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## International Art and Cultural Heritage

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# International Art and Cultural Heritage

PATTY GERSTENBLITH\*

## I. Introduction

In 2010, most of the significant legal developments in the cultural heritage field concerned questions of recovery of art works and other cultural materials that had been expropriated sometime in the past, particularly during the Holocaust. Over the last year, international treaties concerning cultural property continued to gain acceptance, while lawsuits involving the Foreign Sovereign Immunities Act were resolved, and negotiations concerning bilateral agreements between the United States and other nations to restrict import of undocumented archaeological materials continued.

## II. International Conventions and Agreements

### A. NEW STATES PARTIES

There were no new States Parties to either the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict<sup>1</sup> or its First Protocol.<sup>2</sup> Three new nations, Georgia, Belgium, and Colombia, joined the Convention's Second Protocol.<sup>3</sup> The Guidelines for the implementation of the Second Protocol were adopted in November 2009,<sup>4</sup> and the Committee for the Protection of Cultural Property in the Event of Armed Conflict was established. This action enables the system of enhanced

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1. See Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, May 14, 1954, S. Treaty Doc. No. 106-1, 249 U.N.T.S. 240.

2. See Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358, *available at* <http://treaties.un.org/doc/Publication/UNTS/Volume%202253/v2253.pdf>.

3. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999, Mar. 26, 1999, 2253 U.N.T.S. 212, *available at* <http://portal.unesco.org/la/convention.asp?KO=15207&language=E>.

4. See UNESCO, Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Nov. 24, 2009, *available at* <http://unesdoc.unesco.org/images/0018/001867/186742E.pdf>.

protection for particularly significant cultural property, established in Articles ten through fourteen of the Second Protocol, to come into effect.<sup>5</sup>

Haiti and Equatorial Guinea joined the 1970 United Nations Educational, Scientific and Cultural Organization ("UNESCO") Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the "1970 UNESCO Convention"), which brought the total number of States Parties to one hundred twenty-three.<sup>6</sup> Six nations—Italy, Gabon, Argentina, Honduras, Trinidad and Tobago, and the Democratic Republic of the Congo—ratified the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, bringing the number of States Parties to this Convention to thirty-five.<sup>7</sup>

## B. IMPLEMENTATION OF THE 1970 UNESCO CONVENTION

In 2010, pursuant to the implementing legislation for the 1970 UNESCO Convention, Switzerland concluded new bilateral agreements with Colombia and Egypt. Switzerland now has agreements with five nations restricting the import of illegally exported cultural property.<sup>8</sup> In accord with its agreement with Peru, Switzerland returned to Peru forty-eight Pre-Columbian artifacts, consisting of ceramics and textiles of the Chancay and Chimú cultures that dated to the tenth to fourteenth centuries A.D.<sup>9</sup>

The United States extended its bilateral agreements ("Memoranda of Understanding") with El Salvador<sup>10</sup> and with Nicaragua,<sup>11</sup> each for an additional five-year period. Such agreements, which restrict the importation of archaeological and ethnographic materials into the United States, last for a maximum of five years but may be renewed an unlimited number of times. In addition to extending the agreements, Article II of both agreements was amended. The U.S. Cultural Property Advisory Committee also considered extending the bilateral agreements with Italy and Colombia, but no decision was an-

5. See *Committee for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=37217&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=37217&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited Jan. 8, 2011).

6. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231. The list of State Parties may be obtained on UNESCO's website. *Conventions*, UNESCO, <http://portal.unesco.org/la/convention.asp?KO=13039&language=E> (last visited Jan. 8, 2011).

7. Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40 (2002). The list of States Parties may be obtained on UNESCO's website. *Conventions*, UNESCO, <http://portal.unesco.org/la/convention.asp?KO=13520&language=E> (last visited Jan. 8, 2011).

8. Switzerland had previously concluded agreements with Italy, Greece, and Peru. See *Bilateral Agreements*, BUNDESAMT FÜR KULTUR [Federal Office of Culture], <http://www.bak.admin.ch/themen/kulturguettertransfer/01985/index.html?lang=en> (last visited Jan. 8, 2011). Unlike U.S. agreements, the Swiss agreements can last in perpetuity with no need for renewal. See *id.*

9. *La Suisse rend au Pérou 48 objets précolombiens* [Switzerland Returns 48 Pre-Colombian Objects to Peru], OFFICE FÉDÉRALE DE LA CULTURE [Federal Office of Culture], June 29, 2010, <http://www.20min.ch/ro/news/suisse/story/La-Suisse-rend-au-Perou-48-objets-precolombiens-13432083>.

10. See *El Salvador*, U.S. DEP'T OF STATE, <http://exchanges.state.gov/heritage/culprop/esfact.html> (last visited Jan. 8, 2011).

