Relationship of international law and municipal law — Treaties — Effect in domestic law — Federal Republic of Germany — Postwar treaties — Treaty on the Final Settlement with respect to Germany, 1990 — Constitutional status — Whether part of German law

States — Germany — Status under allied occupation — Resumption of full sovereignty by united Germany — Effect on postwar treaties — Convention on the Settlement of Matters Arising out of the War and the Occupation, 1952

Treaties — Application — Termination — Convention on the Settlement of Matters Arising out of the War and the Occupation, 1952 — Effect in German law — Relationship with Treaty on the Final Settlement with respect to Germany, 1990 — Termination by exchange of notes, 1990

War and armed conflict — Reparations — Seizure of German external assets — Convention on the Settlement of Matters Arising out of the War and the Occupation, 1952 — Definition of German a matter for the law of the confiscating State — Persons of German ethnic origin possessing nationality of neutral State — Whether assets liable to seizure — Whether German courts entitled to adjudicate upon claims — The law of Germany

PRINCE HANS-ADAM II *v.* MUNICIPALITY OF COLOGNE[1]

(PIETER VAN LAER PAINTING CASE)

(Case No 22 U 215/95)

Federal Republic of Germany, Court of Appeal of Cologne. 9 *July* 1996

(Oehler, *Presiding Judge*; Eickmann-Pohl and Caliebe, *Judges*)

[1] His Highness Prince Hans-Adam II of Liechtenstein was represented by Scherff, Dr Hahn, Dr Krumbiegel, and Dr Hofmeister and Coßmann. The Municipality of Cologne was represented by the *Oberstadtdirektor* (chief administrative officer of the city). The Historical Monument Office in Brno, intervening, was represented by Dr Köhler, Dr Vieregge, Prof. Dr Salzwedel, Dr Bauer, Prof. Dr Jacobs, Dr Stiegler, Dr Piltz, Dr Loschelder, Dr Rüffer, Dr Strothmann, Dr Lauer, Dr Drouven, Dr Kappus, Dr Budde, Dr Schnepp, Dr Wiehe, Dr Wahlers and Dr Grimm.
For related proceedings, see 149 ILR 26, 32 and 89 below.

SUMMARY:[2] *The facts*:—In 1991, a painting by the artist Pieter van Laer was lent by a museum in the Czech Republic to a museum in Cologne for exhibition. The painting had been confiscated by the Government of Czechoslovakia from the then reigning Prince of Liechtenstein in 1945 under a decree confiscating the property in Czechoslovakia of persons of German and Hungarian origin irrespective of their nationality. The painting had been kept in a castle in Czechoslovakia which had been part of the private property of the Prince. A challenge to the legality of its seizure had been rejected by a court in Czechoslovakia in 1951. Prince Hans-Adam II of Liechtenstein, the reigning prince in the 1990s and son of the prince from whom the painting had been taken, brought proceedings in the German courts for the recovery of the painting. He maintained that the confiscation had been unlawful, because Liechtenstein had been neutral during the Second World War and the decree should not, therefore, have been applied to the property of the Liechtenstein royal family.

In 1952, France, the United Kingdom and the United States of America concluded with the Federal Republic of Germany the Convention on the Settlement of Matters Arising out of the War and the Occupation ("the Settlement Convention"). As amended, the Settlement Convention provided, in Article 3 of Chapter 6, that the Federal Republic would raise no objection against the measures carried out with regard to German external assets and that no action against persons acquiring property as a result of such measures would be admissible.[3] Article 5 of Chapter 6 provided that the Federal Republic would ensure that the former owners were compensated. This legal regime was expressly stated to be temporary until the problem of reparation was finally settled by a peace treaty. The Settlement Convention entered into force in 1955. The Treaty on the Final Settlement with respect to Germany, concluded in 1990 and entering into force in 1991, between France, the USSR, the United Kingdom, the United States of America, the Federal Republic of Germany and the German Democratic Republic constituted a final settlement of matters arising out of the Second World War so far as Germany was concerned. It was accompanied by an exchange of notes between the parties to the Settlement Convention terminating that Convention but providing that paragraphs 1 and 3 of Article 3 of Chapter 6 would remain in force.

The Regional Court of Cologne dismissed the proceedings. Prince Hans-Adam II appealed to the Court of Appeal.

Held:—The appeal was dismissed. Recourse to the German courts was precluded by Article 3(3) of Chapter 6 of the Settlement Convention.

