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## Case Die Grosse Seestrasse in Wannsee – X. v. Switzerland

*Switzerland/Suisse – Liebermann Villa – Artwork/oeuvre d'art – Nazi looted art/spoliations nazies – Post 1970 restitution claims/demandes de restitution post 1970 – Negotiation/négociation – Judicial claim/action en justice – Judicial decision/décision judiciaire – Choice of law/droit applicable – Procedural issue/limites procédurales – State immunity/immunité des États – Ownership/propriété – Loan/prêt – Donation – Conditional restitution/restitution sous condition*

*The painting “Die Grosse Seestrasse in Wannsee” by Max Liebermann was bought in 1948 by François de Diesbach, the Swiss representative to Berlin. After de Diesbach’s death, the painting was forgotten within the Swiss embassy and rediscovered in 1997. Attempts made by the Swiss Confederation to identify the rightful owner failed. When the Swiss embassy decided to donate the painting to the Liebermann Villa, a distant relative of de Diesbach seized a Swiss court and claimed ownership over the painting. The High Court of the Canton of Bern ultimately held that the Swiss Confederation had acquired ownership over the painting. The court’s ruling gave way for the donation of the painting to the Liebermann Villa.*

*I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.*

## I. Chronology

### Nazi looted art – Post 1970 restitution claims

- **15 December 1948:** François de Diesbach, who acted as Swiss representative to Berlin after the Second World War, **bought the painting “Die Grosse Seestrasse in Wannsee”** by Max Liebermann (hereinafter “the Painting”) at the Berlin auction house Leo Spik.<sup>1</sup> De Diesbach hung the Painting in his private premises in the Swiss embassy<sup>2</sup> building in Berlin.
- **23 July 1949:** De Diesbach passed away after an accident. **The Painting remained within the premises of the Swiss embassy in Berlin.**
- **1965:** The Painting was added to the **inventory** of the Swiss embassy.<sup>3</sup>
- **1997-1999:** The Swiss embassy found out that the Painting had been bought privately by de Diesbach.<sup>4</sup> Concerned that it might have been **looted** by the Nazi regime prior to the acquisition by de Diesbach, with Liebermann being of Jewish origin, efforts were made to clarify the Painting’s background and to find potential heirs of de Diesbach. Two distant relatives were identified. One of them (hereinafter: ‘the relative’ or ‘X’) claimed to be the owner of the Painting.<sup>5</sup>
- **20 February 2018:** The then Swiss ambassador in Berlin, Christine Schraner Burgener, decided to **donate** the Painting to the **Liebermann Villa**.<sup>6</sup>
- **6 June 2018:** The relative seized the High Court of the Canton of Bern and **requested** an **interim injunction to prevent the donation**.
- **7 June 2018:** The High Court of the Canton of Bern **granted** an **interim injunction**.
- **8 June 2018:** The Painting was handed over to Liebermann Villa in the form of a **long-term loan**.<sup>7</sup>
- **14 August 2018:** The High Court of the Canton of Bern decided that the Swiss Confederation had **acquired** the Painting by way of **adverse possession**.<sup>8</sup>
- **14 April 2019:** The **long-term loan** of the Painting was **transformed into a donation** by the Swiss Confederation to the Liebermann Villa.<sup>9</sup>

<sup>1</sup> Simon Preisig, “Für Jahrzente vergessen”. In the catalogue of works of Max Liebermann, provided by Matthias Eberle, the Painting is assigned the number 1923/16. See *Max Liebermann 1847-1935, Werkverzeichnis der Gemälde und Ölstudien*, Vol. II, 1900-1935 (Hirmer Verlag, 1996) 1082.

<sup>2</sup> Used for convenience of language. The representation became an embassy only in 1999.

<sup>3</sup> See notably Preisig, n. 1.

<sup>4</sup> Hickley, “Swiss Government Gives Disputed Liebermann Painting to Berlin Museum”.

<sup>5</sup> Cf. Hickley, ibid. The identity of the claimant has remained undisclosed.

<sup>6</sup> The Liebermann Villa is the former home of Max Liebermann and serves as a privately funded museum since 2006.

