REDEKER SELLNER DAHS & WIDMAIER RECHTSANWÄLTE

Leipziger Platz 3 D - 10117 Berlin

Kammergericht
8. Senat
Elßholzstraße 30-33
10781 Berlin

Fax: 90152200

Gemeinsame Briefannahme
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Reg.-Nr. 86 09 758 SMN/msh/1105 KG (DHM Vs Sachs)

Sekretariat Scheidmann:
Telefon +49 / 30 / 88 56 65 – 16 (Fr. Matthias)
Telefax +49 / 30 / 88 56 65 98

e-mail: scheidmann@redeker.de

Das Berliner Büro ist umgezogen!
Neue Anschrift seit dem 01.03.2009:
Leipziger Platz 3, 10117 Berlin
Our Berlin office has moved!
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Leipziger Platz 3, 10117 Berlin

In the appeals case

Peter Sachs - Plaintiff and Appellee

versus

Stiftung Deutsches Historisches Museum -Defendant and Appellant

- 8 U 56/09 -

we are thankful for the extension of the deadline granted for the brief on appeal and announce that in the hearing we will move on behalf of Defendant and Appellant

by way of repealing the decision of the Landgericht Berlin of 02/10/2009 (19 O 116/08)

1. **to have the case dismissed if it has not already been dismissed and**

2. **regarding the counter-claim**

   a) **to determine that Plaintiff and Appellee is not the owner of the posters of the poster collection of the dentist Dr. Hans Sachs (collection period 1896 to 1938) in the possession of Defendant and Appellant which can be identified by a sticker or stamp as collected by Dr. Hans Sachs. Currently identified: 4,259 posters;**

   b) **to determine – in the alternative – that Plaintiff is not authorized to demand restitution of the posters from the poster collection of the dentist Dr. Hans Sachs (collection period 1896 to 1938) in the possession of Defendant and Appellant which can be identified by a sticker or stamp as collected by Dr. Hans Sachs. Currently identified: 4,259 posters;**

In substantiation of the motions we make the following statements:

I.
The facts of the case

Plaintiff and Defendant are arguing by claim and counter-claim whether the posters from the poster collection of the dentist Dr. Hans Sachs – Plaintiff's father – in the possession of Defendant are to be returned to Plaintiff as the owner. Plaintiff uses two posters as examples to assert his claim:

- the movie poster "The Blonde Venus", 1932, by the company A. Scherf,
- the poster called "Mastiff" by Th. Th. Heine

In its decision of 02/10/2009, the Landgericht Berlin dismissed the claim with regard to "The Blonde Venus" due to missing evidence of a former ownership by Dr. Hans Sachs of this poster – and thus due to missing evidence that the poster was part of Dr. Hans Sachs' collection.

However, the Landgericht Berlin admitted the claim with regard to the poster "Mastiff". In summary the Landgericht argues as follows :

1. The poster undisputedly belonged to the poster collection of Dr. Hans Sachs and was undisputedly his property in 1938. Furthermore it was undisputed that Plaintiff was universal legal successor of his mother, Felicia who again was the sole heir of Dr. Hans Sachs. Undisputedly again, the poster is in the possession of Defendant. Defendant has to prove that Dr. Hans Sachs or one of his legal successors at some point in time lost ownership of this poster. In this respect Defendant did not succeed.

2. The seizure by the Gestapo in 1938 did not lead to a loss of ownership and no legal basis for a seizure has been presented. Even if there had been such legal basis, it would have been an invalid act of official arbitrariness.

3. Dr. Hans Sachs did not effectively lose his ownership by sale to the banker Lenz. The knowledge of the circumstances is insufficient. It is not clear whether the banker Lenz was the "Aryan banker" mentioned by Dr. Hans Sachs in his report. Even if one were to interpret Dr. Hans Sachs' phrase that he "formally transferred" the collection to the Aryan banker in favor of Defendant in such a way that Dr. Hans Sachs was referring to the (oral?) agreement to a transfer, the handing over of property to Mr. Lenz was lacking in order to effectuate an actual transfer of ownership. The latter mentioned that the collection was "given in pledge" to him. This does not mean a transfer but only a reassignment of property in pledge. Regarding the unpropertied assignment as security alleged by Defendant, the knowledge of circumstances is insufficient for the assumption of an ownership agreement [Besitzkonstitut] according to § 930 BGB. In addition, there was no claim to be secured by Mr. Lenz vis-a-vis Dr. Hans Sachs. If the security agreement was missing, the executory agreement was also ineffective. Furthermore, essential parts of a potential executory agreement (purchase price or value of the pledge) had not been agreed upon. Dr. Hans Sachs' statement under oath also argues against an effective transfer of the poster collection. Finally, the agreement might be viewed as a simulated transaction which would be void according to § 117 Abs 1 BGB. Both parties knew that no property was to be transferred in earnest.

4. Dr. Hans Sachs did also not lose ownership of the poster collection as a consequence of the restitution settlement in 1961. Ownership of the poster collection was neither the subject of the proceedings nor of the settlement. In addition, the parties involved in the settlement had been under the impression that the collection was lost.

5. A waiver of ownership by Dr. Hans Sachs could not be established either. In § 959 BGB only abandonment of property is considered a waiver of ownership. The contents of Dr. Hans Sachs' letter to Mr. Rademacher could not be interpreted as a waiver. Furthermore, there was no abandonment of property as required by § 959 BGB. A waiver of ownership in favor of a third party was not possible, either. In the end there was no recognizable intention of waiving ownership to be found in the

comments made by Dr. Hans Sachs, nor was there an offer of transfer to be seen in his statement. Such an offer would not have been accepted anyway.

