AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL LAW WINTER 2018

Art & Cultural Heritage Law Newsletter

A Publication of the Art & Cultural Heritage Law Committee

The Dawn of a New Era? Restitution of Colonial Artifacts by France

By: Anne-Sophie Nardon[1]

The French art market and museum institutions have recently found themselves in the eye of the hurricane, as Emmanuel Macron, the President of the French Republic pledged to commence a process of returning items of African cultural heritage with these words: "*Starting today, and within the next five years, I want to see the conditions put in place so as to allow for the temporary or definitive restitution of African cultural heritage to Africa*."[2] A Restitution Report by Bénédicte Savoy and Felwine Sarr, dated November 23rd, 2018, commissioned by President Macron, went a step further, with a recommendation to organize the full restitution of African artifacts that have been taken without consent,to a limited number of countries, including Bénin, Sénégal, Cameroon and Mali.[3] The legal definition of "without consent" is revisited to include any mode of acquisition, sale, gift or donation. The authors of the Restitution Report envision the dawn of a new era : "*To envision the possible of the future requires clearing away the painful legacies of the colonial past, of doing away with a sense of indebtedness. If this can be accompanied by a return of emblematic objects, the memory work can function as an operator for the reconstruction of the identity of subjects and communities*." Whereas President Macron acknowledged the legal consequences deriving from the diversity of means, including legal one, by which French museums acquired African artifacts, Savoy and Sarr propose to look beyond legitimate ownership, and return property notwithstanding the museum's good title.

It cannot be disputed that such contemplated temporary or definitive restitutions would indeed constitute a major change in French cultural heritage laws.

1. The almighty principle of inalienability

Since the Edit de Moulins of 1566, the principle of inalienability of State property has been at the heart of French cultural heritage laws. When taking the oath of coronation, kings of France used to swear "to keep and maintain the royal domain and heritage". This principle of inalienability survived the Revolution of 1789 and found its way in the Code Général de la Propriété des Personnes Publiques (CG3P). According to article L. 3111-1 of the CG3P, "property of public persons referred to in article L. 1, which falls within the public domain, is inalienable and imprescriptible". The property as defined in article L.2112-1 of the same code includes notably all national art collections and archives. As museums in France are mainly accredited or owned by the State, most benefit from the principle of inalienability. Consequently, their property may not be transferred in any manner, voluntarily or coerced, for consideration or gratuitously.

In a very recent decision, rendered a year after the presidential keynote address in Ouagadougou, the Conseil Constitutionel, which decides on the conformity of laws to the constitution, reaffirmed the principle of inalienability by confirming its compliance with the Constitution and the rights and freedoms it guarantees.[4]

2. Scarce restitution cases

On the basis of the principle of inalienability, successive French governments have turned down all requests for restitution from foreign countries, with the exception of New Zealand and South Africa, in two cases involving human remains. The first case, in 2002, concerned the restitution of the mortal remains of Saartjie Baartman ("Venus hottentot") to South Africa. The second, in 2010, related to the restitution of mummified and tattooed Maori heads considered as sacred by the Maori of New Zealand, for whom a non-buried head condemns the soul to an eternal wandering. In each case, a specific law authorized the repatriation of the remains.

It was in 2002 that a first law was enacted to authorize limited decommissioning of public property and set up a National Scientific Commission of the Museums of France, in charge of examining restitution requests. Decommissioning cases have been almost non-existent, bearing in mind that the 2002 law excluded decommissioning of objects given, bequeathed or acquired with the financial assistance of the State.

Besides those legal exceptions, there have been a few cases in which former French Presidents have, for diplomatic reasons, taken on themselves to present Foreign leaders with artifacts taken from a public museum. In 2010, former President Nicolas Sarkozy brought to Seoul certain Korean manuscripts that had been taken by the French Navy in 1866 and kept at the Bibliothèque Nationale de France. The manuscripts remain in Korea under a renewable five-year loan.

Apart from these rare exceptions, the French public collections have so far been protected from all restitution claims from foreign countries.

3. The UNESCO convention of 1970

Restitutions are also prevented by the non-retroactivity of the international conventions applicable to the restitution of cultural items, and especially the UNESCO Convention of 1970 on the means of prohibiting and preventing the illicit import, export and transport of ownership of cultural property. This convention was ratified by France in 1997, and only applies to illicit trafficking after 1970. African cultural artifacts claimed by countries that were part of former French colonies had been exported to France in the XIX° century, and at any rate before 1970.

In conclusion, the full restitution of African artifacts, as advocated by the recent Restitution Report, is unlikely to happen under the present legal regime for the protection of cultural heritage. There is, however, enough room in the legislation for loans and reciprocal exchanges between museums. The Musée du Quai Branly, who owns 70,000 pieces from sub-Saharan Africa, has already engaged in this approach. Meanwhile, the impact of the restitution debate on the art market for African artifacts is palpable, as private possessors fear possible restitution claims based on illicit provenance. ♦

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[2] Keynote Address of President Macron at the University of Ouagadougou, Nov. 28, 2017

[3] www.restitutionreport2018.com

[4] Décision n° 2018-743 QPC du 26 octobre 2018 du Conseil Constitutionnel.