11. See *Nicaragua*, U.S. DEP'T OF STATE, <http://exchanges.state.gov/heritage/culprop/nifact.html> (last visited Jan. 8, 2011).

nounced.<sup>12</sup> Finally, the Hellenic Republic (Greece) presented a new request to the United States for a bilateral agreement under Article 9 of the 1970 UNESCO Convention.<sup>13</sup>

### III. Foreign Sovereign Immunities Act Litigation

#### A. CASSIRER

Claude Cassirer sued the Kingdom of Spain ("Spain") and the Thyssen-Bornemisza Collection Foundation ("Foundation") to recover a painting, *Rue Saint-Honoré, après midi, effet de pluie*, by Camille Pissarro, owned by his grandmother, Lilly Cassirer.<sup>14</sup> In 1939, when she sought to leave Germany because of Nazi persecution, she was forced to sell the painting, for which she never received payment. The painting was ultimately confiscated by the Gestapo, sold through several hands (including a New York gallery), and finally purchased by Baron Thyssen-Bornemisza after 1976. The painting is now in the collection of the Thyssen-Bornemisza Museum, an instrumentality of Spain, in Madrid. In 2000, Cassirer learned the location of the painting and requested its return. In 2005, without having pursued any judicial proceedings in Spain, Cassirer filed suit in federal district court in California against the Foundation and Spain. In 2006, the district court denied motions to dismiss brought by Spain and the Foundation.<sup>15</sup>

On appeal, the Ninth Circuit considered only the question of whether the Foreign Sovereign Immunities Act ("FSIA")<sup>16</sup> permitted a suit against a foreign state under the FSIA's expropriation exception,<sup>17</sup> even when the foreign state being sued did not expropriate the property. In its 2009 decision, the Ninth Circuit affirmed the district court's holdings that the foreign state against whom the claim is made need not be the foreign state that expropriated the property,<sup>18</sup> that the Foundation had engaged in commercial

12. See Notice of Proposal To Extend the Agreement Between the Government of the United States of America and the Government of the Republic of Colombia Concerning the Imposition of Import Restrictions on Archaeological Material From the Pre-Columbian Cultures and Certain Ecclesiastical Material from the Colonial Period of Colombia, 75 Fed. Reg. 52,582 (Aug. 26, 2010), available at <http://exchanges.state.gov/media/office-of-policy-and-evaluation/chc/pdfs/2010frncoextprop.pdf>. See also LAWYER'S COMM. FOR CULTURAL HERITAGE PRESERVATION, <http://www.culturalheritagelaw.org/Default.aspx?pageId=595025> (last visited Jan. 8, 2011).

13. Notice of Receipt of Cultural Property Request From the Government of the Hellenic Republic, 75 Fed. Reg. 52,582 (Aug. 26, 2010), available at <http://exchanges.state.gov/media/office-of-policy-and-evaluation/chc/pdfs/2010frncoextprop.pdf>.

14. See *Cassirer v. Spain*, 461 F. Supp. 2d 1157 (C.D. Cal. 2006), *aff'd in part, rev'd in part and remanded*, 580 F.3d 1048 (9th Cir. 2009). See also Patty Gerstenblith, *International Art and Cultural Heritage*, 44 INT'L LAW. 487, 492-93 (2010).

15. *Cassirer*, 461 F. Supp. 2d at 1178-79.

16. See 28 U.S.C. §§ 1602-11 (2011).

17. 28 U.S.C. § 1605(a)(3) provides, in part, that a "foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which rights in property taken in violation of international law are in issue and that property . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality . . . is engaged in a commercial activity in the United States." *Id.* § 1605(a)(3).

18. *Cassirer*, 580 F.3d at 1056.

activity in the United States,<sup>19</sup> and that Congress did not impose an absolute requirement in the FSIA to exhaust local remedies.<sup>20</sup>

The Ninth Circuit reconsidered this decision en banc<sup>21</sup> and affirmed the panel decision on these three issues.<sup>22</sup> Relying on the plain meaning rule in statutory interpretation and viewing the language of section 1605(a)(3) of the FSIA as clear, the court concluded that no requirement existed that the foreign state being sued also be the foreign state that took the property at issue in violation of international law.<sup>23</sup> In defining what activity is commercial in nature, the en banc decision agreed with the district court that commercial activity is defined by its nature, not its purpose, and therefore need not be carried out for profit. The defining criterion for commercial activities is that they are “the type of actions by which a private party engages in trade and traffic or commerce.”<sup>24</sup> Drawing upon the precedent established in *Altmann v. Republic of Austria*,<sup>25</sup> the decision concluded that the defendant Foundation engaged in sufficient commercial activity in the United States, including advertising of the defendant museum that utilized an image of the Pissarro painting and sales of posters, books, and catalogues, including images, to satisfy the FSIA’s requirement.<sup>26</sup>

A forceful dissent focused on statutory interpretation and, in particular, whether the expropriation exception applies to a foreign sovereign that was not complicit with the wrongful taking of the property.<sup>27</sup> The dissent argued that section 1605(a)(3) of the FSIA was unclear because it used the passive voice and did not state *who* took the property.<sup>28</sup> The dissent therefore gave the FSIA’s legislative history greater weight in interpreting the statute. The dissent viewed section 1605(a)(3) as parallel to the Hickenlooper exception to the act of state doctrine, which states that “disputes over expropriated property were justiciable when rights in property were asserted on the basis of a taking ‘by an act of that state in violation of the principles of international law.’”<sup>29</sup> Further, the dissent argued that the FSIA should be consistent with international law; a taking of property in violation of international law is no longer a sovereign act and the foreign sovereign therefore loses its immunity. Yet, a foreign sovereign that did not expropriate the property or was not otherwise complicit in the expropriation did not violate international law and therefore should not lose its immunity.<sup>30</sup> On December 10, 2010, the defendants filed a petition for certiorari to the Supreme Court.

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19. *Id.* at 1057-59.

20. *Id.* at 1062.

21. See *Cassirer v. Spain*, 616 F.3d 1019 (9th Cir. 2010).

22. *Id.* at 1022.

23. *Id.* at 1028-30.

24. *Id.* (quoting *Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)).

25. See *Altmann v. Austria*, 317 F.3d 954 (9th Cir. 2002).

26. *Cassirer*, 616 F.3d at 1019.

