

**Expert Group ‘Mobility of Collections’**

**Subgroup ‘Immunity from Seizure’**

**REPORT**

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## 1. Introduction

### 1.1. Background to the subgroup ‘Immunity from Seizure’

Since the beginning of this millennium, the notion of ‘immunity from seizure’ (as element of the overall theme ‘mobility of collection’) 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>1</sup>

During the Dutch Presidency (second half of 2004), the issue of mobility of collections was taken up in the working plan for Culture for 2005 – 2006, which was adopted by the Council of Ministers.<sup>2</sup> The plan focused on five priority areas, amongst which was mobility of collections and works of art. Within this context, the Council Presidency set up a working group of museum experts with the mandate to prepare practical recommendations for improving the mobility of museum collections.<sup>3</sup> The report of the working group “*Lending to Europe, Recommendations on collection mobility for European Museums*” was presented to the Council on 23 May 2005.

Besides the initial mandate, more subjects related to collection mobility had been discussed in the working group, e.g. the issue of immunity from seizure. The problems around the issue of immunity from seizure had been considered by the subgroup to be a major obstacle to the mobility of museum collections on a wider scale. But because of the problematic nature of the subject, the subgroup was not in a position to recommend a detailed proposal for immunity from seizure.

The complexity of the subject made it necessary, in the view of the subgroup, to carry out a detailed comparative study of the various systems of immunity from seizure currently applied.

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<sup>1</sup> Study No. 2003-4879: An inventory of 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).

<sup>2</sup> Council resolution 13839/04

<sup>3</sup> *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, page 9.

The report can be found at: [http://www.museumcollectionsonthemove.org/references/Lending\\_to\\_Europe.pdf](http://www.museumcollectionsonthemove.org/references/Lending_to_Europe.pdf).

The study would take into account the wishes of those European countries that do not yet have anti-seizure laws, and it would furthermore analyze the American system, which – as the oldest such system – would offer the greatest number of practical examples. The study should conclude by making precise recommendations as to the relevant law. 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>4</sup> met in Vienna to draw up an action plan concerning loans for exhibitions between museums in the European Union. The draft 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.<sup>5</sup> 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.<sup>6</sup> Besides, six working groups were established to encourage the implementation of the Action Plan.<sup>7</sup> One of the working groups regarded the issue of immunity from seizure.<sup>8</sup> 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, this working group did not finalize its work at the time the European Committee decided to set up an OMC Expert Group “Mobility of Collections”, as the EU Council Work Plan for Culture 2008-2010 firmly included the follow-up schedule of the Action Plan agreed on under the Finnish Presidency. One of the central objectives of the Culture Programme 2007-2013 of the European Commission became to encourage the circulation of works of art. Within the framework of the Working Group, five sub-working groups were established; one

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<sup>4</sup> The Netherlands, United Kingdom, Luxembourg, Austria, Finland en Germany.

<sup>5</sup> Action Plan for the EU Promotion of Museum Collections' Mobility and Loan Standards, Helsinki 2006, to be found at: [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).

<sup>6</sup> Page 4 of the Action Plan.

<sup>7</sup> These working groups were: (1) Loan administration and loan standards; (2) State indemnity schemes; (3) shared liability, non insurance, self-insurance and valuation of cultural objects; (4) Immunity from seizure; (5) loan fees and long term loans; (6) building up trust and networking; (7) Digitisation. Groups 1-6 worked on their subjects. The group 7 was promoted by the National Representatives Group for the EU co-ordination of the digitalisation of cultural and scientific content.

<sup>8</sup> This working group was led by Hillary Bauer, Head of the Cultural Property Unit of the UK Department for Culture, Media and Sport.

of these subgroups chaired by Poland and Germany was the Immunity from Seizure subgroup.

## **1.2 Composition and working methods of the subgroup**

The working Group met 7 times: 12-13 November 2008; 5-6 February 2009; 18-19 June 2009; 24-26 November 2009; 20-21 January 2010; 16-17 March 2010, 19-20 May 2010.

**13 States participating in works of the group: Austria, Belgium, Finland, France, Germany, Greece, Hungary, Netherlands, Poland, Romania, Portugal, Spain, UK.**

The subgroup understands “immunity from seizure” as the legal guarantee that cultural objects loan from another state will be protected against any form of seizure during the loan period.<sup>9</sup> When the report refers to ‘seizure’, it needs to be emphasized that this term is used in an overall meaning. From the discussion within the subgroup it was clear from the beginning, that every process of attachment, execution, sequestration, requisition, foreclosure, replevin, detinue etc.

The aim of the Working Group’s introductory research was to collect, to compare and to summarize the present situation and trends in legislation concerning Immunity from Seizure, and to collate existing regulations applied by museums in the EU.

Between autumn 2008 and spring 2009, a questionnaire was prepared and circulated to all EU Member States. A table summarizing the received questionnaires is at pages 32 – 38 below.

As one of the results of this query, the group intended to formulate a description and comparison of the existing legislation. At the same time the intention was to provide knowledge and propose best practices for those States which are in a process of enacting anti-seizure legislation, or doubt which way would be the most feasible or practical for them.

The aim of providing overview and knowledge has been realised, but the members of the group expressed doubts whether it would be possible to formulate a “one size fits all” approach at the moment. Instead of proposing one best practice for all, the working group

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<sup>9</sup> Definition based on the description of immunity from seizure in the Action Plan for the EU Promotion of Museum Collections' Mobility and Loan Standards, Helsinki 2006, to be found at: [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)

decided to set out Frequently Asked Questions (FAQ), to prepare a (non exhaustive) check list to be used when considering introducing immunity from seizure legislation, and to recommend webpages and a limited bibliography which may help to possibly introduce or to extend Immunity from Seizure legislation in the Member States of the EU. The report is completed by six recommendations which take into account the differences in national legislation in the respective Member States.

The members of the subgroup stress that Immunity from Seizure may have a positive influence on the opening up and trans-border movement of hidden collections in Europe. They accentuate the linkage between Immunity from Seizure regulations and provenance research of objects in museums, with the aim of identifying and clarifying provenance gaps, expropriation or illicit transfer of cultural objects.

The working group **recommends** publication of this report (and the annexes) on the web sites of NEMO, ICOM, The Collection Mobility 2.0 and/or the European Council and to provide links to national websites, to be available for all museum professionals, ministries, higher schools teaching museology, together with all annexes. A printed version may be also useful for all professionals dealing with this subject.

### 1.3 Questionnaire and Results

A questionnaire was sent to all Member States in the Spring of 2009 and Member States responded by January 2010<sup>10</sup>. The aim of the questionnaire was to get insight into the existing regulations, possible foreseen amendments and approaches and to investigate whether immunity from seizure legislation is planned in those Member States where such legislation does not yet exist. The questionnaire also included a question concerning the practice of “letters of comfort”.