A Drafter's Interpretation of the FSIA

By: Mark B. Feldman[1]

A. Drafting History and Congressional Intent

The Foreign Sovereign Immunities Act of 1976 ("FSIA" or "Act") was initiated by the Executive Branch.[2] Both the Act and its legislative history were drafted largely by attorneys in the Justice and State Departments. Its main purpose was to transfer determinations of foreign state immunity from the Department of State to the courts.[3] Broadly speaking, the FSIA was intended to implement the restrictive theory of immunity, followed by the United States since 1952, but there were a number of innovations, including the "expropriation exception" set out in section 1605(a)(3). To properly understand this provision, one needs to appreciate the historical context in which Congress legislated and its intent at that time.

My credentials to speak to this question are set out in an Expert Witness Report posted on-line.[4] Briefly, as Deputy Legal Adviser at the State Department, I was deeply involved in drafting the FSIA and in U.S. policy relating to foreign expropriations. Work on the FSIA began in the late 1960s during the Johnson Administration and continued through the Nixon and Ford Administrations until 1976. Throughout this period, foreign expropriation of American investment was a major foreign policy issue for the United States and a deep concern in Congress. The Castro expropriations confiscated billions of American investments in Cuba, and major properties were seized without compensation in several other countries, including Peru, Chile and Jamaica. By 1971, U.S. agencies were dealing with fifty-six uncompensated expropriations of American investments abroad.

Both the Executive and Congress were thinking primarily of foreign takings of major American investments in natural resources, including petroleum concessions, copper and bauxite mines and sugar plantations.

In response, Congress adopted a number of measures requiring the Executive to suspend foreign aid, and to vote against loans by international financial institutions, to any country expropriating American property without compensation.[5] Congressional and business pressures were so high in 1972 that President Nixon formally adopted a new expropriation policy reflecting these Congressional directives, and transferred bureaucratic responsibility for managing these cases from the State Department to a new inter-agency committee chaired by the White House.[6] At the same time, the U.S. faced intense diplomatic efforts by developing countries in the United Nations to establish a new international economic order including the right to nationalize foreign-owned natural resources without accountability under international law. U.S. relations with Latin America became so inflamed in 1974 that Secretary of State Kissinger launched a dialogue with Latin American Foreign Ministers outside the OAS to negotiate a compromise on the expropriation issue. That effort failed.

Section 1605(a)(3) was drafted by the Executive at the height of political focus on expropriation in Congress. Both the Executive and Congress were thinking primarily of foreign takings of major American investments in natural resources, including petroleum concessions, copper and bauxite mines and sugar plantations. The drafters understood that expropriation of foreign investment was generally understood to be a sovereign act, *jure imperii*, but saw a compelling need to provide some remedy for foreign confiscations in U.S. courts. The solution they constructed was to establish U.S. jurisdiction over takings by foreign states in violation of international law in two narrow circumstances where the foreign state benefits from expropriated property in commerce connected to the United States.

B. Statutory Text

Section 1605(a)(3) reads:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . .
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such 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.

The statutory definition of "foreign state" in section 1603(a) includes the government that exercises sovereign authority for the state and other entities: "For purposes of this chapter—A 'foreign state', except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection b."

The first prong of section 1605(a)(3) is exceedingly narrow. A foreign government or governmental agency that chooses to bring expropriated property into the United States for commercial purposes invites litigation of its title to that property, including judicial review of the foreign taking under applicable principles of international law. Few foreign governments would take that chance. The second prong is a bit more expansive. Foreign states who expropriate foreign investments, particularly those in natural resources such as petroleum and mining, often assign those properties to governmental agencies (defined by the Act to include state-owned enterprises) who use them to generate products sold world-wide, including the United States. The second prong of section 1605(a)(3) was drafted to allow claims against a "foreign state," as defined, when an agency or instrumentality that owns or operates property taken in violation of international law is "engaged in" a commercial activity in the United States. The foreign sovereign is a proper defendant in this situation, because it implemented the taking and is the party responsible to provide compensation as required by international law.

C. Judicial application of the second prong

Under the plain language of the statute, the courts have jurisdiction over taking claims against a foreign state under both prongs of the expropriation exception. This was not an issue in Congress in 1976, and did not become controversial until 2004, when the Supreme Court ruled, over the objections of the Executive, that an action may be brought under the FSIA for claims arising long before its enactment, *Republic of Austria v. Altmann*.[7] It is not unreasonable to wonder whether that result was influenced by the fact that the plaintiffs in *Altmann* were heirs of Holocaust victims seeking to recover a valuable painting seized by the Nazis.

Following *Altmann*, the State Department and the U.S. Government have generally opposed Holocaust litigation under the FSIA, and have supported a variety of positions that would limit the scope of jurisdiction available to any plaintiff under the expropriation exception. Thus, the Executive now maintains that actions under the second prong of section 1605 (a)(3) may only be brought against an agency or instrumentality of a foreign state. On that construction, an action may be brought against the foreign state itself only "where the property concerned is present in the United States in connection with a commercial activity carried on in the United States by the foreign state." The Ninth Circuit has twice rejected this restriction,[8] but the government's view was recently adopted by the D.C. Circuit in *de Csepel v Hungary*, and the Supreme Court declined review.[9]

As noted above, this view is contrary to the text of the statute and to the intent of the drafters. Proponents argue that the Act recognizes a distinction in other provisions between the "foreign state" itself and an "agency or instrumentality."[10] That distinction is made in three provisions relating to service of process,[11] execution of judgment,[12] and punitive damages.[13] Each of these distinctions is express, and none relates to jurisdiction.