(1) Article 3 of Chapter 6 of the Settlement Convention had not been abrogated by the Final Settlement Treaty of 1991 and the termination of the quadripartite occupation regime for Germany, which provided for the resumption of full sovereignty by the united Germany (pp. 8-10).

[2] Prepared by the Editors.
[3] The text of Article 3 appears at 149 ILR 98 below.

(2) The exchange of notes of 27-28 September 1990 was an independent international treaty and not merely an instrument for the interpretation of the Final Settlement Treaty. With the exception of paragraphs 1 and 3 of Article 3 of Chapter 6, which the exchange of notes expressly retained in force, the exchange of notes terminated the Settlement Convention. It was not necessary that the termination of a treaty was effected by the same kind of legal instrument as the treaty itself (p. 10).

(3) The exchange of notes was effective in the domestic law of Germany as a treaty. No particular formality was required for an international agreement concluded by the Federal Government to take effect in German law, nor was legislative consent a requirement in this case. No violation of basic rights was involved (pp. 10-13).

(4) Article 3(3) of Chapter 6 was part of the system of liquidation of German external assets for the purpose of reparation. Its effect was to exclude the jurisdiction of the German courts and debar them from ruling on the Prince's claim that the confiscation of the painting was unlawful (pp. 13-17).

(5) It was not contested that the Prince and his father had at all relevant times been citizens of Liechtenstein, a neutral State, and had not held German nationality. However, the question whether particular property was to be considered as German external assets within the terms of the Settlement Convention was to be examined on the basis of the law of the expropriating State, in this case Czechoslovakia. The law of Czechoslovakia had treated property as German if the owner was of German ethnic origin, even if he or she was not a national of Germany. It was not open to the German courts to question that judgment. The German ethnic origin of the Prince and his father was common knowledge (pp. 17-20).

(6) The painting was part of the agricultural property to which the decree applied and had been seized because of the state of war and for the purpose of reparation measures (pp. 21-4).

The following is the text of the judgment of the Court:

[435] The appellant's appeal against the judgment of the 5. *Zivilkammer des Landgerichts Köln* (5th Section for Civil Matters of the Regional Court of Cologne)—5 O 182/92—is dismissed.

The costs of the appellate proceedings and the extra-judicial costs of the intervening third party shall be recoverable from the plaintiff.

The judgment is provisionally enforceable.

The plaintiff may avert execution by the defendant and the intervening third party by providing a security to the amount of DM 25,000.00 for each party, unless security to the same amount was provided prior to execution.

[436] The respective securities may also be provided by way of an absolute guarantee to be assumed by a major German bank or public savings bank.

STATEMENT OF THE FACTS

The plaintiff is the heir of his father, the former Prince of Liechtenstein. Until the end of 1944, his father was the owner of the painting at issue by Peter van Laer, "Der große Kalkofen", that had been part of the Liechtenstein family's collection since 1767 at least. At the end of the Second World War, the painting was to be found in one of the castles of the Liechtenstein family on the territory of today's Czech Republic. In 1991, the defendant received the painting from the intervening third party as a loan for an exhibition. By virtue of an interlocutory injunction of the Regional Court of Cologne dated 11 November 1991—5 O 388/91—sequestration of the painting was effected on 17 December 1991.

The plaintiff demands the defendant's consent that the painting be returned to him. In his opinion, he has become the owner of the painting in his capacity as heir of his father. He claims that the painting had not been the object of expropriation measures in Czechoslovakia, and in any case, such measures were invalid or ineffective on the grounds that they represent a violation of the *ordre public* of the Federal Republic of Germany.

The plaintiff filed the motion that

> the defendant should be ordered to return to him the painting by Pieter van Laer entitled "*Szene um einen römischen Kalkofen*" (dimensions 51.5 cm × 69.2 cm), by declaring his consent that the above-mentioned painting be handed over to the plaintiff from the custody of the *Obergerichtsvollzieher* (senior bailiff) Kramer in his capacity as sequestrator, and by releasing the painting in this respect.

The defendant and the third party intervening in his support filed the motion that

> the case be dismissed.

[437] The defendant and the intervening third party stated that the plaintiff's father had lost his title to ownership with respect to the painting as a result of an expropriation effected in Czechoslovakia. The party intervening in support of the defendant submits in this respect that the painting at issue was expropriated by the 12th Presidential Decree dated 21 June 1945. The legality of such expropriation was constituted by judgment of the Administrative Court of Bratislava on 21 November 1951.