The results showed that 6 out of 27 Member States (MS) have Immunity from Seizure legislation (Austria, Belgium, France, Germany, Netherlands, and UK) either as a separate law or as provisions in the Code of Civil Procedure. 2 MS (Lithuania and Romania) have

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<sup>10</sup> Excluding Slovakia

regulations that are related to the subject; 2 MS have almost finalized its legislation (Finland, Italy), 7 MS are considering to enacting anti-seizure legislation at some point in the future (Czech Republic, Greece, Hungary, Latvia, Poland, Portugal, Slovenia). In all 17 out of 27 MS have implemented or are considering to implement anti-seizure regulation or related legislation. It was also observed that 14 MS (Cyprus, Estonia, Finland, Greece, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain and previously UK) were able of issuing or still use letters of comfort, as this form of guarantee has been a condition for loan (for example from Russia).

#### **1.4 Tentative conclusions**

The number of EU Members States enacting anti-seizure legislation for cultural objects is slowly but steadily growing. 63% of countries have decided to introduce or are on the way to introducing Immunity from Seizure legislation for purposes of (or including) international art loans. However, the group concluded that there is still an existing but decreasing group of countries where letters of comfort play an important role in anti-seizure guarantees.

## **2. International and EU instruments on the return of cultural goods, and the ICOM Code of Ethics for Museum with relevance to Immunity from Seizure:**

The following instruments are recommended for consideration in any discussion regarding immunity from seizure and in particular the consideration of due diligence requirements. All these instruments contain a procedure for the return of certain cultural property (or are otherwise related to our topic). On the one hand, this can be considered as confirming the notion of ‘immunity from seizure’; as such an immunity guarantee also envisages the return of the cultural objects (to the lending State or institution). On the other hand however, these instruments may in practice be also at odds with a guarantee of immunity from seizure.

There are a few important international agreements which include a return obligation. Most important once are 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 Cultural Objects and the 1993 European Union Directive on the Return of Cultural Objects Illegally Removed from the Territory of a Member State. They all have return obligations to third States of origin (so,

another State than the lending or borrowing State) within their provision, whereby also seizure sometimes may be necessary to secure the return to such a third State.

Most of the national immunity from seizure legislation has a clause, stating that international return obligations, or a court order of an international legal tribunal, prevail over the immunity from seizure guarantee as foreseen in the national legislation. This would mean that some caution is advisable, when providing immunity from seizure guarantees. Adequate provenance research will be necessary to identify any possible conflicts with obligations under international law and will reduce the chance of any harm doing.

## **2.1. International Instruments (UN, UNESCO in chronological order)**

### **2.1.1. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>11</sup>**

The following 22 EU Member States are a Party to this Convention:

Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, UK.

The widespread illicit trafficking in cultural property, the lack of legal provisions to enable their return into the countries of origin and the international trade of illicitly exported items led to the elaboration of an international Convention under the aegis of UNESCO. The 1970 UNESCO Convention was adopted at the 16<sup>th</sup> General Conference of UNESCO in November 1970 and entered into force on 24<sup>t</sup> April 1972. The Convention is not retroactive which means that it does not apply to events which took place before it entered into force for a State.

1970 UNESCO Convention has been established to address the increase of thefts of cultural objects at the end of the 1960's and in the beginning of the 1970's, both from museums and at archaeological sites, and the fact that these objects were increasingly offered or had been fraudulently imported.

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<sup>11</sup> 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](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html)

Related to the theme of mobility of collections, the Convention considers in the preamble amongst others that the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations. While promoting the mobility of collections, UNESCO gives with this Convention a clear message that exchange of cultural objects with a doubtful provenance, or which have been illegally acquired or replaced, cannot be tolerated.

It provides in Article 7 an obligation with regard to cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to the Convention. At the request of the State Party of origin, appropriate steps should be taken by the State Party that received the said property to recover and return any such cultural property imported after the entry into force of the Convention in both States concerned. It is foreseeable, that this may include seizure of the said property as well, in order to be able to return it to the requesting State Party. Article 13 states that States Parties to the Convention also undertake, consistent with the laws of each State, (c) to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners.

Since the Convention is not self executing, the provisions have to be implemented in national law. Thus far 121 States have ratified the Convention<sup>12</sup>.

### **2.1.2 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects<sup>13</sup>**

The following EU Member States are a Party to this Convention:

Cyprus, Denmark, Finland, France, Greece, Hungary, Italy, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain.

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

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<sup>12</sup> See also: <http://www.culture.gov.uk/images/publications/Dealincultural.pdf> , and: [http://www.culturalpropertyadvice.gov.uk/trade/buying\\_with\\_confidence](http://www.culturalpropertyadvice.gov.uk/trade/buying_with_confidence)

<sup>13</sup> Rome, 24 June 1995, 34 ILM 1322

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

The UNIDROIT Convention was adopted in Rome the 24<sup>th</sup> of June 1995 and aims to harmonize the laws of participating countries regarding claims for the return of stolen or illegally exported cultural property. More specifically, it allows a State Party or an individual stakeholder or a legal entity owner to bring claims for the return of stolen cultural property that has occurred in a foreign country; and it also aims to clarify the extent to which importing countries are obliged to respect other countries' export-control laws. The Convention has set clear time limits for the claimant.

The Convention mainly focuses on the recovery phase and sets uniform rules and conditions for restitution claims on stolen cultural objects, as well as return claims on illicitly exported cultural objects. Under the Article 3 it covers only objects of illicit provenance in terms of stolen and/or illicitly exported items.

As regards the three main principles of the provisions a) the parties may agree to replace compensation b) the requesting State covers the costs of returning the object without prejudice to the right to recover costs from any other person c) the current possessor is not in a more favourable position than the former possessor.

The Convention has operational private law provisions, and restitution requests are brought before the court or other competent authority of the State Party where the cultural object is located. Nevertheless the parties may also agree to submit the dispute to another court or to arbitration.

The Convention is not retroactive thus applies between States Parties after their entry into force. It is also to be mentioned that the UNIDROIT Convention should be regarded as complementary to the 1970 UNESCO Convention.

### **2.1.3 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property<sup>14</sup> (not yet in force)**

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<sup>14</sup> New York, 2 December 2004, A/Res/59/38  
[http://untreaty.un.org/ilc/texts/instruments/english/conventions/4\\_1\\_2004.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf)

The following EU Member States are a Party to this Convention:

Austria, Portugal, Romania, Sweden.