<sup>7</sup> Hickley, n. 4.

<sup>8</sup> High Court of the Canton of Bern, 2<sup>nd</sup> Civil Chamber, Judgment of 14 August 2018, ZK 18 278.

<sup>9</sup> Krimphove, “‘Grosse Seestrasse’: grosse Schweizer Schenkung, grosse Hindernisse”.

## II. Dispute Resolution Process

### Judicial claim – Judicial decision – Negotiation

- Following the discovery that the Painting had been bought privately by de Diesbach, the Swiss government – notably the Swiss Federal Department of Foreign Affairs (*Eidgenössisches Departement für auswärtige Angelegenheiten*, EDA) – made researches to clarify the Painting's background and to find potential heirs of de Diesbach. These investigations were motivated by the fact that, as the painter was of Jewish origin, the Painting might have been looted by the Nazi regime prior to the acquisition by de Diesbach. The EDA found out that the wife of de Diesbach, whose marriage had remained childless, had passed away in 1984, as had his two sisters (in 1967 and 1974). In addition, two distant relatives were identified, both of whom no longer carrying the family name.<sup>10</sup>
- The dispute began in 1999, when one of the relatives identified by the EDA claimed to be the owner of the Painting. Correspondence between the parties lasted until 2003 but did not result in an amicable solution. The Swiss Confederation refused to hand out the Painting to the relative as it was of the view that his ownership seemed highly questionable, particularly in view of other potential heirs and a possible joint heirship. It thus appears that the Swiss Confederation rejected the relative's proposition to settle the dispute out-of-court.<sup>11</sup>
- Following a period of over 15 years without further developments, the Swiss Confederation decided to donate the Painting to the Liebermann Villa.<sup>12</sup> Even if it was not obliged to do so, the Confederation notified the relative with a letter of 20 February 2018, also requesting a declaration of consent by 15 March 2018. A meeting of the parties took place subsequently, but did not change the course pursued by the Swiss embassy.<sup>13</sup>
- In its request for interim relief to the High Court of the Canton of Bern, the relative requested that the Swiss Confederation be forbidden from disposing of the Painting and thus from carrying out the donation. The court granted interim relief in the form of a *superprovisorische Anordnung*. Although the Swiss Confederation was forbidden from disposing of the Painting, it was nevertheless handed over to the Liebermann Villa, but in the form of a long-term loan.<sup>14</sup>
- In its final decision of 14 August 2018 the High Court of the Canton of Bern lifted the order of 7 June 2018 as it had found that the Swiss Confederation had become the owner of the Painting by way of adverse possession.<sup>15</sup> As a result, the loan of the Painting was transformed into a donation from the Swiss Confederation to the Liebermann Villa.

<sup>10</sup> Krimphove, *ibid.*

<sup>11</sup> High Court of the Canton of Bern, n. 8, para. 7.3.

<sup>12</sup> This course of action was decided following the legal opinion of Marc-André Renold : ‘Avis de droit pour la Confédération suisse, représentée par le DFAE, agissant par le Secrétariat général’, 13 December 2017, 2.

<sup>13</sup> High Court of the Canton of Bern, n. 8, para. 7.3.

<sup>14</sup> *Ibid.*, para. 3.

<sup>15</sup> *Ibid.*, para. 17.