All that proves is that Congress knew how to draft language prescribing differential treatment when it chose to do so – not that courts are authorized to add limitations on jurisdiction not stipulated by Congress.

Judge Tatel, writing in *de Csepel*,[14] finds the text as drafted anomalous in that it affords broader jurisdiction over the foreign government when the property taken by the state is in the hands of a separate agency engaged in commercial activity in the United States. That may seem unusual, but it makes sense. Foreign governments do not normally engage in international trade and commerce directly, but through commercial entities (*e.g*., state banks and petroleum companies) and expropriated enterprises. That was the situation Congress was trying to reach. As noted in *Bancec*, "Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities."[15] Section 1603(a)(5) does not imply piercing the corporate veil, however. It does not expose the sovereign to liability for conduct of a separate agency or *vice versa*; rather, it establishes jurisdiction over a sovereign that expropriates property when the sovereign provides that property to its agency engaged in commerce in the United States.

The first prong alone is so narrow as to be virtually meaningless. Perhaps, the Executive drafters of the Nixon bill submitted to Congress in 1973 added the second prong – following the semicolon – later in the drafting. Regardless, the text is not ambiguous. Both prongs apply to all elements of the "foreign state" as defined. I understood that when I edited the expropriation exception in 1974 for inclusion in what became the Ford bill submitted to Congress in 1975 and let it stand, with one change,[16] because that reach was consistent with U.S. expropriation policy driven by Congress. I also noticed that the phraseology "engaged in commerce" differs from the language used in the commercial exception and let the difference stand. As I saw it, the purpose of the two provisions is not the same and, possibly, should be applied differently.

Finally, contrary to Judge Tatel's speculation, I see nothing in the text that would preclude plaintiffs in *de Csepel* from suing both Hungary and the state institutions holding the art, if the second prong applies to the former. Both defendants are foreign states, as defined.

D. Judicial Deference to Foreign Courts?

Perhaps, the most disturbing decisions under the expropriation exception are the Seventh Circuit rulings in *Abelesz v Magyar Nemzeti Bank*[17] and *Fischer v. Magyar Allamvasutak Zrt.*,[18] that Holocaust victims must exhaust judicial remedies in Hungary[19] before their claims may be heard in U.S. courts. As one of the drafters of the FSIA, I have no doubt that Congress intended to provide a remedy for foreign expropriations in U.S. courts in the narrow circumstances stipulated in section 1605(a)(3). U.S. experience with foreign confiscations in the 1960-70s demonstrated the futility of local remedies and informed Congressional action in the FSIA, the Hickenlooper amendment and other statutes of that period.[20] The Seventh Circuit approach is a questionable response to the difficult issues presented by seventy-year old Holocaust claims against Hungary. As applied to current and future foreign confiscations, it would nullify the expropriation exception and frustrate the intent of Congress.

The whole point of the FSIA is that, going forward, any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.

Abelesz and *Fischer* are inconsistent with the Supreme Court holding in *Republic of Argentina v. NML Capital, Ltd.*,[21] where the Court rejected Argentina's claim to immunity from post-judgment discovery as a matter of international comity because nothing in the plain text of the FSIA provides for such immunity. As the Court noted, Congress replaced the prior common law regime applying comity *ad hoc* with a comprehensive statutory scheme incorporating comity considerations in its jurisdictional provisions.

Moreover, it is widely recognized that the doctrine of exhaustion of remedies applies in international claims diplomacy and in litigation between nation states, not to private claims against foreign states in U.S. courts.[22] Further, the doctrine does not apply to illegal, discriminatory takings. The Seventh Circuit recognized this last point in *Fischer,* but inexplicably makes an exception for Holocaust claims.

For all these reasons, the D.C. Circuit recently declined to recognize an exhaustion or comity defense in two cases brought against foreign state agencies under section 1605(a)(3), *Philipp v. Federal Republic of Germany*[23] and *Simon II*.[24] As noted in *Simon II*,

> There is no room in those "comprehensive" standards governing "every civil action," [*NML Capital*, 134 U.S. 2250], for the extra-textual, case-by-case judicial reinstatement of immunity that Congress expressly withdrew. As we explained in *Philipp*—echoing the Supreme Court—the whole point of the FSIA is that, "[g]oing forward, 'any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.'" *Id.* at 415 (quoting *NML Capital*, 134 S. Ct. at 2256).[25]
>
> Hungary's theory . . . lacks any pedigree in domestic or international common law. See Philipp, 894 F.3d at 416 (citing *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 466 F. Supp. 2d 6, 21 (D.D.C. 2006). ("[T]his court is not willing to make new law by relying on a misapplied, non-binding international legal concept.")).[26]

The Supreme Court may have to resolve the conflict between the circuits. ♦

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[1] Mark B. Feldman was formerly Deputy Legal Adviser, U.S. Department of State. This Paper will be presented at the ABA Section of International Law 2019 Annual Conference, as part of a panel discussion entitled "Are Courts Narrowing FSIA Jurisdiction over All Expropriations to Avoid Litigating Holocaust Claims?"

[2] P.L. 94-583, 90 Stat. 2891, 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d) and 1602-1611.

[3] Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 Int'l Comparative L. Quart 302 (1986); Feldman, *Foreign Sovereign Immunity in the United States Courts 1976-1986*, 19 Vand. J. Transnat'l L. 19 (1986).