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. Cultural objects play a special role under the Convention when it comes to immunity from seizure. While the Convention proceeds from the principle that no measures of constraint (as it is called under the Convention) may be taken against property of a State, it also provides for certain exceptions to that principle. However, Article 21(1)(e) of the Convention explicitly states that 'property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale' should be considered goods intended for public service. As a consequence, these cultural objects are by definition immune from measures of constraint. However, the Convention has not yet come into force. To come into force, it is necessary for at least 30 States Parties to give their formal consent to be bound by it. Currently (Spring 2010), only nine States have done so. Amongst those are four EU Member States: Austria, Portugal, Romania and Sweden. Several States are of the opinion that the above mentioned provision can be considered as a rule of *customary international law*, or that this rule is emerging. That would imply that the content of the provisions of the Convention are applicable, without the necessity of becoming a Party to the Convention. Based on the questionnaire, the following States were explicit in stating that a rule of customary international law exists: Belgium, Cyprus, Denmark, Estonia, Finland, Malta, the Netherlands, Portugal, Romania, Slovenia, Spain and the United Kingdom.

## **2.2 European Union**

With the aim of preventing the illicit trafficking of cultural goods between Member States of the European Union or within the European Union two legal instruments have been established which cover the export of cultural goods as well as the restitution of cultural goods that have been unlawfully removed from a Member State.

Both the Council Directive 93/7/CEE, of 15 March 1993<sup>15</sup> on the restitution of cultural goods (hereafter “Directive”) and the Council Regulation (EC) 116/2009, of 18 December 2008, on the export of cultural goods (hereafter “Regulation”) aim at the reconciliation of the fundamental principle of the free circulation of cultural goods with the objective of protecting the cultural heritage of Member States.

The Directive and the Regulation are intended for the establishment of a communitarian system for the protection of the Member States’ Cultural Heritage in accordance with the respective national laws and should prevail over other international instruments in respect to relations within the European Union.

### **2.2.1 1993 European Union Council Directive on the Return of Cultural Objects Illegally Removed from the Territory of a Member State<sup>15</sup>**

Aiming at the mutual recognition of the relevant national laws, the Directive is a first step in establishing cooperation between Member States in the field of restitution in the context of the internal market. It creates conditions for close collaboration between Member States particularly in investigating objects which have been removed illegally.

Only cultural goods that have been unlawfully removed from the territory of a Member State since 1 January 1993 may be the object of a restitution action in accordance with the Directive.

Article 14 (1) of the Directive admits the possibility that cultural goods not listed in the Annex but acknowledged as cultural goods belonging to the heritage of a Member State may also be the object of a restitution action.

Article 5 of the Directive institutes the restitution of a cultural good that has been unlawfully removed from the territory of a Member State. According to the Directive any Member State may initiate, before the competent court in the requested Member State, proceedings against

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<sup>15</sup> No. 93/7/EEC (OJ No. L74/74 March 1993).  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0007:en:HTML>

the possessor of a cultural good which has been unlawfully removed from its territory with the aim of securing its return.

As this pretension may conflict with a return guarantee issued in accordance with the immunity from seizure statute, it is necessary to clarify how this conflict may be overcome.

### **2.2.2 Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods<sup>16</sup>**

The Regulation establishes a uniform export control for specific categories of cultural goods and requires a licence to be issued by competent authorities. The licence must be presented at the customs office where the export formalities are to be completed. Together with the Directive, it introduces a community system to protect Member States' cultural goods.

### **2.3 ICOM Code of Ethics for Museums**

ICOM calls its Code of Ethics for Museums '*the cornerstone of ICOM*'.<sup>17</sup> It sets minimum standards of professional practice and performance for museums and its staff. It is expected from ICOM members that are professional museums, to undertake to abide by the Code.

Two articles in the Code are relevant in connection with **immunity from seizure**. These are related to collection acquisition, as loans might be considered as temporary acquisitions:

#### ***Article 2.2 Valid Title***

No object or specimen should be acquired by purchase, gift, **loan**, bequest, or exchange unless the acquiring museum is satisfied that a valid title is held. Evidence of lawful ownership in a country is not necessarily valid title.

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<sup>16</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:039:0001:0007:EN:PDF>

<sup>17</sup> ICOM Code of Professional Ethics was adopted by the 15th General Assembly of ICOM in Buenos Aires, Argentina in 1986. It was amended by the 20th General Assembly in Barcelona, Spain in 2001 and renamed **ICOM Code of Ethics for Museums**. It was revised by the 21st General Assembly in Seoul, Republic of Korea in 2004. <http://icom.museum/ethics.html>

### ***Article 2.3 Provenance and Due Diligence***

Every effort must be made before acquisition to ensure that any object or specimen 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.

### **3. Acts with regard to immunity from seizure of cultural goods in EU Member States**

This chapter is divided into three parts. The first part presents information on Immunity from Seizure legislation existing in the following Member States: France, Germany, Belgium, Austria and UK – ordered in chronology of implementation. The chronological ordering shows the process which started in Europe in 1994.

The second part describes the situation in the MS having general legislation with regard to immunity from seizure (the Netherlands), whereas the third part describes the situation in, Romania and Lithuania, States which have legislation related to immunity from seizure. The fourth part of this chapter lists countries intending to implement Immunity from seizure<sup>7</sup> regulation soon, or just having proposed the regulation to their respective Parliament.

#### **3.1 Existing Immunity from Seizure regulations specified to cultural objects**

##### **3.1.1 1994 France**

Loi No. 94-679 of the 8<sup>th</sup> August 1994, Art. 61<sup>18</sup>:

“Cultural objects loaned by a foreign power, a foreign public or cultural entity, which are to be exhibited to the public in France, cannot be seized while they are loaned to the French

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<sup>18</sup>[http://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=263C671FB53513DB2DB74E13266190C3.tpdjo04v\\_2?idArticle=LEGIARTI000006698549&cidTexte=LEGITEXT000005616367&dateTexte=20100115](http://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=263C671FB53513DB2DB74E13266190C3.tpdjo04v_2?idArticle=LEGIARTI000006698549&cidTexte=LEGITEXT000005616367&dateTexte=20100115)  
Art. 61. - Les biens culturels prêtés par une puissance étrangère, une collectivité publique ou une institution culturelle étrangères, destinés à être exposés au public en France, sont insaisissables pour la période de leur prêt à l'Etat français ou à toute personne morale désignée par lui. Un arrêté conjoint du ministre de la culture et du ministre des affaires étrangères fixe, pour chaque exposition, la liste des biens culturels, détermine la durée du prêt et désigne les organisateurs de l'exposition.

State or to any legal person designated by it. A decree issued jointly by the Minister of Culture and the Minister of Foreign Affairs fixes, for each exhibition, the list of cultural objects, determines the duration of their loan and identifies the organisers of the exhibition.”