### III. Legal Issues

#### Choice of law – Ownership – Procedural issue – State immunity

- Applicable law. According to Article 100 of the Swiss Private International Law Act (PILA), questions relating to property rights over movable objects are governed by the law of the State where the objects concerned are located. The Painting has undoubtedly been located in Germany since its purchase in 1948, when it was brought into the Swiss embassy in Berlin. It was hence German law that applied to the question of ownership.<sup>16</sup> It is noteworthy that Swiss law, which applied to all questions of succession under Article 91(1) PILA, and Article 25 of the Introductory Act of the German Civil Code (EGBGB), knows an “action for recovery of inheritance”. By virtue of this remedy, according to Article 598(f) of the Swiss Civil Code (CC), a heir can demand that the estate or any part thereof be relinquished. However, the action for recovery of inheritance was not brought forward by the relative and would have been time-barred in any event under the statute of limitations of Article 600(1) CC.
- Basis of the claim. The claim for restitution was based on a right of property in accordance with § 985 German Civil Code (BGB, *dinglicher Herausgabeanspruch*).
- State immunity. The High Court of the Canton of Bern briefly touched upon the question of State immunity. It held that adverse possession was not an act of the State performed in its function as sovereign entity (*acta iure imperii*) but a business activity (*acta iure gestionis*).<sup>17</sup> Thus, State immunity did not hinder the question of adverse possession from being adjudicated under German law. This rule applied despite the fact that the Painting was kept inside the Swiss embassy building.
- Capacity to sue. The claim by the relative was denied for lack of *locus standi*. According to Article 602(1) and (2) CC, where several heirs inherit an estate, they form a community of heirs and become joint owners of the property belonging to the estate. In procedural terms, they form a mandatory joinder of parties and must appear jointly before the court as plaintiffs.<sup>18</sup> In the present case, the relative had claimed that at least his sister was a heir to the Painting, too. It was held that either her participation in person or her representation by the relative would have been necessary for the relative to claim the right of property over the Painting.<sup>19</sup> Because this was not the case, the relative’s capacity to sue was denied and his claim rejected. The exception to mandatory joint appearance in the case of emergency to protect the estate did not apply, given that the heir could have contacted his sister between the court order of 7 July 2018 and the pending procedure.<sup>20</sup>

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<sup>16</sup> Ibid., para. 9.1.2 f.

<sup>17</sup> Ibid., para. 9.1.2.

<sup>18</sup> See Art. 70(1) of the Swiss Civil Procedure Code.

<sup>19</sup> High Court of the Canton of Bern, n. 8, para. 13.4 f.

<sup>20</sup> Ibid., para. 13.3 f.

- Situation of ownership. The situation of ownership over the Painting can be considered the central question of the dispute. The Swiss Confederation held that it had acquired ownership over the Painting by way of adverse possession. For a thing to be acquired by way of adverse possession under German law, § 937 BGB requires that the thing must be held in proprietary possession over a period of ten years in good faith.<sup>21</sup> The court found that these requirements were met in the present case.<sup>22</sup> The Painting had remained in the embassy building after de Diesbach's death and was at some point discovered by embassy staff, who assumed the Painting to belong to the embassy. The court found that this amounted to indirect possession of the Painting by the Swiss Confederation. On 12 August 1965, inventory marks of the Swiss embassy were attached to the Painting. In this moment at the latest, the Swiss Confederation had also manifested its will to possess the Painting as its own. The question of good faith was affirmed. Under § 937 BGB, good faith does not require the possessor to investigate the origin of the thing. Apart from gross negligence, only active awareness over the missing entitlement results in bad faith.<sup>23</sup> Given that doubts over the ownership of the Painting arose only in 1997, i.e. 32 years after the manifestation of will by the Swiss Confederation to possess the Painting, the requirement of a ten-year period of good-faith possession was fulfilled. It was consequently held that the Swiss Confederation had become the owner of the Painting.
- Looted art. Not addressed within the court proceedings, yet still a highly sensitive subject touched by the present affaire, was the question whether the Painting had been looted by the Nazi regime. Liebermann and his family were persecuted by the Nazi regime and his house and belongings were seized after 1933.<sup>24</sup> His art was deemed “*entartete Kunst*”.<sup>25</sup> However, investigations did not unveil any indications that the Painting was looted.<sup>26</sup>

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<sup>21</sup> The so-called *Ersitzung*. See Baldus in *Münchener Kommentar zum BGB*, paras. 20-61. See generally with regard to the question of adverse possession in relation to cultural heritage under German law Schulte-Nölke in *Bürgerliches Gesetzbuch. Hankommentar*, para. 4.

<sup>22</sup> High Court of the Canton of Bern, n. 8, para. 14.1 ff.

<sup>23</sup> Wiegand in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, para. 8.

<sup>24</sup> With regard to the impairments suffered by Liebermann, see e.g. Nicholas, *The Rape of Europa*, 13, 15, 18. See also Meißner, *Max Liebermann*.

