State immunity and cultural objects on loan
van Woudenberg, N.

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“Culture should have no borders.”

7.1 State immunity in the United Kingdom

The State Immunity Act 1978 has been enacted in order to implement the European Convention on State Immunity of 1972 into British law. Thereby, the doctrine of absolute State immunity was changed to the doctrine of restrictive State immunity. On 22 November 1978, the Act came into force. In a case to which the State Immunity Act does not apply, it is necessary to apply the common law of State immunity. Rules of customary international law form part of the common law.

Under the State Immunity Act, “[a] State is immune from the jurisdiction of the courts of the United Kingdom except as provided in [the provisions of Part I of the Act].” The provisions of Part I of the Act, regarding proceedings in the UK by or against foreign States, do not apply to criminal proceedings.

The Act only applies to (property of) a State, whereby a reference to a State includes references to “the sovereign or other head of State in his public capacity; the government of that State; and any department of that government, but not to any entity [...] which is distinct from the executive organs of the government of the State and capable of suing or being

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1 David Lammy, Ministry for Culture of the United Kingdom, 27 November 2005 during the international museum conference Increasing the mobility of collections.
4 And also the Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, Brussels, 10 April 1926.
6 Ibid. (Council of Europe), under ‘Introduction’.
7 Section 1(1) of the Act.
Although a separate entity is separated from the notion of a ‘State’, it is immune from the jurisdiction of the courts of the United Kingdom “if, and only if (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and (b) the circumstances are such that a State [...] would have been so immune”. According to F.A. Mann, it can only be in rare circumstances that a separate entity will be entitled to immunity.

Section 3 of the Act concerns commercial transactions and contracts to be performed in the United Kingdom. This section was designed “to avoid the well-known problem of deciding whether a contract to supply boots for the army was a commercial or a public act of the purchasing State.”

“A State is not immune as respects proceedings relating to -
(a) a commercial transaction entered into by a State; or
(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.”

A commercial transaction has been defined as

“(a) any contract for the supply of goods or services;
(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority[.]

Section 13(2)(b) of the Act states that “the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.” There are certain exceptions to that provision. The paragraph “does
not prevent the giving of any relief or the issue of any process with the written consent of the State concerned.[16] More importantly, it “does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes[.]”[17] When years later the UK enacted specific immunity from seizure legislation,[18] the UK Department for Culture, Media and Sport (DCMS) stated that “[t]he definition of commercial purposes [in the State Immunity Act] is very extensive, and it is far from clear whether works of art or cultural objects on loan to exhibitions in this country would be considered to fall into this category.”[19]

The assurance of the head of a State's diplomatic mission in the United Kingdom[20] “to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes” has to be accepted as sufficient evidence of that fact, unless the contrary is proved.[21]

What does all this mean for my study? How useful can the Act be considered?

“The Act may be useful in respect of countries such as Russia, where the State does own the national collection, but it is otherwise of limited application.”[22] In most cases, museums (including the national museums of a State) would be considered to be separate entities. Hence such museums would not be entitled to claim immunity from jurisdiction in the event of any claim against the museum for any of its normal activities, such as exhibiting its collection, lending cultural objects to other institutions, etc.

The State Immunity Act provides, however, some protection for cultural objects lent to

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[16] Section 13(3). The text goes on: “and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.”

[17] Section 13(4). The text goes on: “but, in a case not falling within section 10 above [ships used for commercial purposes], this subsection applies to property of a State party to the European Convention on State Immunity only if

(a) the process is for enforcing a judgment which is final within the meaning of section 18(1)(b) below and the State has made a declaration under Article 24 of the Convention; or

(b) the process is for enforcing an arbitration award.”

[18] More about that infra, in Ch. 7.3.


[20] Or the person for the time being performing his functions.

[21] Section 13(5).
exhibitions in the United Kingdom where such objects are the property of a foreign State.\textsuperscript{23} This protection does not apply to property which is in use, or intended for use, for commercial purposes. But as we saw in Section 13(5), the assurance of the head of a foreign State's diplomatic mission, to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes, shall be accepted as sufficient evidence of that fact unless the contrary is proved. That may lead to the result that an act of lending may probably be seen as a commercial transaction, but that the State property involved should be considered as not having a commercial purpose.

All this makes that the application of the Act to cultural objects which are lent to the United Kingdom for exhibitions is not entirely clear. “Protection may not be available where, when making the loan, the State is pursuing a commercial activity [and where an ambassador did not proclaim the non-commercial character of the objects; or where he did, the contrary was proved], or where the lending institution, although State-owned, is constituted as a separate entity.”\textsuperscript{24} It is therefore understandable that the Russian Federation was not completely at ease with this Act, as we shall see in the next subchapter. But it is equally understandable that the UK authorities tried to reassure the Russian authorities by referring to the State Immunity Act.

As we shall see infra, in November 2006, the UK authorities introduced a bill providing immunity from seizure for cultural objects. But before that was the case, the United Kingdom signed the 2004 UN Convention on Jurisdictional Immunities of States and Their Property, on 30 September 2005.

### 7.2 The way towards immunity from seizure legislation

Immunity from seizure for cultural objects lent to the United Kingdom for a temporary exhibition in a museum or gallery has been included in a bill which was introduced into the House of Lords on 16 November 2006: the Tribunals, Courts and Enforcement Bill.\textsuperscript{25}

\textsuperscript{22} Op. cit. n. 19, para. 1.11.
\textsuperscript{23} Whereby we have to realise that the definition of State under the UK State Immunity Act is more limited than under, for instance, the US Foreign Sovereign Immunity Act, or the 2004 UN Convention.
\textsuperscript{24} See also ‘Immunity from Seizure’, Withersworldwide, 1 August 2006, to be found at: http://www.withersworldwide.com/news-publications/51/immunity-from-seizure.aspx. [Last visited 8 March 2011.]
\textsuperscript{25} The bill is a broad measure designed to implement a number of very different proposals regarding changes to
One of the important cases which gave rise to the enactment of immunity from seizure legislation was the *Noga* case in Switzerland. In November 2005, a collection of French masterpieces which belonged to the Pushkin Museum in Moscow was temporarily seized in Switzerland, as the Swiss company *Noga* claimed Russia owed to it millions of dollars in alleged debts. The objects were quickly released, following an intervention by the Swiss Government, but the Russian Federation became increasingly nervous about lending to the United Kingdom and other States without sufficient immunity from seizure guarantees. Moreover, as we will see *infra*, in Chapter 9.11, the Russian national legislation demands that the borrowing State provides the Russian lending institution with a return guarantee.