[4] Expert Witness Report: http://www.markfeldmaninternationallaw.com/mezerhane-testimony/

[5] *E.g.*, Hickenlooper Amendment, Foreign Assistance Act, 28 U.S.C. § 2370(e)(1) (1962); Inter-American Development Bank Act, § 21, 86 Stat. 59 (1972); International Development Association Act, § 12, 86 Stat. 60 (1972); Asian Development Bank Act, § 18, 86 Stat. 57 (1972).

[6] Statement Announcing United States Policy on Economic Assistance and Investment Security in Developing Nations, Jan. 19, 1972, available at: The American Presidency Project, https://www.presidency.ucsb.edu/documents/statement-announcing-united-states-policy-economic-assistance-and-investment-security

[7] 541 U.S. 677 (2004).

[8] *Cassirer v. Kingdom of Spain,* 616 F.3d 1019, 1028-34 (9th Cir. 2010) (*en banc*), *cert. denied*, 564 U.S. 1037 (2011); *Altmann v. Republic of Austria,* 317 F.3d 954, 968-69 (9th Cir. 2002), *amended on denial of reh'g*, 327 F.3d 1246 (9th Cir. 2003), *aff'd,* 541 U.S. 677 (2004)); *see also Kalamazoo Spice Extraction Co. v PMGSE*, 616 F. Supp. 660 (W.D. Mich. 1985).

[9] *de Csepel v. Hungary*, 859 F. 3d 1094 (D.C. Cir. 2017), *reh'g en banc denied*, 859 F. 3d 1094 (D.C. Cir. 2017), *cert. denied*, No. 17-1165, 2019 WL 113526 (2019).

[10] *See generally* Restatement (Fourth) of Foreign Relations Law § 455 rep. n. 9 (Am. Law Inst. 2018).

[11] 28 U.S.C. § 1608.

[12] 28 U.S.C. § 1610.

[13] 28 U.S.C. § 1606.

[14] *de Csepel v. Hungary*, 859 F. 3d at 1108.

[15] *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 633 (1983) ("*Bancec*").

[16] I deleted the reference to "political subdivision" in the second prong included in the 1973 bill to conform with section 1603 which differentiates such entities from an "agency or instrumentality."

[17] 692 F.3d 661 (2012).

[18] 777 F.3d 847 (2015).

[19] The Court of Appeals in *Simon* summarized the historical background as follows: "Nowhere was the Holocaust executed with such speed and ferocity as it was in Hungary. More than 560,000 Hungarian Jews—68% of Hungary's prewar Jewish population—were killed in one year. In 1944 alone, a concentrated campaign by the Hungarian government marched nearly half a million Jews into Hungarian railroad stations, stripped them of all their personal property and possessions, forced them onto trains, and transported them to death camps like Auschwitz, where 90% of them were murdered upon arrival." *Simon v. Republic of Hungary*, 911 F.3d 1172, 1175 (D.C. Cir. 2018), *reh'g en banc denied* (Feb. 15, 2019) ("*Simon II*") (Millet, C.J.) (internal quotation marks and citations omitted).

[20] *See* Feldman, *Cultural Property Litigation and the Foreign Sovereign Immunities Act of 1976*, ABA Section of Int'l Law, Art & Cult. Heritage Law Committee Newsletter, Vol. III, Issue No. 2, pp. 9-13 (Summer 2011).

[21] 573 U.S. 134, 134 S. Ct. 2250, 189 L.Ed.2d 234 (2014).

[22] Restatement (Fourth) of Foreign Relations Law § 455, rep. n. 11*; see Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 949 (D.C. Cir. 2008).

[23] *Philipp v. Fed. Rep. of Germany*, 894 F.3d 406 (D.C. Cir. 2018).

[24] *Simon II*, 911 F.3d 1172.

[25] *Id*. at 1181.

[26] *Id*.

AML for the Art Trade: How Not to Go to Jail Under the 5th Directive

By: Gregor Kleinknecht and Petra Warrington[1]

The 5th EU Anti-Money Laundering Directive (5AMLD) is due to be implemented into UK law by 10th January 2020. The good news for art dealers and intermediaries is that they have nearly a year to prepare. The bad news is that Brexit is unlikely to interfere and that, as matters stand, the UK will still implement 5AMLD after leaving the EU. Like it or not, the art trade will face an increase in regulation and bureaucracy that may at first feel alien and inquisitorial. It will affect non-European buyers who seek to purchase artworks in galleries, at fairs or at auction in the UK as much as non-European dealers who transact as buyers and sellers in the London market, whether in person or online.

While the financial and legal sectors, and estate agents, have grown used to concepts such as 'know your client' and regularly undertake enhanced customer due diligence and ID checks, these practices have so far largely bypassed the art trade. Whereas, traditionally, dealers and intermediaries may have met face-to-face and built personal and professional relationships with the majority of their clients, now they may never meet them in person as business becomes transacted increasingly through online and other means of distance communication. As a result of those changes in market practices, the art trade will now be obliged by 5AMLD to find out who their clients are by asking for photo identity, birth dates and information about their business activities and source of wealth, in a way that will come as a shock to many in the market and as an intrusion in personal affairs. The trade's due diligence obligations in relation to corporate, foundation or trust clients will include potentially navigating complex offshore structures to verify their client's identity, structure of control and ultimate beneficial ownership, a process that will take time and administrative capability.