<sup>25</sup> Meißner, *ibid.*, 70.

<sup>26</sup> Provenance researcher Ina Weinrautner, who was charged by the Liebermann museum to study the Painting, stated: “The case is not closed, but I got as far as I could. [...] I couldn't find any evidence that it [the Painting] was looted. I also can't rule it out”, in Hickley, n. 4. See further the “Degenerate Art” Research Center operated by the Freie Universität Berlin, where the painting is not listed: <http://emuseum.campus.fu-berlin.de/eMuseumPlus?service=RedirectService&sp=Scollection&sp=SfieldValue&sp=0&sp=2&sp=3&sp=SdetailList&sp=0&sp=Sdetail&sp=0&sp=F>.

## IV. Adopted Solution

### Loan – Donation – Conditional restitution

- The Liebermann Villa acquired the ownership of the Painting through donation following the decision of 14 August 2018 of the High Court of the Canton of Bern.
- The donation contract between the Swiss Confederation and the Liebermann Villa contains a restitution clause, according to which the Painting will be restituted to the descendants of the original owner if it turns out that the Painting was looted.<sup>27</sup>
- The then ambassador of Switzerland in Germany, Paul Seger, concluded the festivities surrounding the donation with the following words: “Der Liebermann, das ist nun so, hängt nicht mehr bei mir im Büro. Das Bild – ich will es nicht verhehlen – wird uns auf der Botschaft fehlen! Doch sagt’ ich mir: «Mein lieber Mann Statt dir nur guckt nun jedermann den wunderschönen Liebermann sich im Museum lieber an! »”.<sup>28</sup>

## V. Comment

- The judgment of the High Court of the Canton of Bern settled a dispute that had been ongoing, and had for the most part been smoldering below the surface, for nearly 20 years.
- Special attention may be drawn to the fact that the High Court of the Canton of Bern provided a detailed analysis of the question of ownership *obiter dicta* given that the relative was missing the capacity to sue and that, contrary to the relative’s submission, a claim for the restitution of property based on § 985 BGB would have been time-barred in any event according to the 30-year statute of limitation of § 197(1) Nr. 1 BGB. The question of ownership evidently lied at the very heart of the dispute. The analysis provided by the court was much welcome.
- The reactions to the settlement of the dispute were predominantly positive. It was generally held that the Painting found its right place at the Liebermann Villa, where it was supposedly created nearly 100 years ago.<sup>29</sup> It is indeed of high value that the Painting of one of the most important German impressionists is now accessible to the public at large.<sup>30</sup> With its restitution clause, the contract takes into account common efforts to consolidate past and inappropriate handlings with such art.<sup>31</sup>

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<sup>27</sup> Hickley, n. 4.

<sup>28</sup> “It has now come that the Liebermann has for the longest time hung in the office of mine. The picture – with that I will not disagree – will be missed by all of us in the embassy! Yet I told myself: “My dear! Instead of you now all and sundry will gather to see in a museum the beautiful Liebermann rather!” (translation by the author).

<sup>29</sup> Preisig, n. 1.

<sup>30</sup> For the importance of Liebermann for German art see Meißner, n. 24, 65.

<sup>31</sup> Cf. the Washington Principles on Nazi-Confiscated Art of 1998.

## VI. Sources

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### b. Court decisions

- High Court of the Canton of Bern, 2nd Civil Chamber, Judgment of 14 August 2018, ZK 18 278.

### c. Legislation

Germany:

- Civil Code (BGB) in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] I page 42, 2909; 2003 I page 738), §§ 197(2), 937, 985.
- Introductory Act to the Civil Code (EGBGB) in the version promulgated on 21 September 1994 (Federal Law Gazette [*Bundesgesetzblatt*] I p. 2494), Art. 25.

Switzerland:

- Civil Procedure Code of 19 December 2008 (CPC; RS 272), Art. 70(1).
- Private International Law Act of 18 December 1987 (PILA; RS 291), Art. 91(1), 100.
- Civil Code of 10 December 1907 (CC; RS 210), Art. 598 f., 602(1), (2).

### d. Media

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