6. Further, there was no indication that Dr. Hans Sachs' wife would have renounced ownership after his death. There was no declaration of intent from Mrs. Felicia Sachs. The mere fact that she "did nothing" could not be seen as a conclusive waiver of ownership. In particular the fact of non-assertion of a claim did not constitute an abandonment of ownership in rem.

7. Finally, Plaintiff himself did not declare a waiver of ownership just by asserting his restitution claim only now. Therefore the question when exactly Plaintiff learned of the existence of the poster collection could be left open.

8. Further, Plaintiff was not prevented from asserting his claim under civil law because of the precedence of the *Vermögensgesetz* [Law on the Regulation of Unsolved Property Questions - VermG].

   Initially, there were indications that Plaintiff's claim was covered by § 1 Abs. 6 VermG. On the one hand, a limitation to the acceding territory would have to be assumed. On the other hand, contrary to the Plaintiff' opinion, this law would also apply in a case in which the damages were caused in the Western part of Berlin after which the property was taken to the acceding territory.

   However, the Law on the Regulation of Unsolved Property Questions *[Vermögensgesetz*] does not apply here, because Dr. Hans Sachs received compensation according to *the Bundesrückerstattungsgesetz* [Federal Restitution Law] at the time. In addition, the Law on the Regulation of Unsolved Property Questions required an actual loss of ownership, which here was not the case here. In principle, the Law on the Regulation of Unsolved Property Questions takes precedence over claims for restitution under civil law. However, the question whether an expropriation actually occurred, might still be open for examination under civil law – e.g. if a claim for vindication [return] was based on the assumption that the alleged expropriation was only simulated.

   In summary, the Law on the Regulation of Unsolved Property Questions was only to be applied if a compensation loophole was to be closed. However, this law would not block potential claims under civil law in case the claimant had actually remained the owner. Since no such loophole exists in this case and the plaintiff had remained owner, the Law on the Regulation of Unsolved Property Questions was not opposing [the application of the civil law].

9. For the same reasons, the counter-claim was to be dismissed since it solely concerns the question whether the Plaintiff was the owner.

10. The same reasons would apply to the subsidiary counter-claim *[Hilfswiderklage]*, in particular regarding the relation of the claims under the Law on the Regulation of Unsolved Property Questions versus those under civil law.

    Moreover, it could not be ascertained that Dr. Hans Sachs had renounced his claims for delivery under law of obligation or under property law. An effective waiver agreement [“Erlassvertrag”] in particular could not be found.

    Defendant did not plead/invoke a forfeiture of the claim for delivery, whereby forfeiture would probably be out of the question due to the lapse of time.

II.
Legal Analysis

Defendant and Appellant challenges the decision of 02/10/2009 as far as the action was admitted with regard to the poster “Mastiff” and the counter-claim was dismissed. It does not oppose the dismissal of the action regarding the poster “The Blonde Venus” due to lack of gravamen – however it must be pointed out that the following considerations as to the inadmissibility and unfoundedness of the action fully apply to this poster as well.

The appeal is justified to the extent of the motion. The decision made by the Landgericht Berlin proves to be faulty – both by upholding part of the complaint and by dismissing the counter-claim.

The underlying facts justify a different decision (§ 513, Abs. 1, 2. Alternative ZPO [Zivilprozessordnung: Code of Civil Procedure]), namely to completely dismiss the complaint as well as to uphold the counter-claim.

The appealed decision handed down by the Landgericht is based on the violation of formal as well as material law (Rights violations - §513 Abs. 1,1. Alternative i.V.m. § 546 ZPO). In particular, the Landgericht violates the provisions of §13 GVG [Gerichtsverfassungsgesetz: Judicature Act] i.V.m. § 1 Abs. 6 VermG as exclusive assignments of the case regarding the restitution of the poster collection to the Administrative Courts. With regard to material law, §985 BGB [Civil Code] as well as §1 Abs. 6 VermG and the Principles of Forfeiture (§242 BGB) have been violated. Plaintiff and Appellee is not entitled to the ownership claim granted him by the Landgericht to restitution of the poster “Mastiff”, neither is he entitled to such a claim regarding the other posters in the possession of Defendant and Appellant from the poster collection of his father (currently identified: 4,259 posters). Defendant and Appellant already explained this position extensively before the Landgericht with regard to judicial and factual aspects. It also does not need to go back on these in view of the Landgericht

decision of 02/10/2009. It upholds its assertion from the first instance to its fullest extent and makes it the subject of its appeal.

Accordingly, the reasons for the appeal are as follows:
The action is already inadmissible because recourse to the civil courts is not open. The Landgericht misjudges this aspect which will have to be officially examined (cf. under 1.).

Irrespective of this, and contrary to the opinion of the Landgericht, the action is unfounded and the counter-claim is well-founded since Plaintiff is not the owner of the posters and is denied in any case a restitution claim based on the forfeiture of a (supposed) restitution claim as well as on the precedence of the Law on the Regulation of Unsolved Property Questions (cf. under 2.).

1. **Complaint inadmissible**

   In its decision, the Landgericht did not recognize the fact that for the present case recourse to civil courts is not open (available).

   According to §13 GVG, a lawsuit will be assigned to ordinary courts unless an assignment to other courts was made.

   In its decision of 04/03/1992, the Federal Court of Justice principally and generally emphasized the precedence of restitution claims under the Law on the Regulation of Unsolved Property Questions in the determination of the legal process over claims under civil law (V ZR 83/91-BGHZ 118, 34, hier zitiert nach Juris, Leitsatz 2 und Rn. 9 ff.). This precedence also applies to restitution claims for losses of assets resulting from NS persecution within the territory of the former GDR, according to §1 Abs. 6 VermG.