Although the domestic regulations that will implement 5AMLD in the UK will not be finalised for some time, and there is no confirmation yet of what demands will be placed on art dealers, auction houses and other agents, the basic framework is set out in the European legislation and there are a number of changes that we can be certain will arrive.

5AMLD does not stand alone, but rather amends the current 4th EU Anti-Money Laundering Directive (4AMLD) which has been implemented into UK law by The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.[2] The definition of "obliged entities" under 4AMLD has been expanded to include "persons trading or acting as intermediaries in the trade of works of art, including when this is carried out by art galleries and auction houses, where the value of the transaction or a series of linked transactions amounts to EUR 10,000 or more". The important features to note are, first, that several small transactions that are linked will quickly reach the threshold when viewed together; and, secondly, that the requirement for customer verification, which previously only applied to transactions in cash, will extend to all transactions irrespective of how the payment is made.

Art dealers and intermediaries who engage in transactions meeting the threshold will need to conduct ongoing risk-based due diligence on their clients. The due diligence required includes verifying the client's identity and source of funds and being able to identify and scrutinise any irregularities in instructions received from a client.

The approach is "risk-based", which means that the dealer must identify and understand the level of risk imposed by the client and the type of transaction entered into and assess the corresponding level of client due diligence that is necessary. Enhanced due diligence will be required for "high-risk" transactions which include *inter alia* those that relate to "cultural artefacts and other items of archaeological, historical, cultural and religious importance…". This means that dealers will need to have a greater awareness of the background and purpose to such transactions and monitor whether any activities are suspicious.

While large international art businesses and auction houses will be able to adapt to the changes in the law relatively seamlessly, small businesses and sole traders that do not have the same resources at their disposal are likely to find compliance more of an administrative and technical burden.

However, help is available. Organisations such as the Responsible Art Market Initiative (RAM), a cross-industry initiative based in Geneva, have sought to assist the trade with risk management including by publishing an "Art Transaction Due Diligence Toolkit", which provides a straightforward set of steps to follow in order to comply with due diligence obligations, and their "Guidelines on combatting Money Laundering and Terrorist Financing", which further assists the trade in implementing risk-based measures and identifying indicators of suspicious activity or "red flags". The due diligence toolkit includes three types of checklists for clients, artworks and transactions. Each checklist is followed by a set of "example red flag situations". RAM has also produced a user-friendly quick reference guide that highlights ten guidelines for undertaking effective anti-money laundering measures. There is also an emerging service industry of companies that offer payment solutions that include compliance checks, although using such services will not absolve members of the trade from taking responsibility for verifying their client's identity and source of funds.

In order to comply their obligations under 5AMLD, members of the art trade will need to start putting in place procedures for dealing with client due diligence, risk assessment and record keeping and would be well advised to do so sooner rather than later. Traders will certainly need to retain many more client and transaction documents than may previously have been the case. Given that this will include personal data, the requirements of 5AMLD will have other legal implications and knock-on effects, e.g., with regard to data protection and compliance with the requirements of the General Data Protection Regulation (GDPR) and will generate the need to have the requisite procedures and policies in place to process that data. ♦

[1] Hunters, London. This article is © Hunters 2019.

[2] The 2017 Regulations sit alongside the Proceeds of Crime Act 2002 and the Terrorism Act 2000, which set out the primary money laundering offences and terrorist financing offences, respectively, and the Criminal Finances Act 2017.

Regulation of the European Parliament and the Council on the Introduction and the Import of Cultural Goods in the EU

By: Isabel Montojo[1]

Within the framework of the 2015 European Agenda on Security[2], and of the 2016 Action Plan to step up the fight against terrorism[3], the European Commission announced its intention to work on a legislative proposal against illicit trafficking of cultural goods from third countries into the EU.

The Directorate-General for Taxation and Customs (European Commission) together with Deloitte, conducted an assessment of the nature and extent of current practices in designing and implementing legislation that protects cultural heritage goods and fights against illicit trafficking in cultural goods. The final report, published in May 2017, concluded that the EU lacked an effective common policy to fight illicit trafficking of cultural goods from third countries into the European Union. The report suggested, among other possible solutions, the development of an EU-level legislative framework along with the creation of control mechanisms within EU member states.[4]

On July 2017, the Commission adopted the legislative proposal and submitted it to the European Parliament and to the Council. A first draft report was presented and discussed on April 2018 at the Committee on International Trade (INTA) and the Committee on Internal Market and Consumer Protection (IMCO). By the end of September 2018, both committees adopted a joint report on the proposal that was later debated at the European Parliament. On November 2018, the Council adopted its position on the draft regulation, and on December 19 2018, a provisional agreement was reached.

In the European Parliament, members of the INTA and IMCO committees voted on the provisional agreement on January 22nd 2019, and a vote in plenary took place on March 12, 2019, at which the resolution was adopted by simple majority, to be forwarded to the Council, the Commission, and the national parliaments. The Council will also have to adopt the proposal and there is no date scheduled for that vote to take place.

Once it is formally adopted, the Regulation shall apply as of the day of its entry into force, that is to say the 20th day following its publication in the Official Journal of the European Union. However, in the case of this Regulation, the enforcement of some provisions is likely to be delayed until the EU customs authorities make the necessary administrative adjustments.