Earlier, already in December 1998, the French authorities decided to re-route the Monet painting *Waterlilies 1904*. The painting had been loaned to an exhibition called *Monet in the Twentieth Century* at the Boston Museum of Fine Art, and would return to France via the Royal Academy at London. Just before, however, the work had been claimed by the heirs of its alleged owner Paul Rosenberg and placed on the Art Loss Register. The French authorities based their refusal to allow the work to visit the United Kingdom on a lack of sufficient legal guarantees that this cultural object would be immune from measures of constraint. Also, the State Hermitage Museum in St. Petersburg, Russia, refused to lend Titian’s *St. Sebastian* to the UK National Gallery in 2003 and it threatened not to support the Tate Modern’s 2006 Kandinsky exhibition. Furthermore, “[a]n important Chinese exhibition planned by the British Museum for 2004 was cancelled after a major loan from Taiwan could not be secured because the lender could not be assured that the material would be protected from seizure while it was in the United Kingdom.” The Tate withdrew Constantin Brancusi’s *The Kiss (1907-1908)* and *The Thigh* from the first major display of the sculptor’s works in the United Kingdom.
because the Romanian Culture Ministry vetoed the loan to it by the Craiova Art Museum on the basis of a potential ownership claim if the work was brought into the United Kingdom.\textsuperscript{31}

So, it was felt necessary to introduce concrete immunity from seizure legislation, as an increasing number of international lenders were refusing to lend items to museums in the United Kingdom without a guarantee of their safe return. The Welsh Assembly Government declared it in its Statement of Information of 15 April 2008 as follows:

“In recent times, some owners of cultural objects who are resident outside of the UK have been reluctant to loan such objects to UK museums or galleries for exhibition. There have been a number of cases where people have threatened proceedings in national courts of countries to whose cultural institutions such objects have been loaned to claim ownership of cultural objects. Often such claims arise from allegations that cultural objects have, at some point in the past, been unlawfully taken from the claimant’s ancestors.”\textsuperscript{32}

DCMS stated in its Consultation Paper:\textsuperscript{33}

“The absence of immunity from seizure legislation in the UK has made foreign lenders increasingly reluctant to lend cultural objects to the UK, such that the quality of major exhibitions had begun to suffer.”

Also, the Museums, Libraries and Archives Council (MLA) stated that there was an urgent need for the United Kingdom to introduce anti-seizure legislation, as “[w]ithout it, the willingness of international lenders to lend to UK venues would be severely jeopardised as such legislation became more and more common in other parts of the world. Without the introduction of the legislation, the UK would be put at a serious disadvantage”, the MLA said.\textsuperscript{34}

\textsuperscript{30} Other carvings called the Kiss (1908) and (1916) were not withdrawn.
\textsuperscript{32} Unsatisfactory immunity guarantees and a potential claim were not the only reasons for the withdrawal. Bogdan Bruma, spokesman for the Romanian Ministry of Culture said that information had been received that the insurance did not provide cover for every possible expense if anything were to happen to the sculptures during their stay in the United Kingdom. Also, it was considered as a problem that the sculptures would be under UK jurisdiction in insurance matters, whereas Romania wanted them to be under Romanian jurisdiction, according to Bogdan Bruma.
\textsuperscript{33} http://cymru.gov.uk/publications/accessinfo/drnnewhomepage/leisuredrs2/Leisuredrs2008/2257301/?jsessionid=JjG7KHvLx2v2bwJ8G0QhdJv6WdDgXwsvs52ywQdJmznzpN0qhpL.1-774995877?lang=en&ts=1. [Last visited 8 March 2011.]
\textsuperscript{34} Consultation Paper on Draft Regulations for the Publication by Museums and Galleries of Information for the Purpose of Immunity from Seizure under Part 6 of the Tribunals, Courts and Enforcement Act 2007, September 2007, para.1.1.

However, it was not completely true that any guarantee for the safe return was non-existent. Three remarks need to be made in that regard. First of all, it should be emphasised that the UK authorities are of the view that cultural property belonging to foreign States is already immune from seizure on the basis of customary international law. As already mentioned in Chapter 6, the subgroup ‘Immunity from Seizure’ of the OMC Expert Working Group on Mobility of Collections issued an enquiry addressed to each Member State concerning immunity from seizure for cultural objects on temporary loan. As stated, the eighth question of this enquiry was: “Does your country, on the basis of (customary) international law, treat cultural property belonging to foreign States as goods intended for public use, and as meaning that those goods are considered to be non-commercial?” And the clear British answer was: “Yes, if the goods are sent for an exhibition for the enjoyment of the public.”

Secondly, and in relation to the above, I have to refer to the State Immunity Act 1978. As we saw, the Act provides to a certain extent protection for cultural objects lent to exhibitions in the United Kingdom, where such objects are State property. The protection does not apply to objects which are in use, or intended for use, for commercial purposes. Yet, as we saw above, British authorities consider cultural objects belonging to foreign States as goods intended for public use, in the sense that those goods are considered to be non-commercial, provided that the objects are sent for an exhibition for the enjoyment of the public. So, those objects would be covered by the Act. However, because of the definition of the term ‘State’ in the State Immunity Act, objects of State museums would not automatically be treated likewise. That makes the application of the Act to cultural objects which are lent to the United Kingdom for temporary exhibitions not entirely clear. So far, there has not been an occasion where this issue could be considered by the British Judicial Branch.

Thirdly, before the legislation was enacted, the United Kingdom issued on occasion so called

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35 Answers on file with the author. The Royal Academy exhibition, to which I shall come infra, should definitely be seen as an exhibition for the enjoyment of the public, and the Russian items concerned are considered as State-owned cultural property. So, if solely based on the legal opinion of the British authorities, legislation to make this exhibition happen can be seen as superfluous. See also: http://ec.europa.eu/culture/our-policy-development/doc/mobility_collections_report/reports/immunity_seizure.pdf. In the Report of the subgroup ‘Immunity from Seizure’ of the Expert Working Group ‘Mobility of Collections’, p. 12, para. 2.1.3, the United Kingdom is mentioned as part of the group of States which stated that a rule of customary international law exists, holding that ‘State property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale’ is to be considered goods intended for public service, with the consequence that these cultural objects are by definition immune from measures of constraint. 36 Op. cit. n. 25, p. 48.
‘letters of comfort’, or ‘immunity declarations’. These letters were signed by the Head of the International and Cultural Property Unit for and on behalf of the Minister for Culture. It is true that such a letter of comfort was not considered as hard law, but could be considered as a best endeavours obligation. In practice, lending and borrowing institutions attached great importance to it.

All this shows that the views expressed that before the enactment of the immunity from seizure legislation no return guarantees were available, is not entirely correct as:

- the UK authorities already consider the cultural State property on loan to be immune under customary international law;
- State-owned cultural objects are covered by the State Immunity Act, and
- additionally, a written best endeavours obligation could be issued.

The way towards the anti-seizure legislation was not very smooth. In preparation for the enactment of the legislation, the DCMS ran a consultation on proposals for possible anti-seizure legislation from March to May 2006. In total, responses were given by 23 British institutions. One of the responses came from the Commission for Looted Art in Europe, which argued that, if implemented, the proposals “would make the United Kingdom a safe haven for stolen, illicitly traded, criminally acquired and looted works of art as well as for those who have assets but unpaid debts”. Furthermore, The Times published on 28 November 2006 a letter written by Lord Janner and ten other members of the House of Lords who had serious concerns regarding the proposed immunity from seizure legislation.