   Based on the provisions of the Law on the Regulation of Unsolved Property Questions, the present cause of action was referred to Administrative Courts. Accordingly, the action here is inadmissible.

   In detail:

a. The provisions of §1 Abs. 5 VermG apply.

   Plaintiff demands the restitution of the posters located in the former Eastern part of Berlin by arguing that they were seized from his father by NS authorities contrary to the rule of law and illegally. He thus demands reparation for a seizure of assets due to NS persecution within the acceding territory by the return of the seized assets in kind (restitution in kind). In the acceding territory, such a claim to restitution in kind of assets seized due to NS persecution is regulated in a constitutive and final manner in §1 Abs. 6 VermG (cf. BVerwG [Federal

Administrative Court], decision of 05/18/1995 – 7 C 19.94 – BVerwG 98 , 261 – Ls. 1 and 263 ff.).

According to §1 Abs. 6 Satz 1 VermG, the Law on the Regulation of Unsolved Property Questions is to be applied to claims pertaining to property rights of citizens and associations who were persecuted for racial, political, religious or ideological reasons during the time from 01/30/1933 until 05/08/1945 and therefore lost their assets due to forced sales, seizure of property or in other ways. The purpose of this regulation is the compensation for injustices pertaining to property rights committed by the NS state during its governance to which the legislature of the Federal Republic of Germany committed itself in light of the concept of a lawful and social state laid down in the Grundgesetz [German constitution]. The legislature thus accounts for the fact that up until the enactment of the Law on the Regulation of Unsolved Property Questions (on 09/29/1990 by the Volkskammer [People's Chamber] of the GDR) there was no restitution legislation in the Soviet occupation zone or later the GDR, nor in the Soviet sector of Berlin, that would have been comparable to the restitution legislation applicable in the Western occupation zones and Berlin sectors or later the Federal Republic of Germany (settled case-law, cf. Federal Administrative Court, decision of 04/06/1995 – 7 C 5/94 – BVerwGE 98, 137, hier zitiert nach Juris, Rn. 22 in; decision of 05/27/1997 – 7 C 67/96 – VIZ 1997, 587, hier zitiert nach Juris, Rn. 12).

In its decision of 01/09/2003 (III ZR 121/02 – BGHZ 153, 258, hier zitiert nach Juris) the Federal Court of Justice adopts the position of the Federal Administrative Court as its own and declares inter alia (l.c., juris Rn. 9f.):

"In order to realize the restitution facts of a case that due to the location of the assets within the territory of the Eastern part of Berlin or the former GDR establish a restitution under the Law on the Regulation of Unsolved Property Questions, it is not relevant whether NS injustice led to a loss of assets under civil law at the time (cf. BVerwGE 98, 261, 263 regarding the invalidity of the decreed disintegration of assets under the Eleventh Ordinance to the Reich Citizen Law as of November 25, 1941, RGBl I, p. 722). For the Regulation of Unsolved Property Questions wants to also and particularly compensate for seizures of assets by the NS state that did not lead to a loss of ownership.

> c) It is a consequence of the applicability of the Law on the Regulation of Unsolved Property Questions to the seizure of assets in question here that as a matter of principle the beneficiary can only regain the lost legal position according to the requirements of the Law on the Regulation of Unsolved Property Questions."

This is true even though seizures by the NS state are to be considered unconstitutional and null and void. The redress of injustices of the NS state according to §1 Abs. 6 VermG – just as the provisions of the Allied restitution

laws – tie in with the respective legal system - and therefore wants to also comprise such assets as have been factually seized from the rights holder, irrespective of any defective title (Urteil BVerwG vom 06.04.1995, a.a.O. Rn. 18, unter Hinweis auf BVerwG, Urteil 30.06.1994 -7 C 24.93 – NJW 1994, 2713; BVerwG, Urteil v. 18.05,1995, a.a.O. S. 263 und 268; BVerwG, Urteil v. 02.12.1999 – 7 C 46/98 – Juris Rn. 10).

Thus proprietary claims [claims under the Vermoegensgesetz] of NS persecutees within the acceding territory have been constitutively substantiated by the provision of §1 Abs. 6 VermG (BVerwG, Decision of 05/18/1995, l.c., Ls 1).

According to this provision, restitution in kind or another form of restitution of losses of assets due to NS persecution within the acceding territory can only be granted within the scope of the framework of the Law on the Regulation of Unsolved Property Questions. This system also applied to restitution claims after the end of the NS period in the old territory of the Federal Republic according to the former restitution laws of the Allied Forces (cf. BVerwG, Decision of 05/18/1995, l.c., p. 268).

b. According to this fundamental principle of restitution law, the assertion of claims under civil law with regard to or in context with the seized assets is generally excluded, unless deficiencies under civil law can be asserted which have no close connection to the facts of the seizure (cf. BGH, Decision of 01/20/2005 – V ZB 37/04 – Juris, Rn. 8; BGH, Decision of 07/07/1995 – BGHZ 130, 231, quoted here after Juris, Rn. 16).