The New Regulation

The Regulation is comprised of sixteen articles and one Annex.[5]

Article 1 of the Regulation explains briefly the purpose and scope of the new rules: to establish "…the conditions and procedures for the import of cultural goods to safeguard humanity's cultural heritage and preventing the illicit trade in cultural goods, in particular where it may contribute to terrorist financing." The Regulation applies only to cultural goods which were created or discovered outside the territory of the European Union.[6]

Article 2 defines the meaning of key concepts as used in the text such as 'cultural goods', and what should be understood when talking about their 'introduction' or 'import' into the EU territory. Certainly, one of the most substantial definitions contained in Article 2 is the one on the 'competent authorities' to issue import licenses, a task that will be executed by the authorities designated by each member state.[7] The Preamble refers to the definitions used in the 1970 UNESCO Convention and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995 as the base for the definitions and concepts used throughout the text of the Regulation.

Article 3 prohibits the introduction into the EU of any of the items listed in Part A of the Annex (see discussion below) which were removed from the territory of the country where they were discovered or created in breach of the laws and regulations of such country.[8]

Under Article 4, imports of cultural goods referred to in Part B of the Annex will require a special import license issued by the 'competent authorities' of an EU country if they are at least 250 years old. Therefore, the same article establishes the basis of the application process and its formalities, as well as the steps and policies to follow on behalf of the 'competent authorities.' To sum up, these licenses will be issued upon proof by the importer that the goods in each case have been lawfully exported from their country of origin.[9]

Article 5 relates to the imports of cultural goods contained in Part C of the Annex and establishes the requirement of a statement by the importer that the goods in question have been lawfully exported.[10]

The different sections of Article 9 settle broad guidelines in regard to administrative co-operation between the States' customs administrations, and the establishment and use of an electronic system for the storage and exchange of information regarding importer statements and import licenses. Such electronic database is supposed to be created and developed by the Commission.[11]

The remaining articles in the text of the Regulation include general dispositions such as the Commission's commitment to cooperate with third countries, the terms and deadlines for reporting and evaluation on behalf of both the EU member states and the Commission, and the entry into force and application of the Regulation.

The Annex contains a detailed list of items considered to be relevant for archaeology, prehistory, history, literature, art, or science.[12] The Annex is divided into three different sections. Each section consists of a list of cultural items grouped in separated categories, depending on their characteristics:

Part A: establishes all the different categories of cultural goods covered in the Regulation.

Part B: lists those cultural goods from Part A that are deemed to be more vulnerable, such as archaeological objects and elements of monuments.

Part C: lists the rest of the categories of cultural goods from Part A that are not listed in Part B, and which are considered to be less vulnerable, such as collections of fauna or flora, coins, engraved seals, paintings, sculptures, and books.

Critiques

Some leading commentators and opinion formers on the international art market argue that, even though the regulations are represented to be necessary to stop a supposed trade by terrorist groups in illegal antiquities, the European Commission has not been able to demonstrate that terrorist-related smuggling of cultural property within the European Union is a real problem.

Even assuming a real threat of illegal trafficking of cultural goods into the EU for the purpose of financing terrorist groups, another possible counterargument to the need of a common policy in the European Union is the current existence of abundant and broad legislation at both the international and regional levels, as well as in domestic legal systems within the Member States. The current international regulatory framework provided by the 1954 Hague Convention and its Protocols, the 1970 UNESCO Convention, and the 1995 UNIDROIT Convention, among many other recent initiatives, have proven to be effective in fighting against illegal trafficking of cultural goods internationally. Moreover, the European Union had already taken regulatory and operational measures to avoid illicit traffic in cultural goods, although the only pieces of legislation which tackle cultural goods entering the customs territory of the Union are two ad hoc measures restricting the imports of goods coming from Iraq and Syria.

the Member States will review each application through their designated competent authorities and will decide whether they issue the imports license to the applicant

Several Member States have already adopted national legislation on the matter, although the European Commission has stated that the legal frameworks available in the Member States are far too diffused in both their scope and field of application. In particular, the Commission has claimed as one of the reasons for a standard policy, the fact that the Member States have too much discretion in developing their national policies on what should be considered illicit trade of cultural goods and how it should be tackled. Nonetheless, this criticism is at odds with the power the new Regulation grants to the Member States to designate the competent authorities to issue import licenses. Thus, the Member States will review each application through their designated competent authorities and will decide whether they issue the imports license to the applicant. Moreover, under Article 10 of the Regulation, each Member State is responsible for laying down the rules on penalties applicable within that State to infringements of the Regulation. It seems likely that some States will be more permissive than others when applying the Regulation and setting forth their own rules infringements' penalties, which can result in the appearance of a sort of "forum shopping" for potential smugglers by trying to get their imports licenses in such states, thus being able afterwards to get cultural goods circulating all over the EU territory.

Finally, some associations of art dealers have expressed their concern about the negative impacts of the Regulation on trade in cultural goods, citing, among other possible negative consequences, the increase of administrative paperwork and costs, and, in some cases, the difficulties to fulfill some of the mandatory requirements for the issuance of the license, such as the identification of the country of origin or documented proof of legal export from the source country. For example, in the case of Egyptian antiquities, Egyptian authorities issued licenses to antiquities dealers and granted permits for exports only until 1983, thus importers will face great difficulty in showing proof of lawful export of such items. ♦

[1] International Law & Justice graduate student at Fordham University School of Law.