The protection offered by the French Law No 94-679 of 8 August 1994 (Article 61) is comprehensive. No cultural object which is loaned by a foreign power, a foreign public or cultural entity for exhibition to the public in France can be seized while on loan to the French State or to any legal entity designated by it.

The French Minister of Culture and the Minister of Foreign Affairs issue jointly a decree for each exhibition listing the cultural objects protected, determining the duration of the loan (and thus of the protection), and identifying the exhibition organisers. The decree has the force of a published administrative decision under French administrative law. It may be challenged by a third party within a period of 2 months from the date of publication in the *Journal Official*. Protection becomes effective if no claims are made within this period.

### **3.1.2 1999 Germany**

An Act to Prevent the Exodus of German Cultural Property in the version published on 8<sup>th</sup> July 1999 (BGBl. I, p. 1754), as most recently amended by Article 2 of the Act of 18<sup>th</sup> May 2007 (BGBl. I, p.757), Chapter Four, section 20:

*(1) If foreign cultural property is to be temporarily lent for an exhibition on the territory of the Federal Republic of Germany, the competent supreme Land authority may, in consultation with the central federal authority, make a legally binding commitment to the lender to return it at the appointed time. In the case of exhibitions organized by the Federation or by a direct federal legal entity, the competent authority shall decide on the making of this commitment.*

*(2) The commitment shall be made in writing before the cultural property is brought into the country, using the wording “legally binding commitment to return”. It may not be retracted or revoked.*

*(3) The commitment shall have the effect that no conflicting third party rights to the cultural property may be asserted against the lender's right to return.*

*(4) Legal action for recovery, orders of attachment, attachment and seizure shall be inadmissible until after the return of the cultural property to the lender. This regulation about the Immunity from seizure was inserted to the Act by the Act on the implementation of the European Community Directive 93/7 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State in 1998.*

On 18<sup>th</sup> May 2007 the German Parliament passed an act on the implementation of the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and on the implementation of the European Community Directive 93/7 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State from 1993.

### **3.1.3 2002 (2004) Belgium<sup>19</sup>**

In Belgium Immunity from seizure for cultural goods was introduced by the Programme Law of the 24<sup>th</sup> December 2002. This ad hoc regulation was in 2004 replaced by the Law of June 14<sup>th</sup> 2004 amending the Belgian Judicial Code in order to establish immunity from seizure for foreign cultural goods on display to the public in Belgium (published in Dutch and French in the Moniteur Belge, 29 06 2004, p. 52719). This law inserts an article 1412 ter in the Judicial Code.

The Belgian Immunity from seizure legislation was introduced in order to give a guarantee to States that (public) collections on temporary loan from that State and on display to the public in Belgium without any commercial goal cannot be seized. The immunity from seizure is granted automatically if the conditions put forward in the law are met. There is no specific act/decision by a government body needed in order to grant the immunity.

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<sup>19</sup> [http://www.juridat.be/cgi\\_loi/loi\\_N.pl?cn=1967101005](http://www.juridat.be/cgi_loi/loi_N.pl?cn=1967101005)

Until the cultural goods have been returned to the lending state, any action at court seeking possession, or seizure of the cultural goods, or measures of enforcement against it is inadmissible (unless the third party might prove that the cultural goods on loan do not meet the conditions of art 1412 ter and therefore do not fall under the immunity from seizure offered by article 1412 ter of the Judicial Code.

#### **3.1.4. 2003 Austria**

Federal Act on the Temporary Immunity of Cultural Property Loans for the Purpose of Public Exhibition, BGBl I 133/2003 amended by BGBl I 65/2006<sup>20</sup>

Austria's federal act applies only to federal museums and gives the Federal Ministry of Education, Science and Culture the power to grant a "legally binding immunity from seizure" for any foreign cultural goods which are temporarily borrowed for an exhibition by federal museums. The exhibition must be one that is shown in the public interest. Application for such protection must be made by the responsible federal museum. The legal effect of this confirmation is that the lender's right to the return of the cultural good takes precedence over any third party rights and, until it has been returned to the lender, any action at court seeking possession, or seizure of the cultural goods, or measures of enforcement against it are inadmissible.

The acts on immunity from seizure exist also in the federal states (Bundesländer) Niederösterreich and Oberösterreich (no. OÖ LGBl. No. 71/2008 (Oberösterreich) and NÖ LGBl. 83/2006 (Niederösterreich). There, Immunity from Seizure can be granted for foreign cultural goods that are temporarily borrowed for a public exhibition in Niederösterreich respectively Oberösterreich.

#### **3.1.5 2007 United Kingdom**

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<sup>20</sup> Bundesgesetz über die vorübergehende sachliche Immunität von Kulturgut-Leihgaben zum Zweck der öffentlichen Ausstellung, [www.ris.bka.gv.at](http://www.ris.bka.gv.at)

Public Acts 2007 Tribunals Courts and Enforcement Act 2007 (c. 15) (the TCE Act). The Protection of Cultural Objects on Loan Regulations 2008, State Immunity Act 1978.<sup>21</sup>

Part 6 of the TCE Act provides immunity from seizure to objects which have been lent to the UK from overseas to be included in a temporary exhibition at a museum or gallery. Immunity will be given from any form of seizure ordered in civil or criminal proceedings, and from any seizure by law enforcement authorities. It will apply to objects of any description which are owned by a person or an institution which is not resident in this country which are lent for temporary exhibitions to the public at any museum or gallery within the United Kingdom, provided that the import of every object in question complies with the law on the import of goods, and that the museum or gallery has published all the necessary information about the objects as required in Regulations made by the Secretary of State.

### **3.2 General legislation with regard to immunity from seizure in EU Member States**

#### **The Netherlands**

Cultural objects owned by a foreign State are, to a large extent, immune from seizure in the Netherlands under Dutch law and international law.

The Netherlands has two relevant Articles in its Code of Civil Procedure which state "Goods intended for public service may not be seized". Article 436 of the Code of Civil Procedure regards post-judgment measures of constraint, whereas Article 703 regards pre-judgment measures of constraint.

It is established practice to treat cultural objects of a foreign State that are in the Netherlands

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<sup>21</sup> Legislation explained:

[www.culture.gov.uk/what we do/cultural property/5122.aspx](http://www.culture.gov.uk/what_we_do/cultural_property/5122.aspx)

Copy of Part 6. Tribunals Courts and Enforcement Act:

[www.opsi.gov.uk/acts/acts2007/ukpga\\_20070015\\_en\\_13#pt6](http://www.opsi.gov.uk/acts/acts2007/ukpga_20070015_en_13#pt6)

Copy of The Protection of Cultural Objects on Loan (publication and Provision of Information) Regulations 2008:

[www.opsi.gov.uk/si/si2008/uksi\\_20081159\\_en\\_1](http://www.opsi.gov.uk/si/si2008/uksi_20081159_en_1)

Copy of the State Immunity Act 1978:

[www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1978/cukpga\\_19780033\\_en\\_1](http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1978/cukpga_19780033_en_1)

temporarily for an exhibition as goods intended for public service. In the view of the Netherlands, support for this practice can be found in international (customary) law.