27. *Id.* at 1038 (Gould, J., dissenting).

28. *Id.*

29. *Id.* at 1040 (quoting 22 U.S.C. § 2370(e)(2) (2010)) (emphasis added).

30. *Id.* at 1040-41.

B. *AGUDAS CHASIDEI CHABAD OF UNITED STATES v. RUSSIAN FEDERATION*

An interesting case involving both the FSIA and the act of state doctrine was resolved in 2010. *Agudas Chasidei Chabad of United States v. Russian Federation* involved a collection of religious books and manuscripts belonging to Chabad. One part of the collection, composed of religious books and manuscripts, was seized during the Russian Revolution (the "Library") and a second part (the "Archives"), consisting of 25,000 pages of hand written materials, was seized by Nazi Germany during the 1941 invasion of Poland and subsequently taken by the Red Army to Russia as war "trophies" and "booty." The Archives and Library are still in Russia today.<sup>31</sup>

In earlier proceedings, the district court granted the defendant's motion to dismiss the claim as to the Library, finding that the defendant was entitled to sovereign immunity, but denied the motion as to the Archives.<sup>32</sup> The court found that the taking of the Library was not in violation of international law, one of the prongs required under the exception to foreign sovereign immunity in section 1605(a)(3).<sup>33</sup> It reached this conclusion based on the assertion that the Library was owned individually by the Rebbe, a citizen of Russia, rather than by Chabad as a whole.<sup>34</sup> The Court of Appeals for the District of Columbia Circuit reversed this holding and also the district court's holding that the Library had not been "retaken" in 1991-92, when Chabad could not regain possession of the Library.<sup>35</sup> The appellate court affirmed the holdings that the commercial use prong of the Section 1605(a)(3) exception was satisfied through activities of the Russian State Library and the Russian State Military Archive in the United States and that there was no need for the plaintiff to exhaust remedies in Russia before suing in the United States.<sup>36</sup>

Russia had also relied on the act of state doctrine to defend both claims. The district court rejected this defense as to the Archive because it was expropriated outside of the territorial boundaries of the then-Soviet Union,<sup>37</sup> and the D.C. Circuit affirmed the decision.<sup>38</sup> Yet, the district court had accepted the act of state defense as an alternative basis for dismissing the claim as to the Library.<sup>39</sup> The D.C. Circuit reversed this holding. First, the D.C. Circuit determined that the district court's holding that the "retaking" of the Library in 1991-92 was protected by the act of state doctrine was incorrect because the Second Hickenlooper Amendment<sup>40</sup> normally bars use of the act of state doctrine with respect to expropriations of property that occurred after January 1, 1959.<sup>41</sup> Second, the D.C. Circuit vacated the district court's order that the act of state doctrine bars judicial examination of the taking of the Library in the 1917-1925 period.

31. *Agudas Chasidei Chabad v. Russian Fed'n*, No. 05-1548, 2010 U.S. Dist. LEXIS 78552, at \*2-3 (D.D.C. July 30, 2010).

32. *Agudas Chasidei Chabad v. Russian Fed'n*, 466 F. Supp. 2d 6, 31 (D.D.C. 2006).

33. *Id.* at 17.

34. *Id.* at 21-22.

35. *Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934, 943-46 (D.C. Cir. 2008).

36. *Id.* at 946-50.

37. *Agudas Chasidei Chabad*, 466 F. Supp. 2d at 26.

38. *Agudas Chasidei Chabad II*, 528 F.3d at 951-52.

39. *Agudas Chasidei Chabad*, 466 F. Supp. 2d at 26.

40. 22 U.S.C. § 2370(e)(2) (2011).

41. *Agudas Chasidei Chabad II*, 528 F.3d at 953.

While recognizing that this taking of the Library occurred within the sovereign territory of the Soviet Union, which would typically fit within the criteria of the act of state doctrine, the D.C. Circuit relied on language in *Sabbatino* that the act of state doctrine is not a rigid rule, but rather one that should take into account a variety of factors.<sup>42</sup> In particular, the D.C. Circuit Court emphasized that the Soviet government is no longer in existence and has been “succeeded by a radically different regime.”<sup>43</sup> The court recognized that it could not evaluate the balance that should be given to this change in regime in determining whether the act of state doctrine should apply. It therefore vacated and remanded to the district court.<sup>44</sup>

On remand, the defendants refused to participate any further in the litigation and defaulted.<sup>45</sup> Despite this default, the plaintiff still had to establish its right to relief by evidence satisfactory to the court. The plaintiff showed that rights in property are at issue: the defendant took plaintiff's property in violation of international law, the property is owned or operated by agencies or instrumentalities of the foreign state, and the defendants are engaged in commercial activity in the United States. The district court then entered a default judgment.<sup>46</sup> Russia then announced that it refused to recognize the ruling.<sup>47</sup> It is not clear what steps the plaintiff will take to recover the Library and Archives, but it could attempt to attach Russian assets located in the United States.

