

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NO. 11-8031

DAVID L. de CSEPEL, et al.,

Plaintiffs-Respondents,

v.

REPUBLIC OF HUNGARY, et al.,

Defendants-Petitioners.

On Defendants' Petition for Permission to Appeal from an
Order of the United States District Court for the District of Columbia
in Docket No. 10-cv-01261 (ESH)

**PETITIONERS REPUBLIC OF HUNGARY, THE HUNGARIAN
NATIONAL GALLERY, THE MUSEUM OF FINE ARTS, THE MUSEUM
OF APPLIED ARTS, AND THE BUDAPEST UNIVERSITY OF
TECHNOLOGY AND ECONOMICS' REPLY IN SUPPORT OF PETITION
FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b) AND
ANSWER IN OPPOSITION TO PLAINTIFFS' ALTERNATIVE CROSS-
PETITION FOR PERMISSION TO APPEAL PURSUANT TO
28 U.S.C. § 1292(b)**

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* Authorities upon which we chiefly rely are marked with asterisks.

Defendants Republic of Hungary, The Hungarian National Gallery, The Museum of Fine Arts, The Museum of Applied Arts, and The Budapest University of Technology and Economics (collectively “Hungary”), by and through their attorneys, hereby respectfully submit: (1) this Reply Memorandum in support of their Petition for Permission to Appeal five issues arising from the district court’s September 1, 2011, Memorandum Opinion and Order [Dkt. Nos. 33-34] (together, the “Order”) (certified in the district court’s Amended Order of November 30, 2011 [Dkt. No. 51] (“Amended Order”)) which granted, in part, and denied in part, Hungary’s Motion to Dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6); and (2) Answer in opposition to Plaintiffs’ Alternative Cross-Petition.

INTRODUCTION

On December 9, 2011, Hungary filed a Petition for permission to appeal, pursuant to 28 U.S.C. § 1292(b), the following five issues arising from the district court’s Order:

1. Whether the doctrine of forum non conveniens warrants dismissal;
2. Whether the District of Columbia’s statute of limitations bars claims relating to the remaining artworks;
3. Whether this case presents non-justiciable political questions;
4. Whether Plaintiffs’ bailment claim states a viable cause of action; and

5. Whether the Court should apply the act of state doctrine to bar Plaintiffs' claims.

As Hungary demonstrated in its Petition, these five issues satisfy the requirements set forth in 28 U.S.C. § 1292(b) as: (1) each issue involves a controlling question of law; (2) a substantial ground for difference of opinion exists as to this Court's ruling on each issue; and (3) an immediate appeal would materially advance litigation.

Plaintiffs contend that the Court should reject Hungary's Petition on the basis that review "will only serve to complicate and delay" Hungary's first appeal, docketed as No. 11-7096 and filed pursuant to 28 U.S.C. § 1291. Opp. to Pet. at 2. Prompt review of these dispositive issues, however, will cause little delay to the litigation as the action is stayed in the district court for the duration of Hungary's appeal in No. 11-7096. Further, the appellate court's review of the issues set forth above is both efficient and prudent as resolution in Hungary's favor of any of the issues advanced here will dispose of the case *in its entirety*. Finally, interlocutory review will allow the Court to save judicial resources by avoiding a piecemeal review of Hungary's arguments.

In light of the importance of the issues present in the Petition, the benefit to the district court of guidance from this Court, and the potential time and expenses saved by having these case-dispositive issues addressed at this stage of the

proceedings, Hungary respectfully asserts that the Court should grant the Petition.

I. SUBSTANTIAL GROUNDS FOR DIFFERENCE OF OPINION EXIST REGARDING EACH ISSUE RAISED IN THE PETITION

Plaintiffs cannot reasonably dispute that the five issues raised by Hungary involve controlling questions of law. Nor can Plaintiffs assert that review of these issues would not materially advance litigation, as reversal of the Court's ruling on *any* of the five issues would completely dispose of the case. Rather, Plaintiffs contend that this Court should deny Hungary's Petition because there are no substantial grounds for difference of opinion concerning any of the rulings. Opp. to Pet. at 3-16. For the reasons set forth below, and in Hungary's Petition, there are substantial grounds for difference of opinion concerning *each* of the district court's rulings on the issues raised by Hungary in its Petition.

A. *Forum Non Conveniens*

Hungary recognizes that a court's findings are entitled to deference "where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). Hungary respectfully asserts, however, that the district court did not properly balance the relevant factors. Recognizing the validity of the judicial system in Hungary, and the due process accorded Martha Nierenberg, Plaintiff de Csepel's aunt, the district court recognized that Hungary provides an adequate forum for this dispute. The district court disregarded the myriad facts favoring

Hungary as a forum, however, and found that the United States is the proper forum to resolve this dispute.¹ *See* Pet. at 6.