By its judgment of 10 October 1995—5 O 182/92 LG Köln (Regional Court of Cologne)—which is referred to here with respect to

all specific details, the Regional Court dismissed the case. In its reasons for the decision, the court stated that the claim was inadmissible, [and] recourse to German courts was excluded. This ensues from Article 3 of Chapter 6 of the Convention on the Settlement of Matters Arising out of the War and the Occupation (Settlement Convention) dated 23 October 1954, which is still in force today. The Court further states that the prerequisites of this regulation are fulfilled. The expropriation of the plaintiff's father by way of the 12th Decree of the President of Czechoslovakia as of 21 June 1945 represented a measure within the meaning of Chapter 6 Article 3 paragraph 1 of the Settlement Convention.

With the pleading received on 15 November 1995, the plaintiff appealed against this judgment served on him on 20 October 1995, and he delivered a statement of grounds for his appeal which was received by the court on 27 February 1996, after an extension of time for filing such statement of grounds for appeal had been granted until 1 March 1996. The plaintiff holds the view that the Settlement Convention was completely repealed by the so-called Two-Plus-Four Treaty dated 12 September 1990. The exchange of letters between the Federal Ministry for Foreign Affairs of the Federal Republic of Germany and the Embassies of the Three Western Powers as of 27/28 September 1990 was not suited to effecting continued validity of Article 3 paragraph 3 of Chapter 6 of the Settlement Convention because this exchange of letters was not approved of and ratified by the competent legislative bodies of the Federal Republic of Germany. In addition, the requirements of Article 3 paragraph 3 of Chapter 6 of the Settlement Convention were not fulfilled. The confiscated property of the plaintiff's father was not part of German external assets within the meaning of this provision. This provision was part of international law of war that could not be applicable to neutral States like Liechtenstein. Neither was this a reparation measure; to the contrary, the Beneš-Decree No 12 was of a punitive nature. And finally, in view of the group of persons protected thereby, the respective **[438]** provision of the Settlement Convention would not justify its application, nor even an analogous application, with respect to the plaintiff.

The plaintiff files the motion that

1. In variation of the judgment passed by the Regional Court, the defendant should be ordered to return to him the painting by Pieter van Laer entitled "*Szene um einen römischen Kalkofen*" (dimensions 51.5 cm x 69.2 cm), by declaring his consent that the above-mentioned painting be handed over to the plaintiff from the custody of the *Obergerichtsvollzieher* (senior bailiff)

Kramer in his capacity as sequestrator, and by releasing the painting in this respect.
2. Within the scope of execution of the judgment, the court should admit that security can also be provided by way of a guarantee to be assumed by a major German bank or public savings bank.

The defendant files the motion that

1. the appeal be dismissed.
2. *alternatively*, the defendant should be allowed to provide a security—if any—by way of a guarantee to be assumed by a major German bank or public savings bank.

The third party intervening in support of the defendant files the motion that

the appeal of the opposing party be dismissed.

The defendant and the intervening third party hold the opinion that the Two-Plus-Four Treaty had not repealed the Settlement Convention, but that such repeal was effected later by the Exchange of Letters dated 27/28 September 1990, which simultaneously agreed on the **[439]** continued application of those provisions of the Settlement Convention which are relevant for the case at hand. As far as Decree No 12 is concerned, this was not an economic policy measure but a measure directed against enemy assets. Consequently, the prerequisites of this provision are fulfilled. The fact that the provision could be applied to the defendant ensues from the provision's purpose.

With respect to all further details as to the state of affairs and the legal position, the Court hereby refers to the contents of the pleadings and statements exchanged and the documents submitted by the parties.

STATEMENT OF REASONS ON WHICH THE DECISION IS BASED

The plaintiff's appeal, filed in due form and time and admissible in all other respects, is not successful as to the merits. The judgment passed by the Regional Court, to the arguments of which the Senate refers in supplement, is in compliance with the factual and legal position. The plaintiff's arguments of appeal do not justify any different evaluation.

I.

The claim is inadmissible. Pursuant to Chapter 6 Article 3 paragraph 3 in conjunction with paragraph 1 of the Convention dated 26 May 1952 with respect to the Settlement of Matters Arising out of the War and the Occupation (Settlement Convention), recourse to German courts is precluded for the claim raised here.

