

March 2013

AUSTRIA

(a)	Registration no.	
(b)	Date	25 October 2011
(c)	Author(ity)	Landesgericht für Zivilrechtssachen Wien (Regional Court of Vienna for Civil Matters)
(d)	Parties	D. H. SE vs. Czech Republik (Ministry of Health)
(e)	Points of law	Pursuant to customary international law, State owned cultural objects enjoy immunity from execution and seizure
(f)	Classification no.	
(g)	Source(s)	Summary published in: Tichy, H. / Schusterschitz, G. / Bittner, P.: Recent Austrian practice in the field of international law. Report for 2011, in: Zeitschrift für öffentliches Recht (Journal of Public Law), Volume 67 (2012), p. 157
(h)	Additional information	
(i)	Full text - extracts - translation - summaries	Summary English: see below

Summary

The Czech Republic had concluded a contract in the 1990ies with a pharmaceutical company based in Liechtenstein. Following a dispute on the fulfilment of contractual obligations the company claimed damages from the Czech Republic before an arbitral tribunal, as provided for in the contract. In 2008, the arbitral tribunal awarded the payment of damages and interests to the company. In April 2011, the company applied for execution of the award in Austria on the basis of the New York Convention of 1958 on the Recognition and Enforcement of Arbitral Awards. In particular, it requested the attachment of two paintings and one sculpture owned by the Czech Republic and at the time on loan in the Austrian museum Belvedere in Vienna for an exhibition on cubism and futurism.

The competent Austrian civil court of first instance, in the course of its proceedings, requested an opinion of the Foreign Ministry via the Ministry of Justice pursuant to Article IX (3) of the Law on Jurisdiction in Civil Matters on the issue of immunity. As the final days of the exhibition came close and the works of art were to be returned to the Czech Republic, the court decided on 16 May 2011 to authorise the attachment without examining whether the Czech Republic enjoyed immunity from measures of constraint. The three works of art were subsequently attached on 25 May 2011, shortly before the end of the exhibition.

In its opinion, which was about to be delivered at the time of attachment, the Foreign Ministry argued in favour of the Czech Republic's immunity for its three works of art. It considered the rules laid down in Article 18 to 21 of the UN Convention on Jurisdictional Immunities of States and Their Property (hereinafter: UN Convention) as reflecting customary international law. International law allows for measures of constraint against property of foreign states only in very limited circumstances. In particular, measures of

constraint may only be taken if the foreign state has given its consent or earmarked the property, or uses or intends to use the property for other than government non-commercial purposes (Article 19 of the UN Convention). Conversely, property used for sovereign public purposes may not be subject to measures of constraint. Article 21 of the UN Convention lists specific categories of property considered to be for sovereign public purposes and thus immune from execution. This list includes cultural heritage and cultural objects forming part of an exhibition (Article 21 (1) (d) and (e) of the UN Convention). As a supportive argument the Foreign Ministry referred to the ILC drafting history of Article 21 of the UN Convention. Already in 1986, the ILC had included the immunity of cultural heritage and cultural objects in its draft articles. This was part of a compromise to counterbalance the relatively wide exception for property in commercial use.

Following the attachment the Czech Republic appealed against the decision of the court of first instance on the grounds that it enjoyed immunity and that the arbitral award was not yet final. On the basis of the appeal and the opinion of the Foreign Ministry the court of first instance decided on 21 June 2011 to review its decision of 16 May 2011 and to discontinue the proceedings *ex officio*. It noted that immunity had to be observed *ex officio* and that its earlier decision had not examined the issue of immunity. The court firstly inquired whether the Czech Republic had applied for and received a legally binding consent to immunity for its three works of art, which can be granted by the federal minister competent for arts in accordance with the Austrian anti-seizure statute, the Federal Law on the temporary immunity of cultural objects on loan for public exhibitions. Since the Czech Republic had not applied for the legally binding consent, the anti-seizure statute was not applicable and any immunity had to be based on the general rules of international law which, pursuant to Article 9 (1) B-VG form part of Austrian law. It also clarified that the anti-seizure statute was without prejudice to existing customary international law. Although the UN Convention has not yet entered into force, the court found that there was sufficient state practice for immunity of cultural objects as set out in Article 21 (1) (e) of the UN Convention. By paraphrasing the government bill for the ratification of the UN Convention, the court held that the protection of property of scientific, cultural or historic interest corresponds to the protection of the self-conception and self-expression of a state. To support its argument, the court referred to the intervention of the Swiss government against an attachment of Russian paintings on loan in Switzerland on the basis of an award against the Russian Federation. For these reasons, it concluded that the Czech Republic enjoyed immunity for its three works of art.

However, the works of art could not be returned to the Czech Republic immediately, as the claimant appealed against the decision of 21 June 2011; they could only be released after the decision of the Regional Court of Vienna for civil matters (Landesgericht für Zivilrechtssachen Wien). In its decision of 25 October 2011 the Regional Court quashed the decision of 16 May 2011 and declared the subsequent proceedings null and void, including the decision of 21 June 2011. The application of the claimant for execution against the Czech Republic was rejected for lack of jurisdiction. In the ensuing days the works of art concerned were returned to the Czech Republic.

In its reasons, the Regional Court recalled the principle of state immunity and the historic development during recent decades to limit it to *acta iure imperii*. In particular, it noted that it was not state immunity that had to be established, but that state immunity was a principle founded in customary international law. On the contrary, exceptions to it had to

be established. In case of doubt there was thus a presumption in favour of state immunity. The court further noted that immunity from measures of constraint had to be distinguished from immunity from jurisdiction and that the Czech Republic had consented in its contract with the company only to the latter. With regard to measures of constraint, a state enjoyed immunity only to the extent that the property at issue was not in use or not intended for use for other than sovereign public purposes.

In the present case, the Regional Court continued, it thus had to be asked whether the three works of art on loan for the exhibition in Austria had to be considered as serving sovereign public purposes. By referring to the Austrian standard textbook for international law, the court found that it was not clear whether cultural institutions of a state and their property served sovereign public purposes. It recalled the cases of Italian stone tablets in Switzerland, Russian paintings in Switzerland and France, and Syrian art in Berlin, but concluded that these cases might not be sufficient to establish general and consistent state practice. However, they might indicate the correct application of the general rule of immunity. The Regional Court then sought to demonstrate that the administration of cultural property was part of the responsibilities of the public administration. It did so by referring to the widely ratified UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970, the existence of laws in many states on the protection of cultural property, the fact that many states subsidise the cultural sector, and the aspect of state representation through the exhibition of cultural objects.

The court also referred to the UN Convention. Although it had not yet entered into force, the court agreed that its provisions reflect to a large part customary international law. In the view of the court, however, there seems not to be sufficient state practice to establish Article 21 (1) (e) concerning the immunity from execution of cultural objects forming part of an exhibition as a rule of customary international law. The court acknowledged that there was some recent practice (see above), but denied the consistency of this practice. Nevertheless, the court continued, the lack of a consistent practice did not exclude cultural objects from the general rule of immunity of state property used for sovereign public purposes from execution. The existing, but not consistent, practice as well as the fact that states subscribed to the UN Convention by their signature might not establish customary international law, but might serve as a relevant indication to understand the existing rules of international customary law.

Finally, the Regional Court confirmed the findings of the court of first instance that the existence of the anti-seizure statute did not exclude customary international law providing for a wider protection of state property.