In jurisdiction, this principle has been emphasized particularly for the offense of dishonest practices according to §1 Abs. 3 VermG. Thus the Federal Court of Justice decided on 04/03/1992 (l.c.) with regard to potential reasons for appeal under civil law in a real estate contract of sale which was concluded under pressure from state authorities in order to obtain a travel permit for exiting the GDR, that this is excluded due to the Law on the Regulation of Unsolved Property Questions (BGH, Decision of 04/03/1992, l.c. Ls. and Rn. 10, 19). Due to this precedence of the Law on the Regulation of Unsolved Property Questions, the procedural recourse to ordinary courts in order to determine a potential nullity of the contract of sale is not applicable. (BGH, Decision of 04/03/1992. l.c. Rn. 22; BGH, Decision of 07/07/1995, l.c., Juris Rn. 15; BGH, Enactment of 01/20/2005, l.c. Juris Rn. 8 – represented there as established case-law). [Translator's note: the first sentence in this paragraph is NOT clear, it may be a typo or grammatical error]

This procedural precedence of the Law on the Regulation of Unsolved Property Questions over the assertion of restitution claims under civil law has been assessed as constitutionally unobjectionable by the Federal Court of Justice (cf. BVerfG, Decision of 10/08/1996 – 1 BvR 875/92 – BverfGE 95, 48, quoted here after Juris, Ls. 1; BVerfG, Decision of 07/07/1998 – 1 BvR 1708/92 – Juris, Ls. 1 and Rn. 11).

c. One of the main thoughts behind this precedence of the Law on the Regulation of Unsolved Property Questions over the assertion of restitution claims under civil law is that of the socially responsible balancing provided for in the Law on the Regulation of Unsolved Property Questions (cf. BGH, Decision of 04/03/1992, l.c., Rn. 14; BVerfG, Decision of 10/08/1996, Rn. 30; BGH Decision of 07/07/1995, l.c., Juris Rn. 16). Thus the Law on the Regulation of Unsolved Property Questions provides a reason for exclusion from restitution in particular in the case of the acquisition of property by a third party within the SBZ [Soviet Occupied Zone] i.e. the GDR if this acquisition was fair (§4 Abs.2 and 3 VermG). The same is true according to §4 Abs. 1 Satz 3 VermG with regard to seized businesses, if these were sold under the laws of the GDR after Reunification, but before the Law on the Regulation of Unsolved Property Questions came into effect. Furthermore, § 5 Abs. 1 contains reasons for exclusion from restitution for cases in which it would be in the public's best interest if the assets remained with the authorized holder [legal owner].

d. This standardized and established jurisdiction of §1 Abs. 3 VermG (Dishonest practices of GDR authorities) with regard to restitution cases also applies fully in cases of redress of NS injustice (cf. BGH, decision of 01/20/2005, l.c., Juris Rn. 8).

A case of unconstitutional actions resulting in seizure of assets is subject to the legal sanctions contained in §1 Abs. 6 VermG and §1 Abs. 3 VermG. Already on the basis of this identical purpose, the quoted considerations of the Federal Court of Justice and the Federal Constitutional Court regarding §1 Abs. 3 apply fully also to cases of redress of NS injustice. Furthermore, in cases of restitution to NS victims a socially acceptable solution is required and necessary. Here as well a fair acquisition by private persons, foundations or religious communities might be considered, which would have to be protected according to §4 Abs. 2 and 3 VermG. The same is true for potential reasons for exclusion according to §5 Abs. 1 VermG, which protect use in the public interest.

This is not in conflict with by the possibility that the Defendant might not be considered a party worthy of protection with regard to a fair acquisition according to § 4 Abs.2 VermG or that there might not be a reason for exclusion according to §5 Abs. 1 VermG. This individual aspect does not matter. With regard to the decision on which legal process to use, what matters is the principle of the restitution provisions according to the Law on the Regulation of Unsolved Property Questions, not their application in an individual case. The question whether an exclusionary reason because of the protection of fairness or of the public interest will be applied in the individual case will have to be clarified in administrative proceedings or in proceedings before an administrative court according to the Law on the Regulation of Unsolved Property Questions and

cannot be a requirement for the applicability of the general systematic principles of restitution laws.

In addition, the Law on the Regulation of Unsolved Property Questions contains time limits for the filing of restitution claims: until 12/31/1992 for real property and until 06/30/1993 for personal property (§ 30a Abs. 1 Satz 1 VermG). These are absolute deadlines (BVerwG, Decision of 03/28/1996 – 7 C 28/95 – BVerwGE 101, 39 quoted here according to Juris, Ls. 1 and Rn 11 ff.). These deadlines also serve the socially acceptable settlement intended by the Law on the Regulation of Unsolved Property Questions, by bringing about a clear understanding with regard to the assertion of restitution claims and the burden restitution places on assets. They also have the effect that within a proper amount of time legal peace will set in and that unsolved property questions will not create uncertainties for all parties involved over a long period of time. This aspect of the legal system would also be undermined if restitution claims could be enforced in civil proceedings as well.

e. Furthermore, according to §1 Abs. 6 VermG, there is a special aspect to restitution claims for loss of property due to NS-persecution favoring their assignment to administrative courts. According to the Law on the Regulation of Unsolved Property Questions this allows the existence of the collective restitution claim of the Conference on Jewish Material Claims Against Germany (JCC). According to §2 Abs. 1 Satz 3 VermG the JCC is considered the legal successor of Jewish beneficiaries within the meaning of §1 Abs. 6 VermG, if those or their direct legal successors did not assert claims according to the Law on the Regulation of Unsolved Property Questions. This collective restitution claim applies particularly in cases in which Jewish persecutees were not survived by heirs because of the Holocaust. However, it also applies if the persecuted persons themselves or their legal successors did not file restitution claims or did not file them within the given period of time. The JCC, however, has filed comprehensive global applications which are accepted to a large extent as applications filed on time.

f. In the end, if the contested decision of the Landgericht were to be upheld, the entire system of the restitution provisions under the Law on the Regulation of Unsolved Property Questions described here would not only be called into question. Rather, the system would be shaken to the core and completely overthrown [or revolutionized ?] after 20 years of practice.