A decision on the act of state doctrine as applied to the Soviet Union's nationalizations of art works and other forms of cultural property in the 1917-1925 period would have been interesting, as this question has arisen with respect to other disputed cultural objects. For example, the outcome of a dispute concerning a van Gogh painting, *The Night Café*, currently in the collection of Yale University and previously owned by a Russian art collector, may turn on the applicability of the act of state doctrine.<sup>48</sup>

### C. ODYSSEY MARINE EXPLORATION

Another case premised on the FSIA involves the disposition of a large quantity of coins recovered from a historic shipwreck off the coast of Spain. In 2007, Odyssey Marine Exploration, Inc., a Florida “company engaged in deep-water exploration of historic wrecks and recovery of artifacts for commercial sale, announced the recovery of over 500,000 silver and gold coins and other artifacts from a [C]olonial era shipwreck code-named *Black Swan*.”<sup>49</sup> Odyssey Marine Exploration described the wreck's location as in international waters west of the Straits of Gibraltar, although it refused to disclose the

42. *Id.*

43. *Id.* at 954.

44. *Id.*

45. *Agudas Chasidei Chabad v. Russian Fed'n*, No. 05-1548 (RCL), 2010 U.S. Dist. LEXIS 78552, at \*1 (D.D.C. July 30, 2010).

46. *Id.* at \*1.

47. *Chabad Seeks to Recover its Archives and Library*, COMM'N ART RECOVERY, <http://www.commartrecovery.org/cases/chabad-seeks-recover-its-archives-and-library> (last visited Jan. 25, 2011).

48. Memorandum in Support of Motion to Dismiss Amended Counterclaims by Plaintiff-Counterclaim Defendant Yale University at 25-34, *Yale Univ. v. Konowaloff*, Case No. 3:09-CV-00466 (D. Conn., Oct. 5, 2009); see also Gerstenblith, *supra* note 14, at 498-99.

49. Press Release, Odyssey Marine Exploration, Odyssey Marine Exploration Announces Third Quarter 2007 Results, (Nov. 7, 2007), available at <http://shipwreck.net/pr150.php>; see also Patty Gerstenblith & Lucille Roussin, *Art and International Cultural Property*, 42 INT'L LAW. 729, 741 (2008).

exact location. Odyssey Marine imported the artifacts into the United States and then filed claims in admiralty in federal district court in Florida, as a way of asserting its rights in the shipwreck. Spain subsequently entered the proceedings, claiming ownership of any Spanish property.<sup>50</sup>

In mid-2009, the magistrate judge decided the issues in favor of Spain, and the district court judge issued an opinion adopting this decision in late 2009.<sup>51</sup> The court concluded, that based on the location of the wreck, historical accounts, the types and age of the coins, the types of cannons, and other artifacts, there was no genuine factual question as to the identification of the wreck as the Spanish naval vessel *Nuestra Senora de las Mercedes*, which exploded in an engagement with the British in 1804.<sup>52</sup> Asserting foreign sovereign immunity, Spain argued that the U.S. court could not exercise subject matter jurisdiction over the wreck because none of the FSIA exceptions to immunity applied.

Courts traditionally exercise jurisdiction over shipwrecks, even if not within the territorial waters of the nation where the court sits, based on constructive possession established through actual possession of some of the contents of the wreck located within the court's jurisdiction.<sup>53</sup> Yet, the court's exercise of jurisdiction over the wreck is limited, particularly where the wreck is the property of a foreign sovereign. The only means by which a U.S. court can obtain jurisdiction over a foreign sovereign is through one of the FSIA's enumerated exceptions, and Odyssey Marine failed to show that an exception applied.<sup>54</sup>

In addition to the question of foreign sovereign immunity, the Treaty of Friendship and General Relations between the United States and Spain of 1902 calls on each nation to accord vessels of the other nation "the same . . . protection and . . . immunities which would be granted to its own vessels."<sup>55</sup> The district court cited several treaties and U.S. statutes, including the Sunken Military Craft Act,<sup>56</sup> stating that the law of finds does not apply to "any foreign sunken military craft in" U.S. territorial waters, and "no salvage rights or awards" will "be granted with respect to such" vessels, "without the express permission of the . . . foreign state."<sup>57</sup>

An interesting aspect of this litigation is that Peru intervened to assert its rights to the cargo of specie. Peru argued that the specie originated from the area of Peru and was removed by Spain as a result of colonialist exploitation.<sup>58</sup> The court rejected the notion that it could resolve Peru's claim for the same reason that it rejected Odyssey Marine's

50. Gerstenblith & Roussin, *supra* note 49.

51. *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126, 1128-30 (M.D. Fla. 2009).

52. *Id.* at 1133-36.

53. *Id.* at 1137. But in another decision this past year, also involving Odyssey Marine Exploration, the same district court judge refused to allow the theory of constructive possession of a wreck's *res* to establish in rem jurisdiction over the entire wreck when the salvor's claim was based on the law of finds. *Odyssey Marine Exploration, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, No. 8:08-cv-1044-T-23MAP, 2010 U.S. Dist. LEXIS 87658, at \*22 (M.D. Fla. July 30, 2010). This case involves artifacts recovered from *Le Marquis Tournay*, a private French vessel that sank in the English Channel in the late nineteenth century. *Id.* at \*1.

54. *Odyssey Marine Exploration*, 675 F. Supp. 2d at 1138-39.

55. *Id.* at 1143-44.

56. *Id.*; 10 U.S.C. § 113 n. (2011).

57. *Odyssey Marine Exploration*, 675 F. Supp. 2d at 1143-44.