The term German jurisdiction (*facultas jurisdictionis*) comprises the power of decision emanating from State sovereignty and generally conferred by the State to its courts, that is the natural power to administer justice (BGH—*Bundesgerichtshof* (Federal Court of Justice) *JZ*—*Juristenzeitung*—1958, 241, 242). In delimitation of the international jurisdiction of a court, which lays down to which extent a State makes use of its jurisdiction and which consequently presupposes the existence of such jurisdiction, German jurisdiction marks the boundaries set by international treaties, customary international law and recognised general rules of **[440]** international law to the power of a State exercising sovereign jurisdiction on its territory (Eickhoff, *Inländische Gerichtsbarkeit und internationale Zuständigkeit für Aufrechnung und Widerklage*, Berlin 1985, 21, 26; Linke, *Internationales Zivilprozeßrecht*, 2nd edn, Cologne 1995, sec. 3 marginal note 65).

Article 3 paragraph 3 in conjunction with paragraph 1 of Chapter 6 of the Settlement Convention excludes German jurisdiction for claims and actions against persons who, directly or indirectly and in the course of reparation measures, have acquired title to property with regard to seized German external assets. This provision has not lost its validity by Article 7 of the Treaty on the Final Settlement with respect to Germany, signed in Moscow on 12 September 1990 (Two-Plus-Four Treaty). The prerequisites of Article 3 paragraph 3 of Chapter 6 of the Settlement Convention are fulfilled.

1.

In Article 7 paragraph 1 sentence 1 of the Two-Plus-Four Treaty, the Victorious Powers declare the termination of their rights and responsibilities with respect to Germany as a whole and Berlin. As a result, the respective quadripartite agreements connected therewith are terminated pursuant to Article 7 paragraph 1 sentence 2 of the Two-Plus-Four Treaty. Article 7 paragraph 1 of the Two-Plus-Four Treaty finally states that full sovereignty of the united Germany is re-established with respect to its foreign and domestic affairs. The extinction of quadripartite law with respect to Germany as a whole, as established by Article 7

paragraph 1 sentence 2 of the Two-Plus-Four Treaty, is supplemented by paragraphs 2 and 3 of the agreement between the governments of the Federal Republic of Germany and the three Western Allies dated **[441]** 27/28 September 1990 with respect to the Convention on Relations between the Three Powers and the Federal Republic of Germany and the Convention on the Settlement of Matters Arising out of the War and the Occupation. In accordance with paragraph 2 of this Convention, the Settlement Convention ceases to be in force with the exception of individual provisions of the instrument listed under paragraph 3, which also includes Article 3 paragraphs 1 and 3 of Chapter 6.

The intergovernmental agreement dated 27/28 September 1990 is effective without any qualification under both international and constitutional law. The fact that the Settlement Convention is abrogated hereby while at the same time the provisions listed under paragraph 3 are preserved, does not conflict with the practical realisation of the agreement dated 27/28 September 1990 in the form of an exchange of notes between the ministries for foreign affairs of the States involved. On the contrary, as a result of this procedure, the provisions concerned came into effect as early as on 28 September 1990, while the Two-Plus-Four Treaty signed on 12 September 1990 did not become internationally binding until after the depositing of the last instrument of ratification on 15 March 1991 (the respective approval required for the adoption of this international treaty of the Federal Republic of Germany dates from 11 October 1990, *BGBl—Bundesgesetzblatt* (Federal Law Gazette) 1990 II, 1317).

a)

The abrogation of the Settlement Convention was not already effected by the Two-Plus-Four Treaty, which would have had the result that abrogation by the exchange of letters would have been of no more than a declaratory nature and, in contrast thereto, the agreed preservation of the provisions of Chapter 6 Article 3 of the Settlement Convention would have had a constitutive effect.

The termination of all "quadripartite" agreements as ordered in the Two-Plus-Four Treaty is necessarily connected with Article 7 paragraph 1 sentence 1 of the Two-Plus-Four Treaty, which provides for a termination of the Four Allies' rights and responsibilities with respect to Germany as a whole and Berlin. As follows implicitly from the systematic and teleological interpretation of sentence 2, only such conventions are regarded as quadripartite agreements as have been entered into by the Four Allies among themselves and with respect to Germany as a whole, but not treaties of the Federal Republic of Germany with the Three

Western Powers (cf. Blumenwitz, *Das Offenhalten der Vermögensfrage in den deutsch-polnischen Beziehungen*, p. 60; Brand, *Souveränität für Deutschland*, Cologne 1994, p. 255; Schweitzer, *Verträge Deutschlands mit den Siegermächten*, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Vol. 8, Heidelberg 1995, sec. 190 marginal note 39). This follows directly from the wording of the treaty that is exclusively connected to the termination of rights and responsibilities of the four above-named States with respect to Germany as a whole (cf. also Gornig, *Der Zwei-plus-Vier-Vertrag unter besonderer Berücksichtigung grenzbezogener Regelungen, ROW—Recht in Ost und West*—1991, 97, 105, fn 65).