More importantly, Hungary asserts that the Court neglected to analyze the remaining viable claims when it weighed the public and private factors. With most, if not all, of David de Csepel's direct claims dismissed from the lawsuit, any connection between Hungary, the Italian Plaintiffs, and this Court is extremely attenuated. Because there is a substantial ground for difference of opinion as to whether the relevant factors weigh in favor of a U.S. forum, *see, e.g., Irwin v. WWF, Inc.*, 448 F. Supp. 2d 29, 35-36 (D.D.C. 2006); *BPA Int'l, Inc. v. Kingdom of Sweden*, 281 F. Supp. 2d 73, 86 (D.D.C. 2003); *Croesus EMTR Master Fund L.P. v. Federative Republic of Brazil*, 212 F. Supp. 2d 30, 39 (D.D.C. 2002); the Court should grant Hungary's Petition seeking permission to appeal this issue.

B. Statute of Limitations

Hungary asserts that a substantial ground for difference of opinion exists as to whether the statute of limitations that governs Plaintiffs' claims should be tolled pending the Nierenberg litigation.² Despite Plaintiffs' assertions to the contrary,

¹ If a Hungarian citizen had a claim against the National Gallery of Art in Washington, D.C., it is reasonable to assume that the U.S. Government would argue that the United States, and not Hungary, was the proper forum.

² No court has recognized or adopted a special federal limitations period governing Holocaust claims. No court has held that the Washington Principles or the Terezin Declaration preempt an otherwise applicable statute of limitation. Rather, courts have consistently applied state statutes of limitations. *See Dunbar v. Seger-*

no case law mandates that tolling is appropriate or necessary in this action. The Court has recognized that a “court’s equitable power to toll the statute of limitations will be exercised only in extraordinary and carefully circumscribed instances.” *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 579-80 (D.C. Cir. 1998) (quoting *Mondy v. Sec’y of the Army*, 845 F.2d 1051, 1057 (D.C. Cir. 1988)); see also *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990).

Plaintiffs fail to offer evidence of any “extraordinary circumstances” sufficient to warrant equitable tolling of claims that arose decades ago.³ Moreover, the cases cited by Plaintiffs and the Court involve tolling in administrative scenarios, where exhaustion was a prerequisite. Even if, however, equitable tolling was to apply in the present matter, such tolling should apply only to claims for the eleven artworks that were the subject of the Nierenberg lawsuit. The Complaint offers no justification for the Italian Plaintiffs’ election not to claim or litigate the other artworks in the Complaint.

Because Plaintiffs offer no justification for equitably tolling the Italian Plaintiffs’ (and the unidentified heirs’) claims, and there is no authority to support

Thomschitz, 615 F.3d 574, 576-77 (5th Cir. 2010); *Von Saher v. Norton Simon Mus. of Art at Pasadena*, 592 F.3d 954, 967-70 (9th Cir. 2008) (as amended); *Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1, 14 (1st Cir. 2010).

³ That Hungary was a communist country until 1989 does not toll the Plaintiffs’ claims. See *Hoang Van Tu v. Koster*, 364 F.3d 1196, 1199-1200 (10th Cir. 2004); *Dayton v. Czechoslovak Socialist Republic*, 672 F. Supp. 7, 13 (D.D.C. 1986).

application of the tolling theory to the facts here, there is a substantial ground for difference of opinion as to whether *any* of Plaintiffs' claims should be equitably tolled.⁴

C. *Political Question*

Hungary contends that Plaintiffs' claims are non-justiciable political questions governed by the Treaty of Peace with Hungary, Feb. 10, 1947, 61 Stat. 2109 ("1947 Treaty") and the Agreement Between the Government of the United

⁴ Plaintiffs contend that United States participation in international conferences that produced the Washington Principles and the Terezin Declaration provide "further support" for the application of equitable tolling and "provide that Holocaust-era looted art claims should be resolved on their merits." Opp. to Pet. at 9. Plaintiffs are mistaken. As an initial matter, the principles promoted in these documents are "non-binding." Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), *available at* <http://www.state.gov/p/eur/rt/hlcst/122038.htm>; Prague Holocaust Era Assets Conference: Terezin Declaration (June 30, 2009) *available at* <http://www.state.gov/p/eur/rls/or/126162.htm>.