Persons or their legal successors could assert restitution claims who had not filed any applications or who had not filed them in a timely manner. A restitution claim under civil law would be applicable, even if during the more than six decades since the damage a third party had become the legal owner in good faith of the property under GDR jurisdiction. Other exclusionary reasons, as well, such as concern the public interest (§ 5 Abs. 1 VermG), could not be sustained in such cases. In cases of seizure of assets due to NS persecution, the collective

restitution claim of the JCC would largely be put into question or rather undermined [cancelled] to a large extent. If at the time of assertion of a claim under civil law restitution had not yet been made to the JCC, its claim would be going nowhere. However, as far as such a claim would already have been fulfilled by a decision to restitute under the Law on the Regulation of Unsolved Property Questions, the effective acquisition of the property by the JCC could be challenged and the JCC itself become subject to a restitution claim under civil law. Under certain circumstances, there might even occur a double claim, namely if the JCC had chosen compensation (§ 8 VermG in conjunction with §1 As. 1 Satz 1 NS-VEntschG [Verfolgten-Entschädigungsgesetz - Act on compensation of persons persecuted under NS regime]) or if it were entitled to a compensation claim in case the global application was not sufficient according to §1 Abs. 1a Satz 1 NS-VEntschG. In such cases the compensation claim under civil law would become equal to the compensation claim under the Law on the Regulation of Unsolved Property Questions.

g. In its decision of 02/10/2009 the Landgericht obviously did not consider or take into account any of this. It therefore not only made the wrong decision, but it also went into opposition to almost all of the circles and organizations involved within the Federal Republic as well as outside of it. All of them assumed that other than restitution claims under the Law on the Regulation of Unsolved Property Questions, an assertion of compensation claims under civil law for assets in the acceding territory is excluded – just as it was already excluded under the restitution laws of the Allied Forces in the old Federal Republic. This is shown in particular in the so-called “Washington Declaration” of 12/03/1998 (“Principles of the Washington Conference with regard to works of art which were seized by the National Socialists”), for which the German Federal Government, the federal states and the top communal associations made the so-called “joint declaration of December 1999” (“Declaration of the Federal Government, the Federal States and the Top Local Associations Regarding the Identification and Return of Cultural Assets Seized as a Result of NS-Persecution, Especially From Jewish Ownership”). With these declarations a voluntary system of identification of confiscated and unrestituted art, as well as of determining to find a just and fair solution within the circumstances of a specific case was established in the Federal Republic as well as in other countries. This system is fundamentally based on the assumption that outside of the Allied restitution laws and the Law on the Regulation of Unsolved Property Questions no restitution claims can be asserted under civil law and that claims according to the provisions of the Law on the Regulation of Unsolved Property Questions can no longer be filed in light of the expired deadlines. This system and the general opinion on which it is based would be put into question to a large extent – if not even obsolete - within the Federal Republic, should the decision of the Landgericht Berlin be upheld and generally accepted.

h. The above-mentioned considerations are not modified either by the argument cited by the Landgericht that Plaintiff’s father received a compensation under the

Bundesrückerstattungsgesetz [Federal Restitution Law] in 1966 and that therefore the question might arise whether §1 Abs. 6 VermG applies or not.

However, with regard to the decision of the Federal Administrative Court of 05/27/1997 (7 C 67/96 – VIZ 1997, 587, quoted here acc. to Juris, Rn. 12 ff.) Defendant is of the opinion that in spite of the compensation received under the Federal Restitution Law basically a claim for restitution in kind could have been asserted. In the view of Defendant, an (earlier) compensation received under the Federal Restitution Law does not fundamentally exclude a restitution in kind under the Law on the Regulation of Unsolved Property Questions – once it is established that it has jurisdiction (cf. §7a Abs. 2, p.4 VermG).

In March1997 the legal committee of the German Parliament in its proposed resolution regarding the so-called "Wohnraummodernisierungssicherungsgesetz – WoModSiG" [Act to secure modernization measures in living space] with regard to a JCC request for clarification in §2 Abs. 1 VermG (BT-Drucksache 13/7275, p. 43, left col. bottom f.) explained as follows:

> "There is just as little doubt …. that the VermG grants restitution claims to persons who so far have not permanently and without limitations regained the seized legal position. … Therefore the exclusive requirement for the claim is the loss of assets described in §1 VermG, which so far must not have been reversed. Prior compensations, as far as they did not effect a complete reinstatement of the legal position taken from the injured party, are not relevant with regard to the restitution claim. … Besides this … the Law on the Regulation of Unsolved Property Questions does not recognize any exclusionary positions of other forms of restitution."

The Federal Administrative Court decision of 05/27/1997 (7 C 67/96 – VIZ 1997, 587, quoted here acc. to Juris, Rn. 12 ff.), according to which compensation paid under the Thüringer Wiedergutmachungsgesetz [Thuringian restitution law] does not oppose a claim for restitution in kind, is very much in line with the argumentation of the legal committee.

Plaintiff demands restitution in kind under civil law for the posters. However, the German Federal legislator established a claim for restitution in kind for losses of property due to NS persecution within the territory of the former GDR exclusively in §1 Abs. 6 VermG within the system of the Law on the Regulation of Unsolved Property Questions and the socially acceptable settlement provided therein. Irrespective of the question whether in the end this position would be applicable in an individual case, the assertion of a restitution claim under civil law is thus excluded already in principle and in general.

i. The same is true with regard to the question also considered by the Landgericht, whether the fact that the seizure of the poster collection occurred in the Western

part of Berlin, i.e. outside of the acceding territory, but that the posters up to this day are located in the Eastern part of Berlin.