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37 The text of this letter was as follows:
“[Authority vested in me as a civil servant on behalf of [Minister for Culture’s name], MP, Minister for Culture. In connection with the loan of [item(s)] to the exhibition [title of exhibition], I confirm that under English law, property of a State, including works of art lent to an exhibition in this country, which are judged by the court not to be in use, or intended for use, for commercial purposes, will be immune from any process to enforce a judgment or arbitration award unless the State itself has waived its immunity. This immunity will extend to applications to seize or attach the property in question. The Government will use its best endeavours, in accordance with the law of England, to ensure the safe return of all objects lent by the [lending museum] to the [exhibiting museum].]”

members stated to be

“deeply concerned at the Government’s proposal to give complete immunity to those who wish to display stolen and looted art works by making them available in this country [the United Kingdom] […]. Do we really wish to educate our children to have no respect for history, legality and ethical values by providing museums with the opportunity freely to exhibit stolen property?"\(^{43}\)

The following day, Lord Howarth of Newport\(^{44}\) responded that safeguards already exist, in the form of ‘due diligence’ exercised by art institutions and existing obligations on the UK under European and international law:

“The Government’s proposals would not promote an “international free-for-all” or give “complete immunity” to those who wish to display what may be stolen and looted art in public exhibitions […]. Immunity from seizure will not mean immunity from suit. [DCMS] guidance on due diligence, together with the code of practice of the Museums Association and the principles promulgated by the National Museum Directors Conference, makes it clear that museums and galleries should borrow items only if they are “legally and ethically sound”. The Tribunals, Courts and Enforcement Bill allows the Secretary of State to withdraw approval, and therefore immunity from seizure, from an institution that she considers not to be performing due diligence adequately. The Government has also made it clear that the immunity will not apply where a UK court is required to make an order for the seizure or confiscation of property under European or international law. The Return of Cultural Objects Regulations 1994 provide for a procedure whereby an object that was removed unlawfully from a member state and is found in the territory of another member state can be returned to the state from which it was removed. The Unesco convention, to which the Government subscribed recently, provides for the recovery and return of stolen cultural property […]. The issue to examine is whether the Government has or has not succeeded in its declared aim of striking a “fair balance” between the rights of the claimant and the public interest. The Government has sought strenuously to resolve the tension between two public goods: the continuation of great art exhibitions […] and access to legal remedy in our jurisdiction for aggrieved claimants of works of art.”\(^{45}\)

The letter of 28 November 2006 in *The Times* by Lord Janner c.s. resulted in some outrage within the DCMS,\(^{46}\) as it considered the accusations to be ill-founded. However, several amendments were made in response to the criticisms made. More guarantees were put in the Bill regarding, among other things, the central role for due diligence and the DCMS guidelines, as well as the obligation for a UK museum or gallery to publish specified information about the objects it intended to borrow in advance of the objects entering the

\(^{43}\) *Op. cit.* n. 25, pp. 52-53 and n. 121.

\(^{44}\) From 1998 until 2001, Alan Howarth (Baron Howarth of Newport) acted as the UK Minister for Culture.

country. 47 Lord Janner declared to be satisfied: “[…] once claimants visit the register and recognize artwork that they know or believe to be theirs, they will now have what they have not had before – the opportunity to pursue their claims in the countries of origin […].” 48

On 6 December 2006, the Joint Committee on Human Rights of the House of Commons issued its view with regard to the question of compatibility of the Tribunals, Courts and Enforcement Bill with the United Kingdom’s human rights obligations. 49 The Committee of the House of Commons stated, inter alia, that

“[a]n immunity against all forms of execution which might be made against an object, against any order made in civil proceedings and any measure taken in criminal proceedings (or for the purposes of criminal investigation) appears to be extraordinarily wide and may give rise to incompatibility with Article 6 and Article 1, Protocol 1 [of the European Convention on Human Rights (ECHR)].”

Furthermore, “[t]he exclusion of the possibility of seizure in relation to criminal prosecutions may possibly frustrate the performance by law enforcement authorities of positive obligations imposed on them to investigate certain criminal offences […].” In particular the Committee questioned “the compatibility of the exclusion of rights of seizure in connection with criminal cases with an individual’s right to a fair determination of any criminal charge, as guaranteed by Article 6 ECHR and the United Kingdom’s positive obligations to pursue a criminal investigation of certain offences.”

In a reaction, the Minister for Justice explained that the government considered that

“any restriction on access to court or to the individual’s right to the peaceful enjoyment of property would be considered justified and proportionate as a) there would be limited circumstances when the Court would be able to exercise its jurisdiction (but would be unable to order seizure or forfeiture); b) if the Court were able to exercise jurisdiction, a claimant would face significant difficulties in pursuing a claim against property ‘founded on events which took place many years ago’; and c) there were alternative remedies available for those claimants.” 50

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46 According to a high ranking official of the DCMS.
47 Op cit. n. 25, pp. 54-55.
48 Ibid., p. 55 and n. 129.
49 This has been done by means of a letter by Andrew Dismore MP, Chair of the Joint Committee on Human Rights, to Baroness Ashton of Upholland, Parliamentary Under Secretary of State, Department for Constitutional Affairs. The letter is on file with the author.
50 The claimant is not prevented from bringing any claim in relation to the object in the jurisdiction where it is normally situated, or in any other place where jurisdiction may be lawfully claimed.
51 Joint Committee On Human Rights Second Report, para. 6.47.
In a follow-up report, the Joint Committee did not seem fully satisfied with the answer and stated that, having considered the Minister's explanation of the government's views, it appeared to the Joint Committee that “the Government’s assessment of compatibility is largely based upon its view that it was highly unlikely that a case will arise which will give rise to a risk of Convention incompatibility.” The DCMS recognised in its Consultation paper on Anti-Seizure Legislation of 8 March 2006 that “in practice, the legislation is likely to prevent claims being made to works of art which are temporarily in the jurisdiction”. The Joint Committee emphasised, however, that

“[w]ithout a right to enforce a judgment, or to ensure an object remains traceable during proceedings, a right to take proceedings may lose its inherent value. The European Court of Human Rights has clearly stated that the guarantees of Article 6 include the implementation and enforcement of court decisions. The right would be ‘illusory’ if a domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party[.]”

The Joint Committee considered that,

“should a case arise in which the domestic courts have jurisdiction, refusing an injunction to prevent the removal of the relevant protected object from the jurisdiction before the hearing of the claim, or barring the seizure of the property in enforcement of a judgment in the claimant's favour, could lead to a risk of incompatibility with Article 6(1) of the [European Convention].”

In the House of Lords debate of 29 November 2006, this relationship between the UK legislation and Article 6 of the European Convention on Human Rights has also been the focus of discussion. The UK Government “appeared satisfied that preventing a potential claimant from seeking a particular form of relief in one jurisdiction for a limited period of time struck a fair balance between the rights of the claimant and the public interest”, but Lord Howarth of Newport stated that it was for the Parliament to see whether that fair balance had been struck in the government’s proposal.

In reaction to the British draft legislation with regard to immunity from seizure, Norman

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52 Ibid., para. 6.48.
53 Ibid., para. 6.49.
54 Ibid., para. 6.50.
Palmer stated:

“An effective anti-seizure statute must deprive the claimant of his or her right of immediate possession, or suspend the claimant’s power to invoke it, for the prescribed period. That period may (according to policy) be expressed to endure for as long as the object is in the jurisdiction. An immediate right to the possession of goods has been classed as a form of property, both under statute and common law. It could also constitute a possession for the purposes of Article 1 of the First Protocol to the European Convention on Human Rights. The abrogation of such right would require careful drafting to avoid offence to the Convention.”