58. *Id.* at 1145-46.



claim—that the court lacked jurisdiction over the wreck and its cargo because of Spain’s right to sovereign immunity for its property.<sup>59</sup>

In its substantive argument, Peru attempted to rely on Article 149 of the United Nations Convention on the Law of the Sea, which calls for preservation of “objects of an archaeological and historical nature” with “particular regard being paid to the preferential rights of the State or country of origin. . . .”<sup>60</sup> The court, however, rejected this argument since neither Peru nor the United States has ratified this treaty, and the court did not view this provision as a part of customary international law.<sup>61</sup> Finally, the court concluded that this dispute was best resolved through direct negotiations between Spain and Peru, rather than through a suit in the courts of a third, otherwise uninvolved nation.<sup>62</sup> The court thus rejected the claims of both Odyssey Marine and Peru and ordered Odyssey Marine to turn the ship’s property over to Spain. This order has, however, been delayed, pending Odyssey Marine’s appeal.

Despite the considerable variety of factual circumstances and legal arguments, these three cases all center on the applicability of the FSIA and, to a lesser extent, the act of state doctrine. It is worth considering why the FSIA has become such a focus of litigation concerning cultural property.<sup>63</sup> There is no simple explanation, although in several of these cases the FSIA seems to serve more as a basis for finding jurisdiction over the foreign sovereign in U.S. courts than as a means of protecting the foreign sovereign from suit. This statute will continue to be tested not only through appeals<sup>64</sup> but also in a new case filed in 2010. The heirs of the Hungarian banker, Baron Mor Lipot Herzog, filed suit in federal court in Washington, demanding return of a collection of art works which they allege was placed in Hungary for safekeeping during World War II or placed there when art works stolen by the Nazis were returned to Hungary at the end of the war.<sup>65</sup> This case, and other decisions, will continue to elucidate when a foreign sovereign can be sued in a U.S. court.

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59. *Id.* at 1146.

60. See Third United Nations Conference on the Law of the Sea: Final Act, art. 149, Dec. 10, 1982, 21 I.L.M. 1245.

61. *Odyssey Marine Exploration*, 675 F. Supp. 2d at 1146-47. The court rejected the use of customary international law because it concluded that international law contains little practice with respect to jurisdiction over shipwrecks and there is no customary international law at all with respect to disputes among sovereigns concerning underwater cultural heritage discovered in international waters. *Id.*

62. *Id.* at 1147-48. The court also relied on the act of state doctrine as an affirmative defense for a reason to refrain from evaluating the actions of Spain in exploiting its former colony. *Id.*

63. The Supreme Court’s decision in *Altmann v. Austria*, 541 U.S. 677 (2004), which concluded that the FSIA applied to actions that predated the FSIA’s enactment, seems to have provided some of the impetus. The *Altmann* decision ultimately led to the restitution of four Klimt paintings to the descendants of Adele Bloch-Bauer.

64. The Seventh Circuit has yet to decide Iran’s appeal, which was argued in October 2009, concerning its right to immunity under the FSIA, in *Rubin v. Iran*, 349 F. Supp. 2d 1108 (N.D. Ill. 2004); see also Patty Gerstenblith et al., *Art and Cultural Heritage*, 43 INT’L LAW. 811, 822-23 (2009).

65. Carol Vogel, *Hungary Sued in Holocaust Art Claim*, N.Y. TIMES, July 28, 2010, at C1, available at <http://www.nytimes.com/2010/07/28/arts/design/28lawsuit.html>.

#### IV. Legal Developments concerning Art Works Looted during the Holocaust

##### A. *BAKALAR V. VAVRA*

The heirs of Franz Friedrich Grunbaum, a Viennese cabaret performer whose collection consisted of 449 artworks, claimed a 1917 Egon Schiele drawing, *Seated Woman with Bent Left Leg (Torso)*. Grunbaum executed a power of attorney, authorizing his wife to deal with his assets while imprisoned at Dachau, where he died in 1941. Galerie Gutekunst, a Swiss art gallery, purchased the drawing in 1956, apparently from Grunbaum's sister-in-law, Mathilde Lukacs-Herzl. Later in 1956, the drawing was sold to the Galerie St. Etienne in New York, from whom Bakalar bought the drawing in 1963. Bakalar consigned the drawing to Sotheby's for sale in 2004, which subsequently froze the sale when the Grunbaum heirs challenged Bakalar's title. Both parties sued in federal court in New York seeking a declaratory judgment.

The district court awarded the drawing to Bakalar based on Swiss law, which the judge deemed controlling. Under Swiss law, "one who acquires . . . an object in good faith becomes the owner."<sup>66</sup> Galerie Gutekunst was entitled to rely on a presumption that Lukacs-Herzl was the owner and it therefore qualified as a good faith purchaser.<sup>67</sup> Furthermore, even if the drawing had been stolen, the original owner's ability to recover the drawing expired five years after Galerie Gutekunst acquired it.<sup>68</sup>

On appeal, the Second Circuit first established the significant difference between Swiss and New York law on the question of whether a good faith purchaser can acquire title to stolen property. A good faith purchaser can acquire title to stolen property in Switzerland, and, at least at the time of the Galerie Gutekunst purchase, Swiss law presumed that a purchaser acted in good faith. In addition, the court noted the difficulties that Holocaust victims and their heirs have had in recovering stolen art works under Swiss law.<sup>69</sup> Under New York law, a good faith purchaser does not acquire title to stolen property, although a claim for recovery may be barred by the statute of limitations or the equitable defense of laches.<sup>70</sup> Because of this difference in Swiss and New York law, the court then had to address the question of choice of law.

The district court judge had adopted the law of the situs where the drawing was located at the time of its alleged transfer, i.e., Switzerland. Yet, the Second Circuit rejected this rule and held that under New York choice of law rules, the appropriate law is the law of the jurisdiction with the greater interest in the transaction.<sup>71</sup> The court then concluded

66. *Bakalar v. Vavra*, No. 05 Civ. 3037 (WHP), 2008 U.S. Dist. LEXIS 66689, at \*1 (S.D.N.Y. Sept. 2, 2008), *vacated and remanded*, 619 F.3d 136 (2d Cir. 2010). See also Gerstenblith et al., *supra* note 64, at 818.