Moreover, these principles promote the *negotiation* of claims. As noted recently by the U.S. Solicitor General, it is

United States policy to support both the just and fair resolution of claims to Nazi-confiscated art on the merits and the return of such art to its rightful owner. *But that policy does not support relitigation of all art claims in U.S. courts.* Neither the Washington Principles nor the Terezin Declaration takes an explicit position in favor of or against the litigation of claims to Nazi-confiscated art. Rather, they encourage resort to alternative dispute resolution, so that such claims may be resolved as justly, fairly, and expeditiously as possible.

Reply at 14 (quoting Brief of United States as Amicus Curiae Supporting Respondents in *Von Saher v. Norton Simon Museum of Art*, (09-1254) at <http://www.justice.gov/osg/briefs/2010/2pet/6invt/2009-1254.pet.ami.inv.pdf> (noting that participation in the Washington Principles is part of the United States' "post-war restitution policy") (emphasis added)).

States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims, March 6, 1973, 24 U.S.T. 522, T.I.A.S. 7569, 938 U.N.T.S. 167 ("1973 Agreement") as the 1947 Treaty "settle[d] questions still outstanding" between Hungary and the United States, and the 1973 Agreement "settled and discharged" all claims by U.S. Nationals against Hungary and its nationals.⁵

This action, which clearly involves the resolution of Holocaust-era compensation and restitution claims, ventures into the exclusive provenance of the Executive. Despite Plaintiffs' assertions to the contrary, Opp. to Pet. at 12, it is well-settled that resolution of Holocaust-era compensation claims is a matter "well within the Executive's responsibility for foreign affairs." *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003); see also *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939, 945 (N.D. Cal. 2000), *aff'd*, *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003); *Kelberine v. Societe Internationale*, 363 F. 2d 989, 991-92 (D.C. Cir. 1965). Because resolution of Plaintiffs' claims would require this Court to take the prohibited action of "review[ing] acts of restitution made by [a] foreign government[]," *Von Saher v. Norton Simon*

⁵ The district court did not analyze whether the 1947 Treaty settled and extinguished Plaintiffs' claims. Rather, the district court focused solely on whether the 1973 Agreement settled and extinguished Plaintiffs' claims. This Court should grant Hungary's Petition to answer whether the 1947 Treaty renders Plaintiffs' claims non-justiciable.

Museum of Art, 592 F.3d 954, 967 (9th Cir. 2010), thus implicating the Executive's foreign affairs powers, see *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), substantial grounds exist for a difference of opinion as to whether Plaintiffs' claims present non-justiciable political questions.⁶

D. Bailment

Hungary contends that substantial grounds exist for a difference of opinion as to whether Plaintiffs' bailment claim is viable. Aside from the fact that the cause of action is nebulous and poorly defined, the claim fails on the merits. The Complaint offers no evidence that Hungary entered into a bailment contract (express or implied) with Plaintiffs or their predecessors regarding any of the

⁶ The U.S. government has a clear policy regarding the resolution of Holocaust-era claims. Shortly after World War II, U.S. policy mandated restitution of looted assets to governments, not to individuals.

The question of restoration to individual owners is a matter for these governments to handle in whatever way they see fit. The original owners may have received part payment for property taken from them under duress and the governments in question may wish to make adjustments for this circumstance in returning the property. In some cases it may be impossible to locate the original owners or their heirs and the governments involved will have to decide what should be done with the property or proceeds therefrom.

Plunder and Restitution: The U.S. And Holocaust Victims' Assets; Findings and Recommendations of the Presidential Advisory Commission on Holocaust Assets in the United States and Staff Report, SR-140 (December 2000, Washington, D.C.) (emphasis added).

More recent U.S. policy promotes the negotiation, rather than litigation, of claims. See Brief of United States as Amicus Curiae Supporting Respondents in *Von Saher v. Norton Simon Museum of Art*, (09-1254).

artwork at issue in this case. Contrary to the district court's finding, there is no evidence offered by Plaintiffs to show that Hungary recognizes any ownership rights by the Plaintiffs (or their predecessors).

The Complaint itself predicates the bailment claim on Article 27 of the 1947 Treaty, stating that the "1947 Peace Treaty among Hungary and the Allies confirmed that Hungary was to act solely as a custodian or sole trustee of looted or heirless property . . ." Complaint ¶ 69. The 1947 Treaty, however, created a relationship between Hungary and the Allies, not between Hungary and the Plaintiffs; nothing in the 1947 Treaty itself can be read to convert a failure to adequately comply with Article 27 into a bailment with a private cause of action for individuals. Moreover, if Hungary has not fulfilled its obligations under Article 27, Article 40 of the 1947 Treaty contains specific directions for resolving such disputes. *See* 1947 Treaty, art. 40; Interpretation of Peace Treaties, Advisory Opinion, 1950 I.C.J. 65 (May 30).