In addition to the aforementioned provisions of the Code of Civil Procedure, and with reference to the Dutch view as expressed above, section 13a of the General Legislative Provisions Act<sup>22</sup> applies. This provision states that the courts must take into account exceptions recognised by international law when determining whether the Dutch court has jurisdiction.

In the unlikely event that a cultural object of a foreign State is at risk of seizure, section 3a of the Court Bailiffs Act<sup>23</sup> applies. Before carrying out the intended seizure of the object, the bailiff levying the seizure is required to contact the Ministry of Justice, which will ask the Ministry of Foreign Affairs to determine whether seizure would be contrary to the State's obligations under international law. If so, the Minister of Justice can issue a notice to the bailiff stating that the object may not be seized. In the unlikely event that such an object has already been seized, the seizure must be cancelled on the basis of the Minister's notice.

### **3.3 Related legislation**

#### **3.3.1. 2006 Romania**

The law no. 438/27 November 2006, on the ratification of the United Nations Convention on Jurisdictional Immunities of States and Their Property adopted in December 2<sup>nd</sup>, 2004 Romania ratified the United Nations Convention on Jurisdictional Immunities of States and Their Property in November 2006, after signing it in September 2005. The law of ratification approves the text of the Convention which, thus, becomes part of the national legislation even though the international legal instrument is not yet into force.

On the other hand, Romania ratified both the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (ratified by Law no.79/1993) and UNIDROIT Convention (ratified by Law

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<sup>22</sup> Wet Algemene Bepalingen.

<sup>23</sup> Gerechtsdeurwaarderswet.

no.149/1997) and, as a member state of the E.U., transposed the Council Directive 93/7/CE on the return of cultural objects unlawfully removed from the territory of a Member State.

The immunity from seizure is to be considered only in the cases where no other contradictory dispositions (such as those contained in the UNESCO 1970 Convention, UNIDROIT Convention or the national law on the protection of national movable cultural heritage) are in force. In this context, Romania has no intention of promoting a specific immunity from seizure legislation.

To the knowledge of the central authority for culture in Romania, no situations where the immunity from seizure needed to be considered occurred

### **3.3.2 2008 Lithuania**

There is a common legal norm embedded in Article 9 of the Law on Courts<sup>24</sup>:

1. Effective court judgements shall be binding for all institutions of State government, officials and employees, enterprises, agencies, organisations, other legal and natural persons and must be enforced on the whole territory of the Republic of Lithuania.
2. The procedure of recognition and enforcement on the territory of the Republic of Lithuania of the judgements of foreign courts, international courts and courts of arbitration shall be established by laws of the Republic of Lithuania and the international agreements to which the Republic of Lithuania is a party.)

The Civil Code of Lithuania<sup>25</sup> states in Article 1.13 that where the provisions established in the international treaties of the Republic of Lithuania are different from those determined by

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<sup>24</sup> 18 July 2000 No VIII-1864; Vilnius (As last amended on 16 December 2008 □ No XI-65); Law on Courts. Article 9. English translation (older version)

[http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=338141](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=338141)

Law on Courts. Article 9. In Lithuanian (up-to-date version)

[http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=330875](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=330875)

<sup>25</sup> Civil Code, English translation (up-to-date version)

[http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=337524](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=337524)

Civil Code, in Lithuanian (up-to-date version)

[http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=334624](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=334624)

the present Code and other laws of the Republic of Lithuania, the provisions of the international treaties of the Republic of Lithuania shall apply.

With regard to application of foreign law the Civil Code states in Article 1.10 and 1.11 that foreign law shall apply to civil relationships where it is so provided for by the international treaties of the Republic of Lithuania, agreements between the parties or the laws of the Republic of Lithuania, unless where the application thereof might be inconsistent with the public order established by the Constitution of the Republic of Lithuania and other laws. In such instances, the civil laws of the Republic of Lithuania shall apply.

### **3.4 EU Member State that are introducing immunity from seizure legislation**

#### **3.4.1 2010 Finland**

A draft for an Act Prohibiting the seizure of certain items on loan in Finland, 31 August 2009.

According to the proposal, an exhibition item protected by the injunction could neither be seized nor could a security measure or a coercive measure be undertaken in regard of it. According to the proposed Act, the injunction against seizure would be granted by the Ministry of Education. The injunction could be granted where a cultural object is lent for an exhibition considered to be of great national relevance in artistic or cultural terms or important in terms of cultural exchanges. The exhibition items should be permanently located outside Finland. The owner or lender of the item could be a foreign or Finnish natural or legal person. The injunction could not be granted if there are well-founded reasons to assume that the object has been criminally obtained or the ownership of, or corresponding right to, the object is in dispute. Nor could the injunction be granted if the granting would violate a binding international treaty or European Community legislation.

The legislation is expected to enter into force in the fourth quarter of 2010.

#### **3.4.2 Italy**

### **Provisions relating to immunity from seizure of cultural goods loan to Italy by Italy Member or other foreign entities for public exhibitions - AS 747 (Poli Bertone), AS 996 (Malan)**

The bill proposed by the Senators Poli Bertone and Malan will aim to encourage the organization of exhibitions and the dissemination of culture through the exhibition of masterpieces scattered in different parts around the world promoting their movement. The cultural goods loan to Italy by a foreign state, community, cultural institution or any other private or public institution, can not be seized for the period in which they are available to the Italian State or entity designated by the same.

The legislative department office of the Italian Ministry of Culture expressed some considerations related to the bill above: the legislation could affect the possibilities to the seizure of cultural goods illegally removed from Italy or illegally exported from our country. The text drafted in this way seems contrary to the constitutional obligation on the prosecution and the right to judicial protection.

We must also consider the incompatibility of the law proposal with the Art. 87 of the Code of Cultural Heritage and the Landscape which stipulates the application of the guidelines dictated by the UNIDROIT Convention, adopted in Rome June 24, 1994, about the return of cultural property stolen or illegally exported. A similar problem of incompatibility could be with the Art. 87 bis (in the same code) on the Illicit Import, Export and Transfer of Cultural Property dictated by the UNESCO Convention, adopted in Paris November 14, 1970.