67. *Bakalar*, 2008 U.S. Dist. LEXIS at \*1.

68. *Id.*

69. *Id.* at 140.

70. *Id.* at 140-42 (describing New York's demand and refusal rule in relation to the statute of limitations for the recovery of stolen property and the Court of Appeals decision in *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991)).

71. *Bakalar*, 619 F.3d at 142-44. The Second Circuit relied on *Istim, Inc. v. Chemical Bank*, 581 N.E.2d 1042 (N.Y. 1991), rejecting "the traditional situs rule in favor of an interest analysis." The interest analysis "begins with an examination of the contacts each jurisdiction has with the event giving rise to the cause of action." 619 F.3d at 143-44. The Second Circuit also criticized the District Court's reliance on *Elicofon v.*

that Switzerland's interest in the outcome based on a sale that took place decades ago and with no present impact on the Swiss gallery was tenuous in contrast to New York's interest "in preventing the state from becoming a marketplace for stolen goods."<sup>72</sup> Once New York law was chosen as the correct law, the question of whether the drawing had been stolen, a question that the district court judge had deemed irrelevant under Swiss law, became a crucial element to determine upon remand. Further, once the claimants met a threshold showing, the burden fell on Bakalar to prove that a theft did not occur.<sup>73</sup>

#### B. *GROSZ V. MUSEUM OF MODERN ART*

The heirs of George Grosz, an early twentieth-century German artist whose art works were considered by the Nazis to be "degenerate" and who was forced to flee Germany in 1933, sued the Museum of Modern Art ("MoMA") to recover three of Grosz's caricatural paintings, *Hermann-Neisse with Cognac*, *Self-Portrait with Model*, and *Republican Automatons*.<sup>74</sup> The plaintiffs alleged that Grosz consigned the paintings to Grosz's art dealer, Alfred Flechtheim, and that each was either stolen or subject to some other form of malfeasance. MoMA acquired the paintings at different times during the late 1940s and 1950s.<sup>75</sup> On November 24, 2003, Ralph Jentsch, "managing director" of the Grosz estate, asked MoMA to return the paintings to the Grosz estate. The plaintiffs filed their complaint on April 12, 2009. MoMA moved to dismiss the complaint on the grounds that the three-year limitations period had expired.<sup>76</sup>

Because in New York the cause of action for the recovery from a good faith purchaser of stolen property, including art works, accrues when the claimant demands return of the property and the demand is refused, the question focused on when MoMA refused the demand. The court defined "refusal" as words or actions that are inconsistent with the claimant's possession or use of the property, regardless of whether the possessor explicitly refuses the demand. Because the purpose of the "demand and refusal" rule is to give the good faith possessor an opportunity to relinquish the property once informed of the claimant's rights, a failure to turn over the property constitutes a refusal.<sup>77</sup>

The parties agreed that Jentsch's 2003 letter constituted the demand. The court concluded that MoMA's failure to turn over the paintings, or a letter MoMA sent to the claimants in 2005 communicating its refusal to turn over the paintings, meant that the

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Kunstsammlungen zu Weimer, 678 F.2d 1150 (2d Cir. 1982), in concluding that the law of the place of the transaction should apply. 619 F.3d 143-46. According to the Second Circuit, the choice of New York law in *Ellicofon* is better explained as an application of the greater interest rule. *Id.* at 143-46.

72. *Id.* at 145.

73. *Id.* at 147. Judge Korman, sitting by designation with the Second Circuit panel, wrote a separate concurring opinion to emphasize that once the court concludes that Grunbaum gave up the drawing involuntarily, title could not pass to a subsequent purchaser under New York law. *See id.* at 148-52 (Korman, J., concurring).

74. *Grosz v. Museum of Modern Art*, No. 09 Civ. 3706 (CM) (THK), 2010 U.S. Dist. LEXIS 1667, at \*1-2 (S.D.N.Y. Jan. 6, 2010), *reconsideration denied*, No. 09 Civ. 3706 (CM) (THK), 2010 U.S. Dist. LEXIS 20248 (S.D.N.Y. Mar. 3, 2010), *aff'd*, 2010 U.S. App. LEXIS 25659 (2d Cir. 2010).

75. *Grosz*, 2010 U.S. Dist. LEXIS 1667 at \*5-16.

76. *Id.* at \*16-17; *see* N.Y. C.P.L.R. 214(3) (McKinney 2010).

77. *Grosz*, 2010 U.S. Dist. LEXIS 1667 at \*24-26.

refusal was made, at the latest, in 2005.<sup>78</sup> This case is one of the few to address the precise definition of what constitutes a refusal of a demand to return an allegedly stolen work of art.

### C. *IN RE FLAMENBAUM*

*In re Flamenbaum*<sup>79</sup> presents atypical facts concerning a cultural object stolen during the Holocaust. German archaeologists excavated a gold cuneiform tablet dated to the reign of the Assyrian King Tukulti-Ninurta I (1243-1207 B.C.) in the foundation of the Ishtar Temple in the city of Ashur, now in Iraq, in 1913; later to be placed in the Vorderasiatisches Museum in Berlin. At the beginning of World War II, the tablet was put in storage but, at the conclusion of the war, was missing. Some sixty years later, it appeared in a safe deposit box of Riven Flamenbaum, a Holocaust survivor and resident of Long Island, New York. In the process of accounting for the estate, the Berlin museum was notified of the tablet's presence, and the museum filed a claim to the tablet.