[2] The European Agenda On Security, COM (2015) 185 final (April 29, 2015). Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2015:0185:FIN#document1

[3] European Commission Press release IP/16/202, Commission presents Action Plan to Strengthen the Fight Against Terrorist Financing (February 2, 2016). Retrieved from: http://europa.eu/rapid/press-release_IP-16-202_en.htm

[4] Fighting Illicit Trafficking in Cultural Goods: Analysis of Customs Issues in the EU, European Commission B-1049, (June 2017). Retrieved from: https://ec.europa.eu/taxation_customs/sites/taxation/files/annex_08_dg_taxud_study_fighting_illicit_trafficking_in_cultural_goods_en.pdf

[5] Proposal for a Regulation of the European Parliament and of The Council on the introduction and the import of cultural goods (December 16, 2018). Retrieved from: http://data.consilium.europa.eu/doc/document/ST-15494-2018-INIT/en/pdf

[6] *Id.* at 15.

[7] *Id.* at 15.

[8] *Id.* at 16.

[9] *Id.* at 18.

[10] *Id.* at 21.

[11] *Id.* at 22.

[12] *Id.* at 27.

The Herzog Collection: Update on an Odyssey (2016—2019)

By: Birgit Kurtz[1]

In the Autumn 2016 issue of this Newsletter, I recounted the dizzying path that *De Csepel v. Republic of Hungary* – a case involving the World War II era expropriation of an art collection – had taken through the U.S. court system up to that point. Now, almost three years later, the legal battle over the Herzog Collection is still ongoing. Here is an update, in chronological order, of the main arguments made and decisions issued in the case between 2016 and mid-February 2019.

Parties

Plaintiffs are descendants of Baron Herzog, a Jewish Hungarian art collector who had assembled a large art collection ("Herzog Collection") before his death in 1934. Defendants are the Republic of Hungary, the Hungarian National Gallery, the Budapest Museum of Fine Arts, the Museum of Applied Arts and the Budapest University of Technology and Economics.

Plaintiffs' Allegations

During World War II, Hungary and Nazi Germany seized the Herzog Collection. After the War, Defendants retained some of the artworks, agreeing to return them upon request. In 2010, Plaintiffs sued in the D.C. District Court for the return of forty-four artworks from the Herzog Collection, arguing that Defendants breached post-War bailment agreements by refusing to return the artworks in 2008.

2011 – March 2016[2]

In 2011, the D.C. District Court held that it has jurisdiction under the "expropriation" exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(3).[3] In 2013, the D.C. Court of Appeals declined to rule on the applicability of the "expropriation" exception, holding instead that Plaintiffs' "claims fell comfortably within the FSIA's commercial activity exception" in § 1605(a)(2).[4]

In March 2016, the D.C. District Court held that the "commercial activity" exception did ***not*** apply because (1) Defendants' limited commercial activities (*e.g*., solicitation of tourists) ***in the U.S.*** were not "sufficiently tethered" to the "gravamen" of Plaintiffs' claims and (2) the bailment agreement did not "necessarily contemplate the U.S. as the place of performance at the time of contract formation."[5] Based on "the extensive record of evidence obtained during discovery,"[6] the D.C. District Court ruled that it has jurisdiction under the "expropriation" exception over Plaintiffs' claims for 42 out of the 44 artworks at issue.

April 2016 – Oct. 2017: D.C. Circuit Court of Appeals

In April 2016, Defendants appealed. In June 2017, the D.C. Circuit Court affirmed the lower court's decision in part, dismissing the case in part, and remanding the case for further proceedings.[7] Judge Tatel authored the opinion of the court, holding as follows:

1. The claims to the artworks that were never returned to the heirs satisfy the FSIA's expropriation exception (affirming the district court decision on that issue).
2. The case is remanded to the district court with instructions to:
   - Determine whether the claim to recover artworks that had been returned to the family can proceed under the FSIA's expropriation exception, in light of, *inter alia*, a 1973 U.S.-Hungary claims settlement agreement.
   - Dismiss the Republic of Hungary as immune from suit under the FSIA.
   - Grant leave to the heirs to amend their complaint in light of the newly enacted Holocaust Expropriated Art Recovery Act of 2016[8] – the so-called "HEAR Act" – which extends limitations periods for certain claims.
3. The appeal regarding the exhaustion of local remedies argument is dismissed because that issue was not covered by the collateral order doctrine – the source of the court's appellate jurisdiction.

Judge Randolph dissented from part II.B.2 of the court's opinion, where the majority analyzed the commercial-activity nexus requirement in the FSIA's "expropriation" exception (§ 1605(a)(3)). Subsection (a)(3) contains two clauses requiring a nexus to the property taken in violation of international law:

> (a) A ***foreign state*** shall not be immune from the jurisdiction of courts of the United States . . . in any case . . .
>
> (3) in which rights in property taken in violation of international law are in issue and
>
> that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States ***by the foreign state***;

> or that property or any property exchanged for such 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; . . .[9]

The majority concluded that, with respect to the applicability of the second clause to foreign states, it was bound by the D.C. Circuit's 2016 decision in *Simon I*,[10] and distinguished the D.C. Circuit's 2008 *Chabad*[11] case. In *De Csepel*, the majority emphasized that, even if it were not bound by *Simon I*, it "would hold that a foreign state retains its immunity unless the first clause of the commercial-activity nexus requirement is met" because the FSIA carefully distinguishes between foreign states and agencies/instrumentalities.[12] In his dissent, Judge Randolph argued that (1) *Simon I* and *Chabad* cannot be reconciled, (2) *Simon I* was decided incorrectly, and (3) the *Chabad* holding – that a foreign state is covered by both clauses – is controlling.[13] In July 2017, the heirs petitioned the Circuit Court for rehearing and rehearing *en banc*, but both remedies were denied in October 2017.