Nothing else ensues from Article 7 paragraph 2 of the Two-Plus-Four Treaty. The fact that the united Germany regained full sovereignty with respect to its internal and external affairs is the logical **[442]** consequence of the agreed regulations under paragraph 1 with respect to Germany as a whole. This is already indicated by the use of the word "accordingly" (cf. Blumenwitz, *Der Vertrag vom 12. September 1990 über die abschließende Regelung in bezug auf Deutschland, NJW—Neue Juristische Wochenschrift*—1990, 3041, 3047). When some experts in the relevant literature are of the opinion that preservation of the Western Powers' rights would have required an express reservation to be included in the Two-Plus-Four Treaty, and failing such a reservation, the conflict between the provisions of paragraph 3 of the agreement dated 27/28 September 1990 on the one side and Article 7 paragraph 2 on the other side would have to be decided in favour of the latter (Fiedler, *JZ* 1991, 685 (690); Gornig, *ROW* 1991, 97 (105); Blumenwitz in the expert opinion rendered on the case under consideration, p. 13 [German original, p. 16 English translation]), this opinion pays sufficient regard neither to the history of its creation nor to the chronological order of events in connection with the Two-Plus-Four Treaty and the intergovernmental agreement. Paragraph 2 of the agreement dated 27/28 September 1990, which was not entered into until after the signing of the treaty of 12 September 1990, would have been dispensable, if an additional objective of Article 7 of the Two-Plus-Four Treaty had been to effect a termination of treaties entered into between the Federal Republic of Germany and the Three Western Powers. In addition, the wording of paragraph 3 of the intergovernmental agreement, according to which the respective provisions shall remain in force, could not be explained otherwise. In particular the opinion held in this respect to the effect that, as a result of Article 7 paragraph 2 of the Two-Plus-Four Treaty, the Settlement Convention was deprived of its basis required for a preservation of the agreement between the Three Western Powers and the Federal Republic of Germany, would not lead to the

consequence that by entering into this treaty this agreement would have become ineffective or irrelevant in any other way. And this is so, because this is in contradiction to the parties' intention as such, as expressed on the one side in the explicit repeal of quadripartite rights only, and on the other side in the Exchange of Notes dated 27/28 September 1990. It is quite obvious that the contracting parties of the Two-Plus-Four Treaty themselves, which means in this respect the Three Western Powers and the Federal Republic of Germany, not only considered it necessary that, in addition to the Two-Plus-Four Treaty, the abrogation of the Settlement Convention was formally regulated, but in particular did not intend to see all provisions of the Convention, in particular of Chapter 6 Article 3 of the Settlement Convention, abrogated as a consequence of sovereignty. Consequently, both instruments concern different **[443]** scopes of application as regards the regulations concerned, and one is the supplement of the other.

b)

On the above-mentioned grounds, and for lack of a reference to the contents of the Two-Plus-Four Treaty signed two weeks before, the agreement of 27/28 September 1990 can be classified under international law neither as a part of the latter nor as an instrument for its interpretation within the meaning of Article 31(2)(a) of the Vienna Convention on the Law of Treaties (Vienna Convention), but has to be classified as an independent international treaty within the meaning of Article 2(1)(a) of the Vienna Convention (cf. Blumenwitz, *Staatennachfolge und die Einigung Deutschlands*, *Teil I: Völkerrechtliche Verträge*, Berlin 1995, p. 66). Excepting the provisions listed under paragraph 3, the Settlement Convention was effectively terminated on 28 September 1990 under the rules of international law and with respect to the relationship between the contracting parties by virtue of the exchange of documents and the ensuing entry into force of paragraph 2 of the above-mentioned intergovernmental agreement. In accordance with Article 54(b) of the Vienna Convention, the termination of a treaty may take place at any time by consent of all the parties after consultation with the other contracting parties. In particular, it is not necessary that the termination or suspension is effected in the same way as the respective treaty itself (Ibsen, *Völkerrecht*, 3rd edn, sec. 15 marginal note 71, p. 174).

c)

The intergovernmental agreement is valid without qualification from the domestic point of view, too. In particular Article 59 paragraph 2 sentence 1 of the *Grundgesetz* (*GG* (German Basic Law)) does not