A Clock in Court: East German Export of Cultural Property Considered by West German Courts[1]

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With the political change in the former German Democratic Republic in November 1989, a scandalous practice of the East German Government came to an end: the systematic export of huge quantities of cultural property in exchange for foreign currency which was needed to prevent the collapse of the economic system. The East German State took possession of the cultural property on its territory in a variety of ways. One way was to impose heavy tax burdens on art dealings and the ownership of collections of art (e.g. by valuing collections for the purposes of wealth tax according to standards of Western countries, which were beyond the means of the collectors and by levying a high turnover tax upon those sales and barters which were necessary to improve collections), thereby forcing the owners to sell their property or entitling the authorities to obtain and realize it by selling it to the state-owned Kunst und Antiquitäten GmbH ('Art and Antiquities Ltd.') which in turn exported the items.[2]

The Kunst und Antiquitäten GmbH was established by the East German regime in 1973, originally for the purpose of selling art work from the state-owned Museum Fund to the West in return for foreign currency. This goal, however, was dropped after stormy protests from East German museum directors and the Federal Republic of Germany. However, the company started to export art and antiques from other sources, forming part of the framework of state-owned export trade companies. These were controlled by the notorious 'KoKo'; the department of commercial coordination in the former East German export trade ministry under the direction of Alexander Schalck-Golodkowski. In 1989, the company had a turnover of 60.8 million Valutamark and a net profit of 37 million Valutamark.[3]

In one case, the victim, a renovator of furniture and collector of antiques, had been deprived of his complete collection in the course of tax proceedings and sentenced to prison for tax evasion. After his release to West Germany he discovered one of the pieces of his collection in the antique shop of the West Berlin department store 'KaDeWe'. The property in question was a grandfather clock made *circa* 1770–80 by the court clock-maker to Friedrich II of Prussia, C E Kleemeyer. The renovator filed an action against the antique

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shop owner with the aim of recovering what he argued was his property. The court of first instance as well as the Berlin Court of Appeal (Kammergericht) granted a judgement for the plaintiff; the Federal High Court, however, reversed these decisions and left the renovator without relief. A complaint of unconstitutionality ('Verfassungsbeschwerde') to the Federal Constitutional Court in Karlsruhe, in which the collector claimed that his fundamental rights had been violated by the High Court's decision, was not accepted for review.

The circumstances of the loss of the plaintiff's collection, according to the appellate court findings, commenced in December 1981, when a prosecution for tax evasion was filed against the plaintiff. He was arrested on December 8 and later sentenced to a prison term of five years and six months. In the days immediately following his arrest, the fiscal authority had the collection of art and antiques inventoried and valued; its value was estimated to be slightly above 2 million Mark. On December 15, the fiscal authority seized the collection as security for an alleged tax obligation of 2 million Mark and had the collection transported immediately to the delivery stores of the Kunst und Antiquitäten GmbH.

In the following tax proceedings, arrears of income tax, sales tax and wealth tax were fixed at 1,517,739 Mark; the fiscal authority requested a payment (including ancillary claims) of 2,035,509 Mark and attached the plaintiff's claim for recovery of his property. The plaintiff filed an appeal with the fiscal authority against the tax assessment, which was rejected in June 1982. No further remedy was provided by East German law. Shortly thereafter, the fiscal authority sold the collection to the Kunst und Antiquitäten GmbH. In October 1984, this company in turn sold the clock to the defendant.

The case raised questions of conflict of laws; in particular, the question whether to recognize obviously confiscatory measures of the East German regime in West Germany.

The court in the first place had to determine the law governing the request for recovery and, as an incidental question, to decide whether the defendant had acquired ownership of the clock. West German courts determined the law applicable in legal disputes involving the two Germanies according to the rules of (West) German private international law. There are no statutory rules in the area of property rights in this body of law. It is, however, a generally accepted principle that legal relations as to goods are governed by the law of the country where they are situated (*lex rei sitae*). The relevant point in time for the application of this law is considered to be the time when the legal consequence in question is to take effect.

The claim for recovery was governed by West German law because the clock at the time of the request to return it was situated in West Germany. The question whether the antique shop through its

purchase from the Kunst und Antiquitäten GmbH in 1984 acquired ownership of the clock, on the other hand, was governed by the laws of East Germany because the acquisition had been completed there. The same law applies to the question whether the Kunst und Antiquitäten GmbH had lawfully acquired ownership in the course of the execution measures of the fiscal authority against the plaintiff in 1982.

According to West German law, the owner may recover goods from a person who possesses them without being entitled to such possession. The plaintiff's claim therefore could be successful only if he did not lose ownership through prior transactions.

As for the purchase of the clock by the antique shop from the Kunst und Antiquitäten GmbH, the Appellate Court stated that it had not been subject to the general law of purchase and sale of the German Democratic Republic, but rather to special rules of the International Commercial Transactions Act (Gesetz über internationale Wirtschaftsverträge, GIW). According to Section 54 I c GIW, the buyer acquires title at the moment of delivery. In this case, the antique shop therefore had acquired title at the moment the goods were handed over to the freight forwarder sent by it to the storage facilities of the Kunst und Antiquitäten GmbH.

This company, in turn, was entitled to dispose of the goods, a further prerequisite of a valid transaction according to East German law. It had acquired the goods on the basis of a sales agreement made with the fiscal authority in 1982. This sale was in compliance with East German law; in particular, it was not necessary according to these laws that the fiscal authorities realize attached assets by public auction.