Is important to note that there is an inconsistency between the legislation of the bill that requires compliance with international agreements on cooperation between states in case of theft or illegal international movement of cultural property (Article 1 co.1, AR rte before) and the subsequent parts (co.1 second part and c.3) which creating a kind of judicial suspension, already initiated, during the period of the exhibition in Italy or, worse, a sort of franchise for crimes not committed in Italy.

We must remember that international conventions require the mutual collaboration between States to contrast the crime against cultural heritage.

Finally, we note an inconsistency in the bill with the constitutional principles in the field of mandatory prosecution and the citizen's right to judicial protection of their rights and interests.

### **3.5 Other MS considering the introduction of immunity from seizure in the future**

The following Member States have the introduction of immunity from seizure put on their political or legal agenda, whereby it is uncertain when the actual enactment of legislation may take place: Czech Republic, Estonia, Greece, Hungary, Latvia, Poland, Portugal and Slovenia.

## **4. Frequently Asked Questions**

### **4.1 What is immunity from seizure?**

Please look definition at point 1.2, page 6

### **4.2 Why do the lenders ask for the immunity from seizure?**

Three main areas can be identified where protection may be needed:<sup>26</sup>

- (1) Protection against application for pre-judgment relief. This would cover the situation when someone wishes to claim ownership of a work of art and brings legal proceedings to do so;
- (2) Protection against applications to enforce any judgment or arbitration award. This is the situation where an individual or company is owed money by the owner of the cultural object(s), and wishes to seize these objects so that they can be sold to pay the debt due;
- (3) Protection against criminal seizure. This category would grant protection against any seizure by police or customs or any other enforcement authority in the exercise of their powers.

### **4.3 What is the difference between ‘immunity from seizure’ and ‘immunity from jurisdiction’?**

Immunity from seizure is a separate rule of international law, and therefore essentially different from immunity from jurisdiction. "Immunity from jurisdiction" refers to exemption from the judicial competence of the court or tribunal having power to adjudicate or settle disputes by adjudication. On the other hand, "immunity from measures of constraint" or

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<sup>26</sup> Based on Paragraph 1.36 ‘Consultation Paper on anti-seizure legislation’, United Kingdom Department for Culture, Media and Sport, 8 March 2006.

"immunity from seizure" relates more specifically to the immunities of States in respect of their property from pre-judgment attachment and arrest, as well as from execution of the judgment rendered. The fact that a national court can have jurisdiction with regard to certain acts of a foreign State, does not mean that measures of constraint can be taken automatically. But it goes the other way as well: the fact that cultural goods are immune from seizure does not automatically imply that it would be impossible to initiate legal proceedings in which the goods are playing a leading role. This all depends on the law of the borrowing State.

#### **4.4 What is 'due diligence' and provenance research?**

Due diligence can be defined as stated in the original "Lending to Europe" Report<sup>27</sup> as "undertaking efforts 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."<sup>28</sup>

"Due diligence" can be also differently defined (see bibliography below) but all definitions relate 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.

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<sup>27</sup> Which itself refers to the ICOM Code of Ethics for Museums

<sup>28</sup> ICOM code 2.3.

Undertaking due diligence into the history and provenance of a work may include: visits to the lender to discuss the objects concerned, taking expert advice on any items which have a potentially uncertain ethical status, checks with stolen art and cultural property advice databases and websites and obtaining warranties or guarantees from lenders as to their ownership of the items concerned.

#### **4.5 What is a 'letter of comfort' and what is the difference between letters of comfort and immunity of seizure legislation?**

A 'letter of comfort' means 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. However, sometimes such a confirmation may be sufficient for the lender. In other cases, concrete legislation may still be necessary. Although customary international law does not provide well established general principles with regard to cultural objects on loan, there is a tendency in State practice to consider cultural property owned by States as not being subject to seizure.

#### **4.6 Should immunity from seizure also cover cultural objects put on sale?**

The immunity from seizure should not be applied to any cultural objects put on sale. The aim of the Immunity from Seizure is only to protect the lender and the loaning institution from the risk of confiscation of cultural objects imported for a temporary exhibition arranged for public benefit, or for research purposes,, and to assure that the imported objects will not be encumbered on the territory of the borrowing State. The applying of the immunity from seizure guarantees that the items return to the lender; a guarantee for objects put on sale would be at odds with this.

### **5. Non exhaustive check list to be used for Member States considering introducing or amending immunity from seizure legislation**

- \* Who should be able to apply for immunity from seizure (public and/or private institutions)?
- \* Should anti-seizure legislation offer potential claimants the opportunity to object to the grant of immunity in relation to a particular object?
- \* Should the grant of immunity from seizure be automatic, or depend on an advance application?
- \* If an explicit application is needed, how far in advance of an exhibition should the application for immunity from seizure be made?
- \* Should immunity from seizure be applicable to objects borrowed by all museums/galleries, or only those that are accredited by a national organisation and subscribing to Due Diligence Guidelines?
- \* What should the relationship be between provision of Immunity from Seizure and provenance research?
- \* How can the application of immunity from seizure be made compatible with the obligations under international law (specifically with the instruments mentioned in Chapter 2 of this report)?
- \* Should reciprocity be an issue?
- \* Who should grant immunity from seizure?
- \* Which Ministries and/or organisations should or could be involved?

## **6. Relevant links and references**

### **6.1 Webpages publishing information on anti-seizure legislation**

<http://www.lending-for-europe.eu>  
<http://www.ne-mo.org>  
<http://www.museum-security.org>  
<http://www.lootedart.com>  
<http://www.culturalpropertyadvice.gov.uk>  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1304910](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1304910)  
<http://www.rcaam.org/IMMUNITYFROMSEIZUREGUIDELINES.htm>  
<http://dosfan.lib.uic.edu/usia/GC/immunity.html>  
[http://www.law.cornell.edu/uscode/22/usc\\_sec\\_22\\_00002459----000-.html](http://www.law.cornell.edu/uscode/22/usc_sec_22_00002459----000-.html)  
[http://www.getty.edu/research/conducting\\_research/provenance\\_index/](http://www.getty.edu/research/conducting_research/provenance_index/)  
[http://icom.museum/pdf/E\\_news2004/p3\\_2004-1.pdf](http://icom.museum/pdf/E_news2004/p3_2004-1.pdf)  
[http://icom.museum/illicit\\_traffic.html](http://icom.museum/illicit_traffic.html)

Consultation paper on Anti Seizure Legislation, prepared by UK, published on the website September 2007:

[http://www.culture.gov.uk/images/publications/draftregulations\\_immunityfromseizure\\_PDF.pdf](http://www.culture.gov.uk/images/publications/draftregulations_immunityfromseizure_PDF.pdf)  
[http://www.culture.gov.uk/reference\\_library/consultations/1115.aspx](http://www.culture.gov.uk/reference_library/consultations/1115.aspx)

*Combating Illicit Trade: Due diligence guidelines for museums, libraries and archives on collecting and borrowing cultural material*, October 2005, Department for Culture, Media and Sport, Cultural Property United. To be found on:  
[http://www.culture.gov.uk/NR/rdonlyres/721E9365-38BE-4AF8-BF8D-BE5B4BF8B21C/0/CombatingIllicitTrade\\_v5.pdf](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](http://www.culture.gov.uk/reference_library/publications/3697.aspx).