The court concluded that the museum had title superior to that of the Flamenbaum estate and that, under New York's demand and refusal rule, the statute of limitations did not bar the museum's claim, but the equitable defense of laches did.<sup>80</sup> The court concluded that the museum's delay in bringing its claim was unreasonable. The museum failed to report the tablet as missing to any law enforcement agency or registry or to undertake any investigation as to its whereabouts, despite the fact that the tablet was seen in the hands of a New York dealer in 1954.<sup>81</sup> On the second prong of the laches defense, the court concluded that this unreasonable delay prejudiced the possessor<sup>82</sup> because the museum's inaction meant that good faith purchasers did not receive notice of possible defects in title and the death of Riven Flamenbaum foreclosed his ability to establish title.<sup>83</sup> This decision is currently on appeal.

The Flamenbaum estate raised an interesting argument alleging that the tablet might have been taken by the Soviet Union from Berlin as spoils of war and that the museum's title was extinguished under international law and the laws of the Soviet Union and its successors.<sup>84</sup> The museum argued, correctly, that the tablet could not be considered the legitimate property of the Soviet Union under the 1907 Hague Convention and, it might be added, under customary international law. The court chose not to resolve this legal question because it could resolve the case more easily under the laches defense. It is, however, unfortunate that the court left this argument unanswered because it conflicts with both New York State precedent<sup>85</sup> and international law.<sup>86</sup>

78. *Id.* at \*27-35. The claimants disagreed with this interpretation of the 2005 letter and characterized a 2006 letter as constituting the refusal. *Id.* at \*35-38.

79. *In re Flamenbaum*, 899 N.Y.S.2d 546, 548-49 (N.Y. Sup. Ct. 2010).

80. *Id.* at 552-53.

81. *Id.*

82. *Id.* at 554 (stating that to assert a defense of laches, the defendant must also allege "injury, change of position, intervention or equities, loss of evidence, or other disadvantage resulting from such delay").

83. *Id.*

84. *Id.* at 550-51.

85. See *Menzel v. List*, 267 N.Y.S.2d 804, 810-12 (N.Y. Gen. Term 1966).

## D. CLAIMS OF SEGER-THOMSCHITZ

In 2009,<sup>87</sup> two district court decisions denied claims by Claudia Seger-Thomschitz, the legatee under the will of a son of Viennese art collector, Oskar Reichel, to recover two Kokoschka paintings, *Two Nudes (Lovers)*, currently in the collection of the Boston Museum of Fine Arts,<sup>88</sup> and *Portrait of a Youth*, possessed by Sarah Blodgett Dunbar.<sup>89</sup> Both decisions were affirmed in 2010. In the *Museum of Fine Arts* case,<sup>90</sup> the First Circuit, applying the Massachusetts three-year limitations period for tort and replevin actions, agreed that the claim would accrue when the claimant knew or reasonably should have discovered the location of the stolen property.<sup>91</sup> Because the Reichel family knew the location of the painting for decades before Seger-Thomschitz claimed it, her claim was barred by the statute of limitations. The First Circuit rejected Seger-Thomschitz's arguments that use of the Massachusetts statute of limitation conflicts with, and is preempted by, federal policies that encourage restitution of art works looted during the Holocaust era and discourage use of technical defenses to bar such claims.<sup>92</sup>

The Fifth Circuit reached a similar conclusion in barring Seger-Thomschitz's claim.<sup>93</sup> Seger-Thomschitz's argument here was primarily that U.S. foreign policy, as articulated in the Terezin Declaration, preempted prescription under Louisiana law.<sup>94</sup> Yet, the court held that Louisiana's prescription periods apply generally to any movable property claim and does not represent any state policy specific to Holocaust victims.<sup>95</sup>

## E. PORTRAIT OF WALLY SETTLEMENT

Litigation concerning the disposition of Egon Schiele's painting, *Portrait of Wally*, began in early 1998, while it was on loan from the Leopold Museum in Vienna to the Museum of Modern Art in New York, and lasted until this past summer. After heirs of the painting's original owner, Lea Bondi Jaray, identified the painting, the New York District Attorney held it as evidence in a criminal investigation. When the New York Court of

86. See, e.g., Hague Convention Respecting the Laws and Customs of War on Land art. 56, Oct. 18, 1907 (stating that "[a]ll seizure of, destruction or wilful damage done to . . . works of art and science, is forbidden, and should be made the subject of legal proceedings").

87. See Gerstenblith, *supra* note 14, at 495-96.

88. *Museum of Fine Arts v. Seger-Thomschitz*, No. 08-10097-RWZ, 2009 U.S. Dist. LEXIS 58826, at \*1-2 (D. Mass. May 28, 2009).

89. *Dunbar v. Seger-Thomschitz*, 638 F. Supp. 2d 659, 661 (E.D. La. 2009).

90. *Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010).

91. *Id.* at 7.

92. *Id.* at 11-14. It is ironic to note the court's concluding thoughts that statutes of limitation are not technicalities and that museums should follow the guidelines of the American Association of Museums—even though those same guidelines state that "to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses." *Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era*, AM. ASS'N OF MUSEUMS, Apr. 2001, [http://www.aam-us.org/museumresources/ethics/nazi\\_guidelines.cfm](http://www.aam-us.org/museumresources/ethics/nazi_guidelines.cfm).