It has not been decided by the Federal Administrative Court whether in such a case a claim for restitution in kind under §1 Abs. 6 VermG would be valid. Appeal proceedings on this issue are pending before the Federal Administrative Court (BVerwG 8 C 12.09). However, here as well the critical point is that a claim for restitution in kind – if it was to be considered – could only be granted under the regulations of §1 Abs. 6 VermG and that an additional assertion of the claim under civil law is excluded.

j. The only exception as to the precedence of the Law on the Regulation of Unsolved Property Questions over restitution claims under civil law which according to established jurisdiction is accepted by the Federal Court of Justice, the Federal Administrative Court and the Federal Constitutional Court– the assertion of invalidity under civil law due to defects in legal transactions which are not closely connected to the government's injustice (s.a. – BGH, Decision of 01/20/2005, l.c., Juris Rn. 8; BGH, Decision of 07/07/1995, l.c., Juris Rn. 16) – does evidently not apply here. Plaintiff relies on, and the Landgericht in its contested decision exclusively refers to reasons for the invalidity of the transfer of ownership of Dr. Hans Sachs, which are in direct context with, or which are rather an immanent part of, the NS persecution.

k. It is also without relevance for the precedence of the Law on the Regulation of Unsolved Property Questions that Plaintiff and the Landgericht view the confiscation by the Gestapo as the damaging event and do not consider the transfer of the poster collection from Dr. Hans Sachs to the banker Lenz (or to another "Aryan banker") a legal business transaction. For, irrespective of the question of whether Dr. Hans Sachs had already given up ownership of the posters because of it having been sold, he had undisputedly lost his legal position versus the poster collection, in fact and permanently. Such a factual seizure is sufficient for the application of the Law on the Regulation of Unsolved Property Questions according to its own system as well as that of the former Allied restitution regulations. It is therefore also sufficient for the precedence of the material restitution rights over restitution claims under civil law (cf. Federal Administrative Court, Decision of 04/06/1995, l.c. Rn. 18; BVerwG, Decision of 05/18/1995, l.c., p. 263 and 268; BVerwG, Decision of 12/02/1999, l.c., Juris Rn. 10).

   In light of this, the opinion of the Landgericht that the Law on the Regulation of Unsolved Property Questions was not applicable and therefore without precedence, because Plaintiff's father had remained owner and thus no "compensation loophole" needed to be closed, cannot be sustained.

l. After all this, it remains to be stated as interim result as to 1.: Due to the precedence of the restitution regulations of the Law on the Regulation of

Unsolved Property Questions, in particular §1 Abs. 6 VermG, recourse to a civil court is inadmissible for the claim for restitution in kind made by Plaintiff before the Landgericht. For this reason already the claim has to be dismissed.

2. Claim unfounded and Counter-claim founded

The action based on a restitution claim as owner according to § 985 BGB is in any case unfounded as well. The decision of the Landgericht is defective in this respect.

Plaintiff is not the owner of his father's poster collection. His father had already lost ownership of the collection due to a legal transaction of transfer of ownership (cf. under a.). Even if one did not want to accept this , Dr. Hans Sachs would have lost the property by renunciation (cf. under b.). For the same reasons, the counter-claim in its main motion is well founded.

Furthermore Plaintiff is impeded in asserting the (alleged) restitution claim, because this claim is forfeited by the behavior of his parents (cf. under c.) and also because of the precedence under substantive law of the provisions of the Law on the Regulation of Unsolved Property Question (cf. under d.). For these two reasons the counter-claim is well founded in its subsidiary motion.

a. Loss of ownership because of assignment.
The transfer of the poster collection by legal transaction follows from the facts stated by the Landgericht. Only its assessment by the Court is defective.

aa. Plaintiff's father undisputedly declared in a 1953 report with the title "The largest poster collection of the world", which the plaintiff himself presented as Exhibit K2, that he already formally conveyed the collection to an Aryan banker in Berlin whom he knew well from business. The Court itself records the respective excerpt from the report in its facts of the decision. At the same time, the Court states that undisputedly on 11/28/1946 Dr. Richard Lenz declared before the Denazification Court [Spruchkammer] Kassel-Stadt II that Dr. Hans Sachs had given a valuable poster collection to him "in pledge". So there are two identical statements declaring the transfer of the poster collection in 1938 before its confiscation by the agents of the NS Propaganda Ministry.

In its defense brief submitted to the Landgericht Berlin, Defendant has elaborately demonstrated that due to these stated facts it has to be assumed that Dr. Hans Sachs' loss of ownership was due to a concluded transfer in a legal business transaction. This must be adhered to.

bb. In contrast, the assessment of the stated facts by the Landgericht in the contested decision is defective.

On the one hand the Landgericht assumes that the “Aryan banker” mentioned in the report by Dr. Hans Sachs refers to the banker Dr. Richard Lenz and implies in favor of Defendant that an agreement on the transfer of property had already been concluded. On the other hand, it gathers from the wording used by Dr. Richard Lenz in his court statement that the property was given “in pledge”, that no actual transfer was intended in the first place, but only a transfer in pledge which in the end did not occur. This conclusion in itself is already inconclusive. In light of the clear and consistent content of the statements of Dr. Hans Sachs and Dr. Richard Lenz it is to be assumed that quite certainly a transfer of property took place – namely by a transfer of ownership agreement [Besitzkonstitut] according to § 930 BGB. The wording used by Dr. Richard Lenz that the property was given “in pledge” only means that ownership was to be transferred, however the property was intended to remain with Dr. Hans Sachs.