Because there is substantial ground for a difference of opinion whether Plaintiffs' Complaint contains a cognizable and viable cause of action for a bailment, Hungary requests that the Court grant the Petition and review this issue.

E. Act of State

As noted in its Motion, Hungary's alleged taking, not the alleged bailment, is the sovereign act at issue here – this is the act for which an exception to the

Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. § 1602, *et seq.*, would strip Hungary of its presumptive sovereign immunity. It is not disputed that such an act is sovereign in nature – such a taking could not have been accomplished by a private actor. Citing *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) and *Agudas Chasidei Chabad v. Russian Fed’n*, 466 F. Supp. 2d 6 (D.D.C. 2006), the district court found, however, that because the taking is attributed in the Complaint to Nazi Germany and/or the World War II-era Hungarian government, the act of state doctrine should not apply. These cases are inapposite because they involved a government that was wholly rejected or because the alleged taking took place in a foreign country. *See Bodner*, 114 F. Supp. 2d at 130; *Agudas Chasidei Chabad*, 466 F. Supp. 2d at 26.

Because “[t]he act of state doctrine ‘precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory,’” *World Wide Minerals v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)), and no case law is directly applicable to the facts of this case, Hungary respectfully asserts that there is a substantial ground for difference of opinion as to the propriety of the district court’s refusal to apply the act of state doctrine.

II. INTERLOCUTORY REVIEW OF THE DISTRICT COURT'S INTERNATIONAL COMITY RULING IS NOT AUTHORIZED BY 28 U.S.C. § 1292(b)

Plaintiffs oppose Hungary's Petition, but request that if this Court grants review of one or more of the issues identified in Hungary's Petition, the Court should review the district court's comity finding. Opp. to Pet. at 16-20. The Court should decline the invitation.

The district court correctly held that principles of international comity counsel against re-litigation of claims resolved fully in a foreign court. Because Plaintiffs have not asserted that there was not an "opportunity for a full and fair trial," *Hilton v. Guyot*, 159 U.S. 113 (1895), in Hungary nor offered any other viable reason why this Court should not accord full effect to the Hungarian Court's decision, there is no basis to disturb the district court's sound decision.

As discussed above, this Court may elect to review a non-final order where the district court judge has found that: (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion concerning the ruling exists; and (3) an immediate appeal would materially advance the litigation. See 28 U.S.C. § 1292(b); *APCC Servs., Inc., v. Sprint Commc'ns. Co.*, 297 F. Supp. 2d 90, 95 (D.D.C. 2003). The issue raised in Plaintiffs' Cross-Petition cannot meet the standard set forth in Section 1292(b).

The district court's international comity ruling does not involve a controlling question of law. *Id.* at 95-96. The district court's detailed analysis of the substantial grounds for difference of opinion regarding the five issues raised by Hungary did not extend to the court's international comity finding. In its Amended Order, the district court recognized that reversal of any of the issues identified by the parties would result in dismissal of the Complaint and the termination of litigation, with the notable exception of the "international comity question" raised by Plaintiffs. Amended Order at 4. Further, Plaintiffs fail to demonstrate that substantial grounds for difference of opinion on the ruling exist, or that reversal would materially advance the litigation. *See APCC Servs., Inc.*, 297 F. Supp. 2d at 95-96.

Plaintiffs' challenge to the legitimacy of the Hungarian Court's decision is predicated solely on the final judgment. After more than eight years of litigation – litigation in which Martha Nierenberg was represented by counsel and afforded due process – the ownership claims were rejected. That Plaintiffs do not like the results of that lengthy litigation is not a basis for rejecting (or ignoring) the long-established principles of comity.

Because Plaintiffs seek review of a non-dispositive issue: (1) that does not involve a controlling question of law; (2) that does not involve a substantial ground

for difference of opinion concerning the Court's ruling; and (3) that would not materially advance the litigation, this Court should deny Plaintiffs' Cross-Petition.

CONCLUSION

For the foregoing reasons, Hungary respectfully requests that the Court grant its Petition for permission to appeal pursuant to U.S.C. § 1292(b). Because there is no legal basis under 28 U.S.C. § 1292(b) to review the district court's finding that principles of international comity preclude re-litigation of the eleven artworks at issue in the Nierenberg lawsuit, Hungary respectfully requests that this Court deny Plaintiffs' Alternative Cross-Petition.

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Respectfully submitted,

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