93. See *Dunbar v. Seger-Thomschitz*, 615 F.3d 574 (5th Cir. 2010).

94. *Id.* at 577-79. See *Terezin Declaration*, HOLOCAUST ERA ASSETS CONFERENCE, June 30, 2009, <http://www.holocausteraassets.eu/en/news-archive/detail/terezin-declaration/>. See also Gerstenblith, *supra* note 14, at 491-92.

95. *Dunbar*, 615 F.3d at 578-79.

Appeals quashed the subpoena in 1999,<sup>96</sup> federal agents seized the painting on the ground that, as stolen property, it had been imported in violation of the U.S. Customs statute.<sup>97</sup>

In 2009, the district court resolved most of the issues in favor of the U.S. government and set a trial on the sole remaining issue—whether the Leopold Museum could rebut the government's showing that Rudolf Leopold knew the painting had been stolen.<sup>98</sup> Before the trial could commence, however, the claim was settled.<sup>99</sup> After being displayed at the Museum of Jewish Heritage in New York, the painting was returned to Vienna. The Leopold Museum paid the Bondi heirs a settlement of \$19 million.

## V. California Statute of Limitations for Recovery of Stolen Art Works

In 2009, the Ninth Circuit struck down as unconstitutional the California Holocaust Art Recovery Statute of Limitations<sup>100</sup> on the grounds that a statute of limitations that applies exclusively to art works looted during the Holocaust infringed on the federal government's exclusive power to conduct foreign affairs.<sup>101</sup> This year, the California legislature amended its statute of limitations in several ways.

The California statute of limitations is unique in explicitly providing a discovery rule for the accrual of a cause of action for the recovery of "any article of historical, interpretive, scientific or artistic significance."<sup>102</sup> Yet, it was not clear whether this discovery rule, enacted in 1983, applied to the recovery of property stolen before 1983. This year's amendment clarifies that the discovery rule applies to claims based on pre-1983 thefts, thus acknowledging that the interpretation of the statute given in *Naftzger v. American Numismatic Society*<sup>103</sup> is correct.<sup>104</sup>

Of perhaps greater significance, the amendment to Section 338 provides for a six-year limitations period and an actual discovery rule for an action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer.<sup>105</sup> It further applies to fine art removed from its owner by "a taking or theft by means of fraud or duress."<sup>106</sup> The cause of action will accrue when the claimant or his or her agent actually

96. *In re Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art*, 719 N.E.2d 897, 898-99 (N.Y. 1999).

97. See 19 U.S.C. § 1595a(c) (2008); 18 U.S.C. § 545 (2006).

98. *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 276 (S.D.N.Y. 2009). See Gerstenblith, *supra* note 14, at 495.

99. Randy Kennedy, *With the End of a Legal Dispute, a Schiele Comes to Manhattan*, N.Y. TIMES, July 29, 2010, at C3, available at <http://www.nytimes.com/2010/07/30/arts/design/30arts-WITHTHEENDOFRF.html>.

100. See CAL. CIV. PROC. CODE § 354.3 (West 2006).

101. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016, 1025-29 (9th Cir. 2009); see also Gerstenblith, *supra* note 14, at 494.

102. CAL. CIV. PROC. CODE § 338(c)(2) (West 2006).

103. *Naftzger v. Am. Numismatic Soc'y*, 49 Cal. Rptr. 2d 784, 792-93 (Cal. Ct. App. 1996).

104. AB 2765, 2010 Leg., (Ca. 2010). An act to amend Section 338 of the Code of Civil Procedure, Section 1(a)(3) and (b).

105. CAL. CIV. PROC. CODE § 338(c)(3)(A) (West 2006).

106. *Id.* Duress is defined as "a threat of force, violence, danger, or retribution against an owner . . . sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act that otherwise would not have been performed or to acquiesce to an act to which he or she would otherwise not have acquiesced." *Id.* § 338(c)(3)(C)(iv).

discovers both the identity and whereabouts of the artwork and information “sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art.”<sup>107</sup> This amended statute applies to “pending and future actions commenced on or before December 31, 2017,” including actions that have been dismissed if the judgment is “not yet final or if the time for filing an appeal . . . has not expired,” so long as the taking of the work of fine art occurred within one hundred years before enactment of the amended statute.<sup>108</sup> Finally, the amended statute provides that a party “may raise all equitable and legal affirmative defenses,” including equitable defenses of laches and unclean hands.<sup>109</sup>

This amended legislation is notable for several reasons. California has long been the only state that provides a specific statutory provision to the recovery of artworks and other cultural objects. Yet, there had been disagreement among the California appellate courts concerning to which actions this provision applied and whether it incorporated a constructive or actual discovery rule. The California Legislature acted not only to remove these ambiguities but, more importantly, apparently to overturn the Ninth Circuit’s striking down of the statute that had extended the time to recover artwork stolen during the Holocaust. By removing any reference to the Holocaust, the legislature eliminated the argument that extending the limitations period is preempted by the federal foreign affairs power. On the other hand, the amended statute will clearly apply to the recovery of artworks looted during the Holocaust, although it may apply in other scenarios as well. It remains to be seen whether a statute extending a limitations period that has already expired to recover a specific work of art will receive further constitutional challenge.

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107. *Id.* § 338(c)(3)(A)(ii). The statute further specifically precludes from actual discovery any constructive knowledge imputed by law. *Id.* § 338(c)(3)(C)(i).

108. *Id.* § 338(c)(3)(B).

109. *Id.* § 338(c)(5).