

Summary

*Access to assets of potentates – between enforcement immunity and victim protection
Practical Implications*

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Private creditors trying to recover assets unlawfully acquired by potentates have to struggle with several legal and practical difficulties. First, they have to find the assets and relate them to the specific debtor. This tracing can be very difficult because property relationships are usually disguised by way of intermediate corporations. The necessary research is often done by professional investigators. To avoid hide-and-seek and split second transborder transfers the located assets have to be secured by a freezing order or an in rem arrest order, as in Germany §§ 917(1), 930 Code of Civil Procedure.

There are no immunity problems when the foreign state itself is the plaintiff and waives a possibly persisting immunity of the former ruler for *acta iure imperii*. Lawsuits filed by private citizens, however, may founder for that reason. Lawsuits will be dismissed because of personal immunity if the defendant is an acting head of state, diplomat or a person with an equivalent status. In such cases the immunity rules already prevent the service of process.

Concerning territorial jurisdiction the plaintiff can choose between the defendant's domicile (Art. 2 Brussels-I Regulation, Lugano Convention) and, if applicable, other special legal venues. If the defendant is domiciled outside of the EU or the Lugano Convention jurisdiction can also be based on the location of the debtor's assets in the forum state (in Germany § 23 Code of Civil Procedure and similar rules in many countries). For the plaintiff it may be quite attractive to file the lawsuit in the USA if he is able to surmount the immunity barrier of the Foreign Sovereign Immunities Act (FSIA) of 1976.

The applicable law is determined by the conflict rules of contracts, torts, or unjust enrichment. The ownership of the assets acquired by potentates is governed by the law of the state of situs (*lex rei sitae*). If the applicable law is that of the potentate's domicile a possible violation of the *ordre public* of the forum state must be thoroughly examined, especially if the law of the domicile includes an unreasonable privilege for the (former) ruler or if, in the reverse case, the potentate as former head of state is now retroactively subject to stricter norms by the new government. If the individual creditors or the former potentates face a denial of justice in their home state, they both need special protection. In procedural terms individual plaintiffs may be helped by granting jurisdiction by necessity. In any case, the forum state must ensure a fair trial so that the potentate can defend his assets in court if they have been acquired lawfully.

The risk of courts getting involved in disputes between the followers of the old and the new regime is obvious but cannot be avoided. A state governed by the rule of law has to accept this challenge and should not take refuge with the "Act of State doctrine" or other tricks. The continuing push back of immunity helps the courts to fulfill their task of adjudicating civil cases independent from any influence from foreign states. This evolution of international law is a very encouraging development for practitioners of civil procedure, however difficult the resolution of the individual cases may be.