In as much as the Court picks up on Defendant’s wording of “unpropertied security agreement” [besitzlose Sicherungsübereignung] and contends that what is missing is a claim to be secured and also a security agreement, this is not convincing. By no means has Defendant maintained that this was a security transfer in order to secure claims. From the description of Dr. Hans Sachs it is evident that the transfer was intended for his personal safety as well as to secure the preservation of the poster collection, not to secure an open claim against him by Dr. Richard Lenz.

Furthermore one has to assume that the parties involved had already concluded a security agreement that contained all the essentials. If the Landgericht gathers from Dr. Hans Sachs’ statement that the banker known to him had wanted to involve experts in order to assess the value, that an agreement on a purchase price or the value of the pledge had not yet been reached, this is not comprehensible/traceable. Dr. Hans Sachs mentioned this within the framework of the description of the chronological occurrence of events. He described the course of the transfer of the poster collection over several weeks. Initially, the banker had offered to take over the poster collection. In this context, he wanted to send experts to assess the value. Subsequently – after the collection had already been formally transferred – agents of the Propaganda Ministry announced their visit. This description of the course of events shows that a certain period of time went by between the assessment of the value and the formal transfer, during which an agreement on the value had been reached. Furthermore, Dr. Richard Lenz in his court statement declared that

"the actual value according to expert opinion amounted to far more than Reichsmark 30,000.00".

So according to this statement (defense) as well, an assessment by experts had to have happened. In addition, Dr. Richard Lenz stated that the confiscation by the Propaganda Ministry caused him – as well as Dr. Hans Sachs – a major loss. This can only be understood in such a way that Dr. Richard Lenz had already compensated Dr. Hans Sachs for the value of the collection.

cc. The assessment by the Landgericht that any contractual agreement would have represented a simulated transaction which according to §117 Abs. 1 BGB would be void, is not very convincing, either. The assumption of a simulated transaction cannot be upheld. Rather, the facts of the case stated by the court exclusively lead to the conclusion that Dr. Hans Sachs as well as Dr. Richard Lenz did not wish a transfer for appearances' sake, but wanted to secure and preserve the poster collection in its entirety by a final transfer of property. Even if one wanted to assume that Dr. Hans Sachs and Dr. Richard Lenz potentially only wanted a temporary transfer, they would still have intended not just a simulated transaction, but an effective and complete transfer.

dd. Even taking into consideration that Dr. Hans Sachs undertook the transfer of the poster collection to Dr. Richard Lenz because of his imminent emigration – and thus ultimately because of his situation as a persecuted person – does not change the above mentioned considerations. However, this aspect which in no way was denied or qualified by Defendant, is not relevant here.

For the above-mentioned precedence of § 1 Abs. 6 VermG prevents Plaintiff from deducing and asserting deficiencies of the transfer. During the restitution proceedings, Plaintiff's mother could have asserted that the sale had been due to persecution. In particular, she could have invoked the rule of presumption in paragraph II of Ordinance BK/0 (40) 180 of the Allied Headquarters of 07/26/1945, cited in § 1 Abs. 6 Satz 2 VermG. However, since Plaintiff's mother as the heir of Dr. Hans Sachs did not choose this path, the transfer has to be considered effective as a result. Otherwise the precedence of restitution according to the Law on the Regulation of Unsolved Property Questions which was described in detail here, would be undermined.

In light of this, also the statement of the Landgericht that Defendant did not succeed in showing and giving evidence of the fact that Dr. Hans Sachs or one of his legal successors at some point in time lost ownership of the poster collection (p. 12 of the Decision), is defective. The rule of presumption of § 1 Abs. 6 VermG does not apply. Therefore Plaintiff is

obligated to give evidence that he is (still) the owner, i.e. that he or one of his legal successors have not lost ownership. If the Landgericht with this statement is trying to (implicitly) tie into the rule of presumption of § 1006 Abs. 2 BGB, this does not hold either. The presumption of ownership resulting from the former ownership by Dr. Hans Sachs has in any case been upset by the quoted undisputed statements by Dr. Hans Sachs and Dr. Richard Lenz and can therefore no longer be upheld. The burden of demonstration and of proof remains with Plaintiff.

b. Waiver of ownership

If we were to assume that no effective legal transfer of ownership of the poster collection had taken place, Plaintiff's father, contrary to the opinion expressed by the Landgericht, would certainly have waived ownership of the remaining posters, as stated by him in his correspondence of the year 1966, in favor of the GDR as supporting agency of the Museum for German History in the GDR. The contents of the letter of 05/23/1966 from Dr. Hans Sachs to Mr. Rademacher, which is quoted literally in the facts of the decision, is unambiguous in its wording. Dr. Hans Sachs declared that he did not have a material interest, but only an idealistic interest in the poster collection. He wrote that he received compensation which covered all his claims.

Contrary to the position of the Landgericht, this displays a waiver of any claims for delivery of property and thus an abandonment of property in the sense of § 959 BGB. Defendant made extensive statements to this effect in first instance. There is nothing else to be added.

c. Forfeiture of the restitution claim

Even if one were not to assume a waiver of ownership or of the restitution claim, the conduct by Plaintiff's legal predecessors - his parents, Dr. Hans Sachs and Mrs. Felicitas Sachs - would have forfeited a restitution claim to parts of the poster collection held by Defendant. Plaintiff must allow this to be imputed to him.