The Explanatory Notes to the Tribunals, Courts and Enforcement Bill explain with regard to Article 6(1) ECHR, that “[t]he right of access to court under Article 6 is not an absolute right, but subject to limitations, provided that any limitations imposed serve a legitimate aim, are proportionate to that aim and do not restrict or reduce the access left to the individual in such a way, or to such an extent that the very essence of the right is impaired.” The Notes continue:

“In this case, we are considering a temporary limitation on one form of relief available to a claimant in this [the UK] jurisdiction. This limitation would serve the legitimate aims of assisting museums and galleries, and so protecting the welfare of an important sector of the UK economy, and of facilitating public access to works of art from other States through major exhibitions. We [the UK authorities] consider the restriction is proportionate to these aims, and that it does not impair the essence of the rights guaranteed under Article 6.”

Furthermore, the Explanatory Notes explain that the UK Government considered that a right to pursue a substantive claim in relation to a cultural object which is loaned to the United Kingdom is a ‘possession’ or ‘property’ for the purposes of Article 1, Protocol 1, ECHR.

“Interference with property is justified under Article 1, Protocol 1 of the European Court on Human Rights if it is lawful, proportionate and strikes a fair balance between the demands of the community and the protection of the individual’s interests [...] We

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56 Professor Norman Palmer acted as consultant in the consultation process on proposals for possible anti-seizure legislation. See also supra n. 40.

57 See also: op. cit. n. 27 (Palmer), p. 48: “In making a claimant’s recovery efforts more difficult, do they offend human rights legislation (such as the right to peaceful enjoyment of one’s possessions and freedom from deprivation)?”


60 Ibid.
consider that preventing a potential claimant from seeking a particular form of relief in this jurisdiction for a limited period of time does strike a fair balance between the rights of the claimant and the public interest in promoting cultural exchanges and enhancing understanding of other cultures by facilitating public access to works of art from other countries through major exhibitions.”

It can also be argued that “by contributing to the mobility of collections, anti-seizure legislation or guarantees may increase information available on the whereabouts of particular works of art, assisting claimants to make claims in the most appropriate jurisdiction.”

When the DCMS held a consultation on introducing legislation to provide immunity from seizure for cultural objects on loan in the United Kingdom, the need to ensure that Holocaust survivors were not denied access to justice was explicitly stressed by the respondents. In the deliberations on the law in the House of Lords, Lord Howarth of Newport stated on 29 November 2006:

“We should in particular be very heedful of the anguish of a survivor of a Nazi concentration camp or the descendant of someone who was killed in the Holocaust era for no other reason than that he was Jewish. They may seek restitution of a work of art which they claim belongs to their family, not only because that is an act of justice but because, in a much broader sense, it is a way to bring settlement or put wrong to right.”

And Norman Palmer stated that “[t]o deny a Holocaust survivor access to justice is an austere and arguably disproportionate response to the administrative, economic and cultural concerns of lenders and borrowers”, how legitimate those concerns might be. Also the Scottish Council of Jewish Communities raised its concern. It stated, among other things, that “[a] curtailment of Holocaust survivors’ legal and moral rights would be incompatible with the UK support for the Principles laid down at the 1998 Washington Conference on Holocaust Era Assets [...]”. It called it “entirely disproportionate to deny access to justice, particularly

61 Ibid., para. 612. See also: op. cit. n. 19, para. 1.20.
62 Op. cit. n. 19, para. 1.16. So, what can be discovered here, is that paras. 6.11 and 6.12 basically give the same kind of reasoning. In Ch. 11 I will come back to this topic.
66 January 2007. http://www.scottish.parliament.uk/business/legConMem/LCM-2006-2007/TribunalsCourtsEnf/2007-01-04-SubmissionSCJC.pdf. [Last visited 8 March 2011.] It stated as well that “the Bill also creates a potential conflict between immunity from seizure legislation and legislation relating to the enforcement of judgments made in other jurisdictions, for example, Chapter III of Council Regulation (EC) 44/2001.” It also stated to have received legal advice that “the Bill may be in breach of the ECHR. Provisions governing protection of property on loan engage Convention rights of access to a Court (ECHR Article 6) and
when the object of a Holocaust survivor’s claim may be the only tangible reminder of their lost family or home. It would also be entirely unjust to prioritise cultural exchange over moral rights”, thus the Scottish Council of Jewish Communities.

Eventually, the immunity legislation received Royal Assent on 19 July 2007 as Part 6 of the Tribunal Courts and Enforcement Act 2007. The Department’s public consultation on the draft Protection of Cultural Objects on Loan (Publication and Provision of Information) Regulations ended on 21 December 2007. The intention was to bring Part 6 of the Act into effect at the same time as the Regulations, which would be submitted to Parliament at the beginning of January 2008, once the responses to the consultation had been analysed and the draft Regulations finalised. That would, however, have meant that this legislation would have not been applicable for a very important upcoming exhibition of important Russian cultural objects, and that might have caused some problems.

In relation to this, towards the end of 2007, a large turmoil occurred in the British and international press. Subject was an important exhibition of Russian-held cultural objects, planned at the Royal Academy of Arts in London. The exhibition, called From Russia: French and Russian Masterpieces of Painting 1870-1925 was threatened to be cancelled as Russian authorities refused to grant licenses for the works to be exhibited in the United Kingdom. The cultural objects belonged to the Pushkin Museum of Fine Arts in Moscow, the State Hermitage Museum in St. Petersburg, the State Russian Museum in St. Petersburg, as well as the Tretyakov Gallery in Moscow.

The 120 masterpieces, including works by Van Gogh, Gauguin, Cézanne, Renoir, Matisse,
Picasso, Kandinsky and Malevich were already on display in Düsseldorf, Germany, and were planned to be brought to London after termination of the Düsseldorf exhibition in the Kunst Palast [Art Palace], where the exhibition took place from 25 September 2007 till 6 January 2008. In London, the objects were to go on display as from 26 January 2008. The Russian authorities, however, feared that some of the cultural objects might be seized by the descendants of two well-known 19th and 20th century art collectors and textile tycoons from Russia, Sergei Shchukin and Ivan Morozov, whose works were nationalised by decrees signed by V.I. Lenin of 29 October 1918 and 19 December 1918 respectively. Of the more than 120 works for the exhibition, 23 once belonged to Shchukin, and 13 to Morozov. The descendants concerned, André-Marc Delocque-Fourcaud who is the grandson of Sergei

71 Sergei Ivanovich Shchukin was born in 1852 and died in 1936 in Paris. He came from an old merchant family and he led a company that dealt in textiles. He became known as a collector of works of French Impressionists. His collection included, amongst others, works by Monet (13), Cézanne (8), Gauguin (16), Renoir, Van Gogh, Derain, Signac, Toulouse-Lautrec and Rousseau, as well as 38 paintings and drawings by Matisse and 50 works by Picasso. In total, the collection consisted of 264 works of art. He began his Matisse collection in 1908. In 1909 Shchukin ordered Henri Matisse to paint two large murals: La Danse and La Musique. Until 1923 the Shchukin collection had been publicly displayed in a museum called First Museum of Modern Western Painting. In that year it was merged with the collection of another famous Russian art collector, I.A. Morozov, which collection was displayed in the Second Museum of Modern Western Painting. Until 1941, the merged collection had been displayed in the State Museum of Modern Western Art. After the World War II, part of the collection was transferred to the Pushkin Museum in Moscow and part to the State Hermitage Museum in Leningrad (St. Petersburg). Two paintings are in Baku, Azerbaijan, and one is in Odessa, Ukraine. See also: http://www.morozov-shchukin.com/html/AhistoA.html. [Last visited 6 March 2011.]