So, on this reasoning, the request for recovery would have been unsuccessful because the plaintiff had validly lost title in the clock. The Appellate Court, however, found that this result would violate public policy because the measures of the East German fiscal authority were to be considered an expropriation of property without compensation. The court examined this issue from two possible perspectives:

1. It examined whether the tax proceedings were initiated for the sole purpose of stripping the plaintiff of his assets. The court was not able to determine this with a sufficient degree of certainty. On the one hand, the court found that the circumstances of the arrest of the plaintiff and the attachment of his collection indicated that the proceedings were a mere pretext in order to obtain the plaintiff's property. The prosecutor, officers of the fiscal authority as well as representatives of the VEB (K) Antikhandel Pirna, a subsidiary of the Kunst und Antiquitäten GmbH, entered the plaintiff's house under the pretext of changing his water meter, arrested him and made an inventory of the complete possessions of the plaintiff's family. A few days later, the items of property were brought directly to the delivery stores of the Kunst und Antiquitäten GmbH, from

which they were sold shortly after the end of the tax proceedings. On the other hand, the court found that in the early stages of the tax proceedings the plaintiff had admitted having traded in art works (albeit on a small scale) and to have made profits therefrom. Furthermore, the court found that the fiscal authority, on the plaintiff's appeal, had thoroughly dealt with his arguments before rejecting his complaint. For these reasons, the court felt unable to conclude that the tax proceedings had been initiated and carried out for purely arbitrary reasons.

2. The court reviewed the applied tax rates and found them confiscatory. The fiscal authority had determined the income which the plaintiff derived from his art dealings in the period 1972–1981 to be 1,595,886 Mark, which essentially resulted from the fact that according to the evaluation by the fiscal authority the value of his property in the same period of time had risen from an original figure of 150,000 Mark to about 2 million Mark. On the basis of this evaluation, the fiscal authority had fixed income tax at 1,215,995 Mark and wealth tax at 212,100 Mark. The court furthermore took into account interests on arrears fixed in the amount of 143,598 Mark, a so-called 're-evaluation balance' amounting to 282,893 Mark for having bought and resold gold and silver ware; fees for the review proceeding were calculated at 94,973 Mark and a penalty fixed in the amount of 100,000 Mark. The court considered the overall effect of this taxation – the tax obligation exceeding the determined profit by 453,673.00 Mark – to be an expropriation. The court concluded that, because of the confiscatory nature of the tax assessment, the acquisition of the plaintiff's collection by the Kunst und Antiquitäten GmbH (and therefore also its sale to the defendant) could not be recognized as valid transactions.

The Federal High Court did not find error in the Appellate Court's evaluation of the facts relating to the initiation and execution of the tax proceedings. As for the amount of taxation, it took a view different from that of the Appellate Court. Although it accepted the Appellate Court's reasoning that a governmental act may be an expropriation, even if it does not bear that name, and that tax proceedings could be construed as such an expropriatory act, it did not agree that the sum of all taxes and ancillary claims should be decisive. Rather, it looked at the individual tax liabilities. The court held that an income tax rate of 76.2% did not exceed that of some other Western countries and therefore could not be considered as confiscatory. Nor did the fact that turnover tax, wealth tax and interest on arrears that had been added justify, in the eyes of the High Court, the conclusion that the tax assessment was an expropriation without compensation.

In the proceedings before the Federal Constitutional Court, the plaintiff did not attack the High Court's findings regarding the tax rates applied but essentially questioned its assessment of the manner in which the tax proceedings had been initiated and carried out.

The Federal Constitutional Court, however, held that the judgment of the Federal High Court did not violate the plaintiff's constitutionally protected property rights. In particular, the Court stated that for reasons of procedural law the Federal High Court had not been able to make its own factual determinations as to whether the tax proceedings had been initiated and carried out purely arbitrarily, but was bound by the determinations of the Appellate Court.

The expectation that the Federal High Court or Constitutional Court would render a precedent for a number of similar cases which had occurred in the former German Democratic Republic was thereby frustrated. The conclusion must be drawn that unless it can be shown that the East German fiscal authorities initiated and carried through tax proceedings against an art collector with pure arbitrariness, there is no remedy under West German law for the losses that occurred through the realisation of collections of artwork and antiques in lieu of tax payments. This high standard had not been met in this case perhaps (as the courts' reasoning indicates) because of inadequate legal representation.

The result remains unsatisfying because it removes individual measures against the victim from the overall context of a systematic stripping of collectors of their property. The hope remains that other cases of this kind will have a greater chance of success before the courts when more details are known on how the 'Koko' – in cooperation with the 'Stasi' (Ministry of State Security) – took possession of collections of art and antiques. This type of information may lead courts to conclude that these 'fiscal proceedings' were mere pretexts used by the East German authorities to appropriate collections of cultural property.

Notes

1 Kammergericht Berlin, decision of September 29, 1987 (17 U 492/87), published in Neue Juristische Wochenschrift 1988, p. 341; Bundesgerichtshof, decision of September 22, 1988 (IX ZR 263/87), published in Neue Juristische Wochenschrift 1989, p. 1352; Bundesverfasssungsgericht, decision of January 9, 1991 (2 BvR 1616/88) (unpublished).

2 For an informative account of these dealings, see Blutke, *Obskure Geschäfte mit Kunst und Antiquitäten* (1990) LinksDruck Verlag, Berlin and reviewed by Kurt Siehr (1992) 1 I.J.C.P. 429–30.

3 Annual Report 1989, cited by Blutke, note 2 above, p. 156.