## **6.2 Further useful webpages**

\* Please look also on UNESCO Database of National Cultural Heritage Laws:

<http://www.unesco.org/culture/natlaws/>

\* International Committee of the Red Cross (ICRC) database on legislation with linkages with cultural property protection and international humanitarian law:

<http://www.icrc.org/ihl-nat.nsf/WebLAW2!OpenView&Start=1&Count=300&Expand=10#10>

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E. Jayme, ‚Das Freie Geleit für Kunstwerke in G. Reichelt (Hrsg)‘, *Vorlesungen und Vorträge des Ludwig Boltzmann Institutes für Europarecht*, Heft 11, 2001.

*Lending to Europe: Recommendations on collection mobility for European museums*, prepared by an independent group of experts set up by Council resolution 13839/04, published Rotterdam 2005 (3.3 Immunity from Seizure).

[http://www.museumcollectionsonthemove.org/references/Lending\\_to\\_Europe.pdf](http://www.museumcollectionsonthemove.org/references/Lending_to_Europe.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*.

M. Weller, ‘Immunity for Artworks on Loan? A Review of Customary Law and Municipal Anti-Seizure Statutes in Light Liechtenstein Litigation’, *Vanderbilt Journal of Transnational Law*, 38, 4, 2005, pp 997-1040.

J. El-Bitar, ‚Das Verhältnis zwischen „Freiem Geleit“ und gemeinschaftsrechtliche Rückgabeklage‘, *Europäische Zeitschrift für Wirtschaftsrecht*, 2005, 173.

*Action Plan for the EU Promotion of Museum Collections' Mobility and Loan Standards*, Helsinki 2006, to be found at:

[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)

S. Boos, *Kulturgut als Gegenstand des grenzüberschreitenden Leihverkehrs (Cultural Property as Objects of Transnational Loans)*, Duncker & Humblot, Berlin, 2006.

N. van Woudenberg, ‘Declarations of Immunity from Seizure of Foreign Artworks and the Legal Position of Sovereign Art Lenders before U.S. Courts: the Malewicz Case’, *The Netherlands in court; essays in honour of Johan G. Lammers*, Leiden/Boston 2006, p. 223-245.

M. Grassi, 'Who Owns the Past?', *New Criterion*, Vol. 25 , 4. December 2006. Foundation for Cultural Review.

S. J. Knerly Jr., 'Overview of laws concerning immunity from seizure of works of art on loan', *35th Annual Ali-Aba Course of Study, Legal Issues in Museum Administration*, March 14-16, 2007, Philadelphia, Pennsylvania.

E. C . Pieler , L. Reis, 'Die Leihe von Kulturgut nach der österreichischen Rechtsordnung'[Art loans under the Austrian legal system], *Kunst und Recht. Journal für Kunstrecht, Urheberrecht und Kulturpolitik*, 2007, 37; p. 37-41.

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.

A. O'Connell, 'The United Kingdom's Immunity from Seizure Legislation', *LSE Law, Society and Economy Working Papers 20/2008*, London School of Economics and Political Science, Law Department.

State Immunity, Anti-Seizure and Customary International Law, Transparency, Integrity, Mobility And Security under Cross-Border Loans and the Sharing Transactions affecting Cultural Objects, Institute of Art and Law, Foundation for International Cultural Diplomacy, Blackwall Green and Withers LLP, London 17-18 July 2008 (conference materials)

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

D. Folga-Januszewska, *Muzea w Polsce – jakich ustaw potrzebujemy pilnie? Zmiana zasad gwarancji i wdrożenie prac nad ustawą o zabezpieczeniu przed konfiskatą poprzedzone ustawą o badaniu pochodzenia [Museums in Poland – what legal regulations do we need? Amendment of state indemnities and implementation of the immunity from seizure proceeded by provenance researches]*, w: *Prawna ochrona dziedzictwa kulturowego [Legal protection of cultural heritage]*, Ed. by W. Szafrński and K. Zalańska. Vol.III, Poznań [Wydawnictwo Poznańskie] 2009, pp. 93-103.

## 7. Conclusions and Recommendations

One of the main conclusions which should be drawn is that there is no best or preferred way to address immunity from seizure. It can therefore be concluded that different States follow different approaches, which may work best for them. This depends both on their respective legal tradition and system and also on the amount of international art loans they are conducting, temporary exhibitions they are hosting, or the demands of lending States or museums. When considering immunity from seizure guarantees (including legislations) States should assess which approach would fit them best.

The following approaches have been adopted by various Member States:

1. immunity from seizure legislation, specifically addressing cultural objects;
  - 1.1 specifically addressing cultural objects of foreign States;
  - 1.2 specifically addressing cultural objects belonging to foreign States and private individuals;
2. general immunity from seizure legislation, not specifically addressing cultural objects, but focusing on property of foreign States, intended for official/public use;
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'.

It needs to be stressed, that it is possible to combine several of the above approaches but that there will always need to be clear consideration of the issues of due diligence to underpin any provision of Immunity from Seizure.

### **Recommendation 1**

There is no best or preferred way to address immunity from seizure. When considering immunity from seizure guarantees (including legislations) States should assess which

approach would fit them best. They can be inspired by the different approaches followed by other States.

### **Recommendation 2**

In light of recommendation 1, it is not recommended that the Commission, or an expert group falling under the auspices of the EC, should attempt to prepare model legislation.

The main aim of this paper is to share and exchange information and best practices. It is considered of importance that this has to be sustained, possibly in the form of putting the information on a website (NEMO?) (CM 2.0 Project?). It is also important that already existing information on relevant websites (e.g. NEMO, ICOM) is easily assessable for all museum professionals, ministries, the academic world and schools teaching museology.

### **Recommendation 3**

The current sharing and exchanging of best practices should be sustained and continued, preferably in the form of a website.

### **Recommendation 4**

Although it is not recommended that the European Commission should attempt to determine the content of Immunity from Seizure legislation, nevertheless the EC should provide a platform for sharing and exchanging best practices.

The notion of immunity from seizure does not stand alone. Although there are different international instruments which promote the mobility of collections, and immunity from seizure may serve as a tool to this, there are also international instruments which may be considered at odds with the notion of immunity from seizure. In addition, undertaking of provenance research, and the implementation in practice of due diligence guidelines may lead to the conclusion that in individual cases immunity from seizure cannot be guaranteed to certain objects.