72 Ivan Morozov (1871-1921). Morozov started with a collection of contemporary Russian artists, before he gradually began to focus on French art. He was a great admirer of Cézanne en Gauguin, but bought - contrary to Shchukin - more art painted by different painters, with the aim to coming to a broader overview of art expressions.

73 The text of the decree read: “Considering that Shchukin's art gallery constitutes an exceptional collection of major works by great European artists, mostly French, from the end of the 19th and the beginning of the 20th century; and that, by its very high artistic quality, it presents for the People's education a national interest, the Council of the People's Commissars decrees:

1°) That Sergei Ivanovitch Shchukin's art gallery is to become the public property of the Socialist Federative Republic of Russia and is to be allocated to the People's Commissariat for Public Education according to the general dispositions applicable to the State Museums.

2°) That the building housing the gallery (Bolchoï Znamenskiï pereoulok, n°8), and as well, the adjacent land constituting the previous property of S.I. Shchukin and all the furniture, are allocated to the People's Commissariat for Public Education.

3°) That the Committee for the Museums and Protected Buildings and the People's Commissariat for Public Education are given the mission to elaborate and put in practice rapidly, a new mode of management and activity for the previous Shchukin gallery which responds to the present needs and to the aim of democratisation of the cultural and artistic establishments of the Socialist Federative Republic of Russia.” See: http://www.morozov-shchukin.com/html/AhistoA.html.

74 That decree read: “That the I.A. MOROZOV’s, I.S. OSTROUKHOV’s and V.A. MOROZOV’s art collections have become State property of the Russian Federative Socialist Soviet Republic and are transferred to the authority of the Educational People’s Commissariat, which is entrusted to urgently elaborate and put into force Regulations about the use of the collections in accordance with the actual needs and tasks of democratization of the artistically-educational Institutions of the Russian Federative Socialist Soviet Republic.” See: http://www.morozov-shchukin.com/html/sa_vie_anglais.html. [Last visited 6 March 2011.]

75 André-Marc Delocque-Fourcaud unsuccessfully started legal action in the United States in 2003 in an attempt to remove 25 cultural objects, including paintings by Van Gogh, Degas and Picasso from the travelling
Shchukin, and Pierre Konowaloff who is the great-grandson of Ivan Morozov, stated, however, that they would not make any legal ownership claims, although they believed that they deserved final compensation. They wanted first and foremost to receive attention for the way the assets of their grandfathers had been expropriated by the Russian Communist regime in 1918. In their view, an agreement should be made that reasonably compensated and paid a percentage of the material benefits that accrued from the exploitation of the works.

Moreover, the Russian Federation feared that other third party claims, as in the Noga case in Switzerland, might be initiated. As Germany had enacted anti-seizure legislation, the Russian Federation considered the cultural objects in Germany as sufficiently safe. Russia urged the United Kingdom to have the legislation in place before the objects would enter the United Kingdom. This Russian demand was also based upon the conditions in its own Russian legislation, as we will see infra, in Chapter 9.11.

In an effort to reassure the Russian Federation, the British authorities stated that the cultural objects would be under the protection of the State Immunity Act 1978. After all, the State Immunity Act 1978 provides some level of protection for objects lent to the United Kingdom. When the Russian Federal Agency for Culture was concerned that cultural objects to be loaned by four of its national museums to the United Kingdom might not be covered by the State Immunity Act 1978, the United Kingdom was assured by the evidence provided that all the objects from the four museums were State property. As a consequence the United Kingdom informed the Russian Federation that the objects to be lent to the United Kingdom

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76 The Morozov and Shchukin heirs state at http://www.morozov-shchukin.com/html/dossier_presse_ang.html: “Though none of Morozov’s or Shchukin’s heirs have ever declared any intention of starting legal proceeding in Great Britain, a controversy has ensued over the fact that the Russian authorities insist that the British Government has not provided satisfactory guarantees for the safe keeping of these pictures, hired from Russian museums, against possible seizure claims from these heirs.” See also: Mark Brown, ‘Russian collectors’ heirs want compensation for lost art’, The Guardian, 22 January 2008.

77 Ibid. (Brown). Press articles stated that the Royal Academy had offered the two heirs £5,000,= each in exchange for their promise not to make claims on the paintings in London. Both turned down the offer. See: Konstantin Akinsha and Grigorij Kozlov, ‘Fighting for Their Rights’, Art News, April 2008, Vol. 107, No. 4.

would be covered by the 1978 Act.  

But, as in the past there had been doubts on how to consider an international exhibition, and whether or not a commercial importance should be attached to it, Russian legal experts believed that the State Immunity Act failed to provide sufficient protection for the valuables. 

Given the importance of the exhibition for cultural life in the United Kingdom and for the cultural relations between the United Kingdom and the Russian Federation, the conclusion of the UK authorities was, that Part 6 of the Tribunal Courts and Enforcement Act should enter into force on 31 December 2007, well before the Regulations under Section 134(2)(e) of the Act became effective. So it happened, after which on 9 January 2008, the Russian authorities gave permission for the objects to travel to the United Kingdom.

7.3 The Tribunals, Courts and Enforcement Act 2007

As stated above, the immunity from seizure for cultural objects on loan is found in Part 6 of the Tribunals, Courts and Enforcement Act 2007. This part, titled Protection of Cultural Objects on Loan, sets out the relevant legal procedures in relation to protection from seizure of cultural objects on display in the United Kingdom and is complementary to the protection found in the State Immunity Act 1978. Part 6 consists of the Sections 134 to 138.

The Explanatory Notes state that so far, the United Kingdom had only given immunity to objects which were covered by the provisions of the State Immunity Act 1978.

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Information obtained from Jessica Morrison, Department for Culture, Media and Sport, November 2010.

The turmoil around the exhibition came at a time when the bilateral relations between Russia and the United Kingdom were already under pressure because of the case of former KGB agent Alexander Litvinenko, poisoned in London in 2006. At the same time, Russia accused the British Council, a British cultural organisation of operating illegally and ordered it to suspend all its operations outside Moscow, which meant that it had to close its offices in St. Petersburg and Yekaterinburg. However, on 17 October 2008, the Court of Appeals in Moscow ordered that the indictments against the British Council were unfounded.


Many thanks go to Hillary Bauer, Head of the International and Cultural Property Unit, Department for Culture, Media and Sport and Marc Caldron, Legal Counsel of the International and Cultural Property Unit, Department for Culture, Media and Sport. The author would also like to warmly thank Anna O’Connell, Solicitor and Consultant, Klein Solicitors, London.