2018 – January 2019: U.S. Supreme Court

In February 2018, the heirs petitioned the Supreme Court for a writ of certiorari. The question presented was:

> Whether a foreign state itself is immune from suit in the United States in a case in which rights in property taken in violation of international law are in issue, the property is located outside the United States, the property is owned or operated by an agency or instrumentality of the foreign state, and that agency or instrumentality is engaged in commercial activity in the United States.

The Court invited the Solicitor General to file a brief expressing the views of the United States. In response, the United States as *amicus curiae* argued that the circuit court's decision was correct and that the Supreme Court's review was not warranted. On January 7, 2019, the Supreme Court denied the petition for cert.[14]

Oct. 2017 – February 2019: D.C. District Court

In October 2017, the case was back in the D.C. District Court. In December 2017, the heirs filed an Amended Complaint against all original defendants, including the Republic of Hungary, as well as a new defendant, Magyar Nemzeti Vagyonkezelö Zrt. ("MNV"). According to the Amended Complaint, MNV "is a private limited company, organized under Hungarian law solely owned by Hungary, that exercises ownership rights over, and operates and manages, state assets."[15] The heirs based their strategy to keep Hungary in the case and to add MNV "on a new principal-agent theory of jurisdiction not previously asserted."[16]

In February 2018, Defendants moved to dismiss the case for lack of subject matter jurisdiction and failure to state a claim, based on, *inter alia*, foreign sovereign immunity, the Act of State Doctrine, principles of International Comity, and the applicable statute of limitations. Upon the heirs' motion, the district court proceedings were stayed between August 2018 and January 2019, pending resolution of the heirs' cert. petition. In February 2019, the district court ordered supplemental briefing regarding the D.C. Circuit's 2018 decisions in *Simon II* and *Philipp*. Briefs and reply briefs are due February 28 and March 11, 2019, respectively.

In *Simon II*,[17] the D.C. Circuit had held that (A) the FSIA did not require the heirs to exhaust domestic remedies before commencing a case in the U.S., (B) the district court abused its discretion in dismissing the case on the basis of *forum non conveniens* (Judge Katsas dissented on this point), and (C) the case would not be reassigned on remand, as the district judge had acted impartially.

In *Philipp*,[18] the D.C. Circuit had held that (1) the district court has subject matter jurisdiction under the FSIA's "expropriation" exception over the defendant instrumentality, but ***not*** over the foreign state, (2) the plaintiff were not required to exhaust domestic remedies before commencing an action in U.S. courts, and (3) the state law claims (replevin, conversion, unjust enrichment, bailment) were not preempted by the 1998 Washington Principles[19] or the 2009 Terezin Declaration.[20]

No End in Sight

This Odyssey will likely not be over anytime soon. In July 2019, the case will be nine years old. Unless the parties settle, the litigation will probably go on for several more years. ♦

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1 Birgit Kurtz is an attorney in New York City.
2 *See* ABA SIL Art & Cultural Heritage Law Committee Newsletter (Autumn 2016) at 3, for a more detailed discussion of the first six years of the litigation.
3 *De Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113 (D.D.C. 2011).
4 *De Csepel v. Republic of Hungary*, 714 F.3d 591 (D.C. Cir. 2013).
5 *De Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143 (D.D.C. 2016).
6 *Id*. at 155.
7 *De Csepel v. Republic of Hungary*, 859 F.3d 1094 (D.C. Cir. 2017).
8 Pub. L. 114-308, 130 Stat. 1524, codified at 22 U.S.C. § 1621 note.
9 28 U.S.C. § 1605(a)(3) (emphasis added).
10 *Simon v. Republic of Hungary*, 812 F.3d 127, 146-48 (D.C. Cir. 2016) ("*Simon I*") (holding that the second clause applied ***only*** to agencies and instrumentalities).
11 *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008) (holding that the second clause is relevant to the sovereign immunity of ***both*** foreign states and agencies/instrumentalities).
12 *De Csepel*, 859 F.3d at 1107-08.
13 *Id*. at 1110-14.
14 *De Csepel v. Republic of Hungary*, No. 17 -1165, 2019 WL 113526 (Jan. 7, 2019).
15 *De Csepel v. Hungary*, No. 1:10-cv-01261 (ESH), Am. Compl., ¶ 3 (D.D.C. Dec. 18, 2017) (DKT# 141).
16 *De Csepel v. Hungary*, No. 1:10-cv-01261 (ESH), Plaintiffs' Memo of Points & Auth. in Opp. to Defs' Motion to Dismiss, at 2 (D.D.C. Mar. 23, 2018) (DKT#153).
17 *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018) ("*Simon II*"), *reh'g en banc denied* (Feb. 15, 2019).
18 *Philipp v. Fed. Rep. of Germany*, 894 F.3d. 406 (D.C. Cir. 2018).
19 The Washington Conference Principles on Nazi-Confiscated Art are available at: https://www.state.gov/p/eur/rt/hlcst/270431.htm
20 The Terezin Declaration is available at: https://www.state.gov/p/eur/rls/or/126162.htm

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