/7/EEC (OJ No. L74/74 March 1993).

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0007:en:HTML>

UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

Paris, 14 November 1970, 823 UNTS 231

http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html

UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

Rome, 24 June 1995, 34 ILM 1322

<http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm>

United Nations Convention on Jurisdictional Immunities of States and Their Property (Esp. Articles 18 – 21)

New York, 2 December 2004, A/Res/59/38

http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf

Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms

(Esp. Article 6)

Rome, 4 November 1950, European Treaty Series – No. 5

<http://conventions.coe.int/treaty/en/Treaties/Word/005.doc>

(First) Protocol to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms

(Esp. Article 1)

Paris, 20 March 1952, European Treaty Series – No. 9

<http://conventions.coe.int/treaty/en/treaties/html/009.htm>