“The absence of a more general immunity for [cultural objects] which are lent for a temporary exhibition in [the United Kingdom] has made museums and private owners in other countries increasingly reluctant to lend to such exhibitions without a guarantee that their cultural objects would be returned.”

After all, the immunity under the State Immunity Act 1978 does not apply to loans from museums (not even objects owned by State museums) or private owners, but only to State property, which of course may be housed in a museum. The sections regarding immunity from seizure in the Tribunals, Courts and Enforcement Act should therefore provide lenders with a (firmer) guarantee that their cultural objects on loan in the United Kingdom would be returned home at the termination of the exhibition.

The protection given in this Act is intended to exclude any form of seizure of an object which has been lent to an exhibition in the United Kingdom (save the exception as stated in Section 135(1)(b) to which I shall come below), either by a claimant to the object, a creditor, or any law enforcement authority and no matter whether seizure has been ordered in a criminal or a civil procedure.

“It will apply to objects of any description which are owned by a person or an institution which is not resident in [the United Kingdom] which are lent for temporary exhibitions to the public at any museum or gallery within the United Kingdom, provided that the import of the object in question complies with the law on the import of goods, and that the museum or gallery has published information about the object as required in regulations made by the Secretary of State.”

The protection given to an object does not include any protection from prosecution for those persons who are dealing with the object, when this dealing would constitute an offence.

Section 134 defines the conditions which need to be met for an object to be protected from seizure. It also specifies where and for how long the protection will be given. An object will only be protected if five conditions are satisfied, according to subsection 2:

- a) the object is usually kept outside the United Kingdom,
- b) it is not owned by a person resident in the United Kingdom.

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84 Tribunals, Court and Enforcement Bill [HL], Explanatory Notes (as brought from the House of Lords on 20 February 2007), Part 6: Protection of cultural objects on loan, para. 42. Meant is more encompassing than the immunity under the State Immunity Act 1978, which immunity only regards State property.

85 Ibid., para. 41. Meant is the Secretary of State of the DCMS.

86 Section 137(6): “An individual is resident in the United Kingdom if he is ordinarily resident in the United Kingdom for the purposes of income tax, or would be if he were receiving income on which tax is payable.”
c) its import does not contravene a prohibition or restriction on the import of goods, imposed by or under any enactment, that applies to the object, a part of it or anything it conceals,
d) it is brought to the United Kingdom for public display in a temporary exhibition at a museum or gallery, and
e) the museum or gallery has complied with any requirements prescribed by regulations made by the Secretary of State under this paragraph about the publication of specified information about the object.”

The above shows that different conditions need to be fulfilled, but not that the cultural objects should be owned by a State. Also cultural objects of foreign private institutions or individuals can be protected, provided that all the other conditions under the Act are fulfilled.

According to Section 134(7), the protection lasts only as long as the object is in the United Kingdom for any of the following purposes:

“a) public display in a temporary exhibition at a museum or gallery;
b) going to or returning from public display in a temporary exhibition at a museum or gallery;
c) related repair, conservation or restoration;
d) going to or returning from related repair, conservation or restoration;
e) leaving the United Kingdom.”

The protection lasts for a maximum period of twelve months, beginning with the day when the object enters the United Kingdom. That period can only be extended if the object has suffered damage while protected (thus, since coming to the United Kingdom) and is “undergoing repair, conservation or restoration in the United Kingdom because of the damage”, until it has left the United Kingdom “following this repair, conservation or restoration because of the damage”. This means that objects on long term loans to museums are not being protected under this law.

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87 That is in line with the view expressed by MLA (Museums, Libraries and Archives Council), which stated that immunity from seizure should be available for loans from public and private ownership. It argues that it is often the exceptional items that can be borrowed from private owners and which have rarely been seen at a public exhibition which add special interest to an exhibition. Private owners would be extremely reluctant to lend to the United Kingdom without the same immunity granted to items from public collections. Also, bodies such as parishes which often own important works of religious art in countries such as Italy and Spain are not strictly public bodies in the same sense as state-financed museums. Many ‘foundations’ which hold important collections are also in a similar position, according to MLA. See: op. cit. n. 34.

88 Subsection 8: “Repair, conservation or restoration is related if it is carried out in the United Kingdom and is done - (a) to prepare the object for public display in a temporary exhibition at a museum or gallery, or (b) because of damage suffered in the course of something within subsection (7).”

89 Section 134(4)(b).

90 Section 134(5).
Protection is not being received automatically. Lenders need to request the borrowing museum or gallery to obtain immunity for the item concerned. As a condition for obtaining protection, a museum or gallery is obliged to publish certain concrete information on its website, thereby following the requirements regarding publication in the Protection of Cultural Objects on Loan (Publication and Provision of Information) Regulations 2008. According to the Explanatory Note to the Regulations, the Regulations set out the information which must be published by a museum or gallery which borrows an object from abroad for a temporary public exhibition if that object is to be protected from seizure or forfeiture under Part 6 of the Act. It also sets out at what stage of the procedure certain information needs to be published and where. This way, a balanced approach has been sought. On the one hand, the UK approach aims to give potential claimants sufficient information, necessary for the identification of the cultural object concerned, which on the other hand would not be overly burdensome for the institution concerned. Moreover, the United Kingdom tries to ensure in this way that looted or stolen cultural objects would not arrive in the United Kingdom under the flag of international loans and thus receive protection in the form of immunity from measures of constraint. Much of the information required by the Regulations is already required in relation to the indemnity cover as foreseen under the Government Indemnity Scheme; if a borrower wishes to obtain coverage under the GIS, it must provide the same kind of information.

Section 135 defines the effect of the protection. It states in the first paragraph:

“While an object is protected under this section it may not be seized or forfeited under any enactment or rule of law, unless –
(a) it is seized or forfeited under or by virtue of an order made by a court in the United Kingdom, and
(b) the court is required to make the order under, or under provision giving effect to, a Community obligation or any international treaty.”

91 Protection of Cultural Objects on Loan (Publication and Provision of Information) Regulations 2008 No. 1159, to be found at: http://www.opsi.gov.uk/si/si2008/uksi_20081159_en_1. [Last visited 8 March 2011.] The Regulations came into force on 20 May 2008, but were already provisionally applied before that date (according to information provided by Hillary Bauer, Head of the International and Cultural Property Unit, DCMS).

92 The Government Indemnity Scheme is an arrangement whereby the UK Government is responsible for payment of compensation in the event of loss of, or damage to, object which are on loan to a museum, gallery or similar institution in the United Kingdom.

93 Thus, Section 135 does not only speak about ‘seizure’, but about ‘seizure and forfeiture’. In my study, I use ‘seizure’ as comprehensive term. See supra, Ch. 1.2.

This means that where measures of constraint are necessary to make the United Kingdom comply with its obligations under international law or European law, or under a United Kingdom provision giving effect to such an obligation, the object concerned will not be protected. An example is given in the situation where a UK court is asked to enforce an order for the seizure of an object made by the courts of another country to confiscate proceeds of crime. As we shall see, more national immunity legislations have an exemption, stating that immunity from seizure is not applicable if it contravenes (other) international legal obligations.