### **Recommendation 5**

When assessing whether immunity from seizure can be guaranteed, possible obligations under international law will need to be considered, as well as the need for very clear guidelines on due diligence and provenance research to be undertaken before loans are agreed.

The boundaries of the European Union are only boundaries in a geographical sense. International art loans are not only conducted between EU Member States, but also between EU Member States and Other States, both towards the East as towards the West.

**Recommendation 6:**

The focus of the attention by EU Member States and/or European institutions and museums should not only be on international art loans and its consequences within the geographical boundaries of the European Union; a global perspective needs to be taken into account as well.

ANNEX 1

Consolidated results questionnaire

<b>Member State</b>	<b>Existing Immunity from seizure legislation</b>	<b>Date of regulation</b>	<b>Letters of comfort in practice</b>	<b>Future plans / Obstacles / other remarks</b>
EU – 27 (2008)	European Union 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)	1993		
1.Austria	Federal Act on the Temporary Immunity of Cultural Property Loans for the Purpose of Public Exhibition	2003	NO	
2.Belgium	Law of June 14 <sup>th</sup> 2004 amending the Belgian Judicial Code in order to establish immunity from seizure for foreign cultural goods on display to the public in Belgium	2002		
3.Bulgaria	NO			
4.Cyprus	NO		YES	It is not amongst the priorities of the relevant authorities to proceed with this legislation at present. Cyprus has ratified the 1970 UNESCO Convention and acts in compliance with it.
5.Czech	NO		NO	No national legislation at the

Republic				moment, but it is currently under consideration.
6.Denmark	NO		NO	
7.Estonia	NO			
8.Finland	NOT yet		YES so far	The legislation is expected to come into force by autumn 2010.
9.France	Loi No. 94-679 of the 8 <sup>th</sup> August 1994, Art. 61	1994	NO	
10.Germany	Act to Prevent the Exodus of German Cultural Property in the version published on 8 <sup>th</sup> July 1999 (BGBl. I, p. 1754), as most recently amended by Article 2 of the Act of 18 <sup>th</sup> May 2007 (BGBl. I, p.757), Chapter Four, section 20	1999	NO	

11.Greece	NO		YES	<p>Greece examines the matter but this does not necessarily mean that it intends to introduce such a legislation; nor is it in its priorities. A comparison study should first take place of the obligations raised by national legislation and international conventions ratified by Greece.</p> <p>Although Immunity legislation is absent, no “tainted” material is allowed to be exhibited in Greece. In case of doubts regarding, provenance, the Hellenic Ministry of Culture proceeds with inquiries on the matter.</p> <p>Greece defines the cultural goods of each foreign State according to the national legislation of these States and in compliance with the definitions provided by the European legislation and the International Conventions Greece has ratified (like 1970 Unesco Convention, Unidroit Convention).</p>
12.Hungary	NO		YES	<p>In order to reach the political agreement Hungary is planning to set the concept or drafted legislation (depending on the preparatory conciliation) before the Government in the second part of 2009. According to our plans the legislation can come into force in 2010.</p> <p>Obstacles: Legal and political reasons</p>
13.Ireland	NO		NO	
14.Italy	NOT yet		YES	The legislation draft: <i>Provisions related to immunity from seizure of</i>

				<i>cultural goods loan to Italy by Italy Member or other foreign entities for public exhibition is going to be presented at Italian Parliament in 2010.</i>
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15.Latvia	NO		NO	<p>Amendments to the “Law on protection of cultural heritage” were planned, but due to content amount insufficiency of the draft law, the amendments were postponed and not introduced. Latvia will try to introduce these amendments within next draft law project.</p> <p>The issue concerning stolen collections in other countries and bringing them to Latvia is not actual problem in Latvia.</p> <p>Latvia will try to introduce these amendments within next draft law project.</p>
16.Lithuania	There is a common legal norm embedded in the Law on Courts (Art.9 Binding Character of Court Judgment).		YES	
17.Luxembourg	NO		NO	
18.Malta	NO		There was no need	<p>Heritage Malta has long been trying to spearhead such an initiative but for the time being it is being adopted on an ad hoc basis as the need arises.</p> <p>Many obstacles (legal, political, economic)</p>

19.Nether-lands	<p>NO</p> <p>The Netherlands has two relevant Articles in its Code of Civil Procedure which state: “Goods intended for public service may not be seized”.</p> <p>Article 436 of the Code regards post-judgment measures of constraint, whereas Article 703 regards pre-judgment measures of constraint.</p>		YES	<p>Existing legislation: Article 436 and 703 of the Code of Civil Procedure: Goods, intended for public service may not be seized.<sup>29</sup></p> <p>Next to the two articles in the Dutch Code of Civil Procedure, Section 13a of the General Legislative Provisions Act and section 3a of the Court Bailiffs Act apply.</p> <p>By means of those four Dutch legal provisions cultural property of foreign States are given considerable and satisfactory protection against measures of constraint.</p> <p>Based on international law, the Netherlands considers cultural property of foreign States as “goods intended for public service”, as long as they don’t have a clearly commercial goal (e.g. offered for sale).</p>
20.Poland	NO		Rarely	Works initiated 2009
21.Portugal	NO		YES The Minister has been issuing Declarations of Immunity which worked in practice.	IMC intends to do such a proposal till the end of February 2010 but the beginning of works in order to study the existing legislation and to prepare a proposal of law depends on the Minister’s decision.
22.Romania	The law no. 438/27 November 2006, on the ratification of the United Nations Convention on Jurisdictional	2006	YES (never did)	

<sup>29</sup> “Beslag mag niet worden gelegd op goederen, bestemd voor de openbare dienst.”

	Immunities of States and Their Property adopted in December, 2 <sup>nd</sup> , 2004 at New York signed by Romania at New York on the 15 <sup>th</sup> of September 2005			
23.Slovakia				
24.Slovenia	NO		YES	Probably combining with Cultural Heritage Protecting Act Legal obstacles
25.Spain	NO		YES	The obstacles are legal. According to keep the ratified international conventions and the national legislation, perhaps could be certain contradiction in the nature of the immunity from seizure.
26.Sweden	NO		NO	Not intending legislation. So far Sweden has not encountered problems in this field to such an extent that potential measures, for instance legislation, have been brought up for discussion.
27.United Kingdom	Public Acts 2007 Tribunals Courts and Enforcement Act 2007 (c. 15) The Protection of Cultural Objects on Loan Regulations 2008 State Immunity Act 1978	2007 - 2008	NO, not since the introduction of Immunity from Seizure in the UK	