In its decision, the Landgericht treats the forfeiture of the restitution claim in a completely inadequate manner. It only notes that Defendant did not plead forfeiture and that forfeiture due only to the expiration of time was not to be considered. This disregards that the question of forfeiture would have had to be examined by the court *ex officio* as a legal question. In addition, there are undisputed facts leading to the necessary circumstance of forfeiture.

aa. A right is forfeit when the beneficiary has not asserted it over an extensive period of time and the obligated party adapted to this and could well adapt to the expectation that the beneficiary will no longer

assert this right in the future (cf. Heinrichs in Palandt, 68. ed., § 242, Rn. 87 under referral to the consistent jurisdiction of the BGH).

bb. In the present case, Plaintiff's father knew since 1966 that the existing parts of the poster collection were located at Museum for German History in the GDR. However, he never requested restitution of the collection, but rather explicitly declared in the well-known letter dated 05/23/1966 that his only interest in the posters was an intellectual one. In addition, Defendant in its brief of 09/05/2008 elaborated extensively on the conduct of Dr. Hans Sachs vis-à-vis Mr. Rademacher and his points of view. Plaintiff did not refute this. In particular, it has to be stated that Dr. Hans Sachs did not only express in his letter of May 1966 that he had no material interests in the poster collection, but did so repeatedly towards Mr. Rademacher. He explicitly confirmed this in a letter to Bernhard Koslowski of 11/09/1966 and declared that he had repeatedly assured Mr. Rademacher that he did not intend to assert any legal claim to his former property and gave as the main reason the settlement under the Federal Restitution Law. Dr. Hans Sachs never changed his position until his death in 1974.

The Museum for German History in the GDR could rely on these clear statements made by Dr. Hans Sachs and arrange itself accordingly. It did rely on and adapted to this by integrating the posters into its own much more extensive collection and by preserving them and making them accessible. After the transfer of the inventory from the Museum for German History in the GDR, Defendant as well adapted in a similar manner and trusted that the posters would continue to remain part of the inventory. This is especially expressed in the fact mentioned in the brief of 09/05/2008, that already during the summer of 1992 the parts of the poster collection held by Defendant formed the core of the exhibition "Kunst! Kommerz! Visionen! Deutsche Plakate 1888 bis 1933" ["Art! Commerce! Visions! German Posters 1888 to 1933"]. In the exhibition catalog Plaintiff's father was recognized in a special way.

cc. This circumstance of the exhibition is of special relevance in particular with regard to the conduct of Mrs. Felicitas Sachs, the heir of Dr. Hans Sachs. From Dr. Hans Sachs' death in 1974 until her own passing in 1998, i.e. particularly during the time of the exhibition in 1992, Mrs. Felicitas Sachs could have asserted potential rights against Defendant. According to known research results, Felicitas Sachs knew of the whereabouts of the poster collection and did not claim restitution from the Museum for German History in the GDR, either after she became heir, which was completely in line with Dr. Hans Sachs' statements,.

In particular, she did not file a restitution claim after reunification under the Law on the Regulation of Unsolved Property Questions (§ 1 Abs. 6

VermG), although this would have been open to her. The fact that she did not file within the statutory time period by 06/30/1993 could only be understood by Defendant to mean that despite of the new legal situation she irrevocably did not assert any claims to the remaining parts of the poster collection and would not do so in the future, either. Defendant adapted to this circumstance by further caring for and preserving the poster inventory.

dd. Plaintiff has to allow this conduct of his parents to be imputed to him.

However, his own conduct as well has contributed to the forfeiture of the restitution claim. Plaintiff himself as well did not assert any claims either against Defendant after he became heir in 1998 up until 2006, although he knew of the whereabouts of the poster collection. In its brief of 09/05/2008 Defendant presented a sufficient amount of facts on Plaintiff's knowledge hereof without being contradicted.

In addition, in 2006 Plaintiff himself together with Defendant appealed to the "Beratende Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter, insbesondere aus jüdischem Besitz" [Advisory Commission in Connection with the Return of Cultural Assets Seized due to NS Persecution, particularly from Jewish Ownership], which had been established by the German government according to the recommendations of the Washington Declaration. Only quite some time after this Advisory Commission recommended on 01/25/2007 that the poster collection remain with Defendant did Plaintiff file the present complaint in March of 2008. In the meantime, upon the decision of the Commission, Defendant again arranged itself trusting that the collection would remain in its holdings by planning a special exhibition of the poster collection of Dr. Hans Sachs for 2009 as recommended by the Commission.

d. Precedence of the Law on the Regulation of Unsolved Property Questions

Even if one was to not follow the present argumentation regarding the inadmissibility or unfoundedness of the complaint, it would still be substantively unfounded due to the precedence of § 1 Abs. 6 VermG and the counter-claim in its subsidiary motion would be well founded.

As already elaborately presented under 1., according to the consistent legal practice of the highest courts, i.e. of the Federal Court of Justice, the Federal Administrative Court and the Federal Constitutional Court, precedence of the Law on the Regulation of Unsolved Property

Questions for claims for restitution in kind of NS persecutees in the acceding territory over restitution claims in civil courts is to be assumed.

Even if on the basis of this precedence one could not assume that Administrative Courts have mandatory jurisdiction, in any case the assertion of restitution claims under civil law would be substantively excluded. Otherwise this precedence and with it the entire structure of the restitution rights within the new Federal States would be shaken. This has been elaborately demonstrated above and does not need to be explained again at this point.

3. Motions

In tenor, the announced appeals motions regarding the counter-claim are identical to the motions filed with the Landgericht. On the merit, Defendant does not disavow those motions of the first instance. The appeal motions have only been modified for reasons of clarity of the wording. If the Court has any concerns regarding this modification we wish to be informed.

4. Conclusion

It is to be noted that on the one hand the complaint is inadmissible, or, at any rate, without merit, and on the other hand the counter-claim is admissible. The Landgericht misjudged this in its decision of 02/10/2009. In accordance with the motion, the appeal will have to be granted in its entirety.

Scheidmann
Rechtsanwalt

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