Where reference is made to seizure or forfeiture in relation to a protected object, it includes references to:

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 a) taking control of the object under Schedule 12;
b) execution or distress;
c) diligence or sequestration;
d) seizure, confiscation or forfeiture, or any other measure relating to the custody or control of the object, in the course of criminal investigation or criminal proceedings (against the owner, the museum or gallery or any other person);
e) the making or enforcement of an order relating to the custody or control of the object in civil proceedings (against the owner, the museum or gallery or any other person).
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Section 136 defines a museum or gallery for the purpose of Part 6 of the Act. Only objects which are loaned to those institutions which have been approved by the relevant UK authority will qualify for immunity under this part of the Act. So, actually, that is the first step in the whole process: first, a museum or gallery needs to apply for the status of approved institution. A ‘museum or gallery’ is defined under the Act as ‘an institution in the United Kingdom Removed Cultural Objects.

Section 135(1)(b).


Section 135(3).

In England and Wales. Schedule 12 regards the powers for bailiffs to take control of goods and sell them to recover debts.

In England and Wales or Northern Ireland.

A legal process for the recovery of unpaid or overdue debts.

In Scotland.

See also the definition of a ‘borrowing institution’ under Section 2(c) of the Protection of Cultural Objects on Loan (Publication and Provision of Information) Regulations 2008: a museum or gallery approved under section 136 of the Act at which the object is, or is to be displayed in a temporary exhibition in the United Kingdom.
approved under that section by the appropriate authority’.

When deciding whether or not a particular institution should be approved, the appropriate authority assesses the institution’s due diligence procedures for establishing the provenance and ownership of objects and, in particular, whether the institution complies with guidance about such procedures, published by the Secretary of State from time to time. Also other factors may be considered by the approving authority. These due diligence guidelines play a very important role and build on standards already disseminated within the UK, such as the

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103 The appropriate authority means the Secretary of State in relation to an institution in England, the Welsh Ministers in relation to an institution in Wales, the Scottish Ministers in relation to an institution in Scotland, and the Department for Culture, Art and Leisure in relation to an institution in Northern Ireland. The following museums have been approved under Section 136 of the Act: The British Museum (London), Compton Verney (Warwickshire), Dulwich Picture Gallery (London), Manchester City Gallery (Manchester), The Courtauld Gallery (London), The Fitzwilliam Museum (Cambridge), The Henry Moore Foundation (Hertfordshire), The National Gallery (London), The National Portrait Gallery (London), The Royal Academy (London), The Royal Armouries (Leeds), The Science Museum (London), Tate (London), The Victoria and Albert Museum, The Whitechapel Gallery (London) and Wolverhampton Arts and Museums (Wolverhampton).

104 See for instance: 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 at: http://www.culture.gov.uk/images/publications/Combating_Illicit_Trade05.pdf. [Last visited 8 March 2011.] The due diligence guidelines aim to assist museums, libraries and archives when considering the acquisition by purchase, gift or bequest of items of cultural property. They contain due diligence procedures to determine whether a proposed acquisition or loan of cultural objects is ethically and legally sound. Items should be rejected if there is any suspicion about it, or about the circumstances surrounding it, after undertaking due diligence. The Report of the EU OMC Expert Working Group ‘Mobility of Collections’, subgroup ‘Immunity from Seizure’ describes due diligence as follows: “Due diligence can be defined as stated in the original ‘Lending to Europe’ Report 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.’ ‘Due diligence’ can be also differently defined […] 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. 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.” See: Report of the subgroup ‘Immunity from Seizure’ of the Expert Group ‘Mobility of Collections’, pp. 25-26, para. 4.4.

105 Once a museum or agency has received approval, it does not need to apply for it again in relation to each and every single exhibition. However, approval may be withdrawn at any time, for instance because the museum or agency no longer complies with a requirement under the Protection of Cultural Objects on Loan (Publication and Provision of Information) Regulations 2008. The withdrawal, however, does not affect the application of Sections 134 and 135 above to any object which is a protected object immediately before the withdrawal. Therefore, objects which are already in the museum or gallery or on its way to it on the date of the withdrawal of the approval do not lose their protected status. However, objects loaned to a museum or gallery after the withdrawal will not qualify for immunity.
Museums Association’s Ethical Guidelines on Acquisition\textsuperscript{106} and the Spoliation Guidelines of the National Museum Director’s Conference.\textsuperscript{107} Without fulfilling the due diligence criteria, a museum is not eligible for becoming an approved institution. It is even possible that the immunity from seizure is void, if it turns out that the due diligence guidelines have not been followed.

Section 137 consists of several interpretations of the relevant terms. For instance, ‘public display’ means “display to which the public are admitted, on payment or not, but does not include display with a view to sale”. Cultural objects, for instance, exhibited by auctioneers with the aim of selling the objects are therefore excluded from immunity. Another relevant term to be addressed is ‘temporary exhibition’; it means “an exhibition of one or more objects which is open to the public for a period of less than twelve months, whether at a single location, or at a succession of locations”. There is no definition of cultural objects.

It should not be forgotten, that although the object may leave the United Kingdom and be returned to the lender, the Act does not by definition prevent claims against the lender, the museum or agency or foreign State being the owner of the cultural valuable concerned; the immunity will only provide protection from seizure, and only during the period of the loan (with a maximum of twelve months). During the debate in the Parliament, it was said during the second reading: “The immunity will provide protection only from seizure. It will not protect museums in the UK or lenders from being subject to a claim in conversion.” And: “Of course, legal proceedings may be brought, notwithstanding the immunity, which applies only to the item itself. For instance, during the loan period actions for damages could be brought.”\textsuperscript{108} Or, as Jane Graham formulated it: “It is important to note that the bill\textsuperscript{109} only precludes physical seizure of a tangible work. Under the bill, it is still possible to bring an action for damages against the museum or for restitution for unjust enrichment, conversion,\textsuperscript{110} or declaration of title.”\textsuperscript{111} So, to that extent it will neither protect museums in the United

\textsuperscript{106} Acquisition: guidelines on the ethics and practicalities of acquisition, Museums Association, 2004.
\textsuperscript{107} http://www.nationalmuseums.org.uk/spoliation.html. [Last visited 8 March 2011.]
\textsuperscript{108} Information obtained from Jessica Morrison, Department for Media, Culture and Sport.
\textsuperscript{109} Meanwhile the Act.
\textsuperscript{110} In law, wrongfully taking possession of goods, disposing of them, destroying them, or refusing to give them back are acts of ‘conversion’. Under UK law, an action in conversion is the usual method for recovering property from a party in possession who unlawfully detains it. See also: op. cit. n. 25, p. 50 and n. 112.
\textsuperscript{111} Op. cit. n. 69 (Graham), p. 79 and n. 51.
Legal actions, for instance, for conversion or declaration of title, can be brought by any person who has possession or the immediate right of possession of the object.113 The key elements of these actions are to be found under the Torts (Interference with Goods) Act of 1977. According to Anna O’Connell,114 although formally the anti-seizure legislation does not protect against a claim in conversion and such a claim is theoretically possible, it is also theoretically thinkable that the Tribunals, Courts and Enforcement Act as currently drafted might deprive a claimant of his or her immediate right of possession. After all, in case of immunity from seizure, it is not possible for somebody else than the borrower to obtain an immediate right of possession. So far, no UK court has assessed this situation yet. If the issue were tested by a UK court, it is unlikely that it would conclude that it was Parliament’s intention to deny a claimant access to other forms of legal relief, according to O’Connell.

7.4 Concluding

The United Kingdom describes what is meant by a State in its State Immunity Act 1978. Reference to a State includes a reference to the sovereign or other head of State in his public capacity, the government of that State and any department of that government. It does not include any entity which is distinct from the executive organs of the government of the State and capable of suing or being sued. We saw supra, in Chapters 3 and 4 that, for instance, the

112 At 687 Parl. Deb., H.L. (5th ser.) (2006) 784, available at http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/61129-0006.htm. [Last visited 8 March 2011.], we can read: “We should note that while the Bill precludes seizure of the work of art, it does not preclude suit.” In defending the draft in the House of Lords against the critique that the Act would deprive dispossessed owners of any judicial redress, the then Secretary of State for Constitutional Affairs and Lord Chancellor relied upon the argument that the envisaged immunity would provide protection only from the material seizure of the object, but would not cover a claim in conversion or a claim for damages. See: Andrea Gattini, ‘The International Customary Law Nature of Immunity from Measures of Constraint for State Cultural Property on Loan’, in: Isabelle Buffard, James Crawford, Alain Pellet, Stephan Wittich (eds.), International Law between Universalism and Fragmentation – Festschrift in Honour of Gerhard Hafner, Leiden, Boston 2008, pp. 421-439, at p. 428 and n. 37.

113 In a claim against a borrower in possession, the claimant will normally allege that the critical act of conversion is the refusal by the borrower to comply with the claimant’s lawful demand that the object be yielded to the claimant. Since the claimant in a case of demand and refusal would necessarily lack possession at the time of refusal, the claim would have to be founded on the immediate right of possession. See also: op. cit. n. 58 (Palmer), paras. 8-12.

definitions of ‘State’ under the 2004 UN Convention or the US Foreign Sovereign Immunities Act are considerably broader. It has been stated in the literature that only in rare circumstances a separate entity will be entitled to immunity under the UK State Immunity Act.

The State Immunity Act provides for immunity from seizure for State property, but does have some important exceptions to that rule. The protection does not apply to State property which is in use, or intended for use, for commercial purposes. The UK Department for Culture, Media and Sport has stated in that regard that it is far from clear whether objects on loan to exhibitions in the United Kingdom would be considered to belong to that category. But if there was any doubt, it is always possible for the head of a State's diplomatic mission in the United Kingdom (or someone who acts on his behalf) to assure that the objects concerned are not in use or intended for use by or on behalf of the State for commercial purposes. This shall be accepted as sufficient evidence of that fact unless the contrary is proved. Moreover, in their communication to the Russian Federation, the UK authorities stated that the cultural objects loaned by four Russian State Museums and owned by the Russian State would be under the protection of the State Immunity Act 1978.

Thus, a State museum may not be immune from jurisdiction under the State Immunity Act, as such a museum would mostly be considered as a separate entity and such an entity is only immune from the jurisdiction of the courts of the United Kingdom if the proceedings relate to anything done by it in the exercise of sovereign authority and the circumstances are such that a State would have been so immune. The normal activities of a museum such as exhibiting its collection and lending cultural objects to other institutions would most likely be considered as falling under the definition of a commercial transaction. However, in case such a museum houses cultural objects and the UK authorities are convinced of the fact that these objects indeed regard State property which is not in use or intended for use for commercial purposes, then the objects may be immune from seizure under the Act. That may lead to the result that an act of lending may be seen as a commercial transaction, but that the State property involved should be considered as not having a commercial purpose. All this makes the application of the Act to cultural objects which are lent to the United Kingdom for exhibitions not entirely clear, as has been admitted by the DCMS as well. DCMS stated that the Act may be useful with respect to States such as the Russian Federation, where the State owns the national collection, but that it is otherwise of limited application.
In order to provide more legal certainty, and in order to cover cultural objects on loan which do not belong to a State but to a separate entity (such as a museum) or to private lenders (institutions or individuals), the UK authorities enacted Part 6 of the Tribunals, Courts and Enforcement Act for additional protection. The sections regarding immunity from seizure in that Act should provide lenders with a (firmer) guarantee that their cultural objects on loan in the United Kingdom will be returned at the termination of the exhibition. The protection given in the Act is intended to exclude any form of seizure of an object which has been lent to an exhibition in the United Kingdom, no matter whether seizure has been ordered in a criminal or a civil procedure. Protection is not being received automatically. Lenders need to request the borrowing museum or gallery to obtain immunity for the item concerned. Only objects which are loaned to those UK institutions which have been approved by the relevant UK authority will qualify for immunity under the Act. When deciding whether or not a particular UK institution should be approved, importance is given to the institution’s due diligence procedures for establishing the provenance and ownership of cultural objects.

If the conditions of the Act are met, an object that has been loaned from abroad for an exhibition cannot be seized, except where required to under EU law or the UK’s international obligations. Thus, a substantiated claim from a State party to the 1970 UNESCO Convention, or a request from another EU Member State for the return of an object on loan to the United Kingdom under the European Council Directive 93/7/EEC on the Return of Illegally Removed Cultural Property would be permitted to proceed, and return obligations under these instruments may prevail. The same would apply in case of obligations under the United Nations Transnational Organized Crime Convention.115 Thus, where measures of constraint are necessary to make the United Kingdom comply with its obligations under international law or European law, or under a United Kingdom provision giving effect to such an obligation, the object concerned will not be protected.

This way, together with the important role of the due diligence guidelines in the whole process, the United Kingdom tries to ensure that looted or stolen cultural objects would not

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115 Adopted by UN General Assembly Resolution 55/25 of 15 November 2000. It entered into force on 29 September 2003. To be found at: http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf. [Last visited 8 March 2011.] The United Kingdom took this convention into account when drafting its immunity from seizure legislation; it should be possible to seize proceeds of crime, or to preserve evidence, if this is necessary.
arrive in the United Kingdom under the flag of international loans, or that immunity provisions would not hinder the return to the country of origin.

It should be kept in mind, that although the object may leave the United Kingdom and be returned to the lender, the Act does not contain any provision preventing claims against the lender, the museum or agency or foreign State that owns the cultural object concerned; the immunity will only provide protection from seizure, and only during the period of the loan. However, for a claim for conversion or declaration of title, a claimant needs to have the immediate right of possession of the object. It is possible that the Tribunals, Courts and Enforcement Act as currently drafted might deprive a claimant of his or her immediate right of possession. So far, no UK court has assessed this situation yet.

Finally, it should be kept in mind that the UK authorities hold the view that cultural property of foreign States is already immune from seizure on the basis of customary international law “if the goods are sent for an exhibition for the enjoyment of the public”. It is thereby likely that the UK follows the definition of a State as referred to in its own State Immunity Act. With its State practice and its efforts to increase legal security, the United Kingdom contributes to the actual formation of a rule of customary international law.

under this UN Convention.