

**CLAUDE CASSIRER v KINGDOM OF SPAIN: THE US FOREIGN
SOVEREIGN IMMUNITY ACT AND ITS APPLICATION TO NAZI-
EXPROPRIATED WORKS OF ART**

By

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In the case of *Claude Cassirer v Kingdom of Spain et al.*¹ the United States District Court for the Central District of California was asked to consider the application of the Foreign Sovereign Immunity Act (FSIA) 28 U.S.C. to works of art expropriated by the Nazis in the course of World War II. The case follows on from that of *Republic of Austria v Altmann*² which concerned six paintings by Gustav Klimt in the possession of the Austrian Gallery and which had been seized by the Nazis and expropriated by the Austrian Government after World War II. In *Altmann* the US Supreme Court was asked to consider the application of the exception in Section 1605(a)(3) of the FSIA which exempts from immunity “rights in property taken in violation of international law”. The Court held *inter alia* that the FSIA applied to conduct that occurred prior to the FSIA’s enactment in 1976 and even prior to the United State’s adoption in 1952 of the so-called “restrictive theory” of sovereign immunity.

In *Cassirer* the plaintiff, the grandson of Lilly Cassirer Neubauer, sought to recover from the Kingdom of Spain and the Thyssen-Bornemisza Collection Foundation (the T-B Foundation), a painting by Camille Pissaro (the Painting) that the Nazis extorted from his grandmother in 1939 as a condition of issuing her an exit visa. After World War II the Painting changed hands several times, ultimately ending up in the hands of Baron Thyssen-Bornemisza, one of the world’s foremost art collectors. In 1988 the Baron loaned his collection, including the Pissaro, to Spain. Spain paid the Baron \$50 million for a ten-year lease of the collection but in 1993 paid an additional \$327 million to enable the T-B Foundation to purchase the entire collection.

The plaintiff claimed that he first learned in 2000 that the T-B Foundation was in possession of the Painting, which he contended was the first information he had regarding the whereabouts of the Painting since it was taken in 1939. In 2001 Cassirer petitioned Spain’s then Minister of Education, Culture and Sports for the Painting’s return to himself claiming to be the rightful owner. This was refused. Subsequently five United States Congressmen requested the Minister to return the Painting. When this was again refused the plaintiff filed an action in the Court seeking the Painting’s return and a number of other remedies. The plaintiff had never sought to recover the Painting through judicial proceedings in Spain. The case before the District Court concerned at this stage solely the question whether the Court could assert jurisdiction over the case.

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¹ Case No. CV 05-3459-GAF (CTx) decision dated August 30 2006

² 541 US ____ (2004)

The principal issue before the Court was whether the Court could properly assert jurisdiction under the exception in Section 1605(a)(3) of the FSIA for cases involving property expropriated in violation of international law. Sovereign States are normally immune from suit under FSIA unless the lawsuit falls within one of the statutorily created exceptions. The FSIA in Section 1605(a)(3) provides that a foreign state or its instrumentality is not immune from suit in any case:

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 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 defendants moved to dismiss the action on a number of procedural grounds, none of which were upheld by the Court. For example Spain contended that there was no “case or controversy” and the dispute accordingly failed to meet the minimum requirement for the exercise of federal jurisdiction because Spain did not cause the plaintiff any injury that is “fairly traceable” to its actions. This raised the question whether the Court could properly entertain an action to force Spain to disgorge the Painting even though Spain was not involved in the illegal expropriation. On that question the Court pointed out that it had already decided on the issue whether the phrase “taken in violation of international law” limited the Court’s exercise of jurisdiction to sovereigns that had been involved in the initial taking and had concluded that on the wording of the statute there was no such limitation.

On the question whether Section 1605 (a)(3) was applicable, the issues that the Court had to decide were:

- i. Was the Painting taken in violation of international law?
- ii. Was the Painting owned or operated by an agency or instrumentality of Spain (the T-B Foundation)?
- iii. Was that agency or instrumentality engaged in commercial activity in the United States?

Violation of international law

On the question of violation of international law, Spain raised a number of preliminary issues. The first was that there was no violation of international law since the taking of the Painting was not by a sovereign. In fact a Munich art dealer named Jacob Scheidwimmer allegedly demanded the Painting from Lilly Cassirer (the original owner) who paid her the sum of \$360 at 1939 exchange rates, which sum had to be paid into a blocked bank account. Spain argued that Scheidwimmer was not an agent of the German Government and that a “sovereign” did not take the Painting. The Court disagreed. While Spain was correct that the term “taken” clearly referred to acts of a sovereign, not a private enterprise, that deprive a plaintiff of property without compensation, in this case the plaintiff had alleged that Scheidwimmer was an agent of the controlling Nazi party and had provided expert compelling evidence to the effect that as a member of the Nazi party he implemented state policies and could be viewed as an agent of the state. On the basis of this evidence the Court concluded that the taking of Lilly Cassirer’s painting was indeed by a sovereign.

The second argument was that even if Scheidwimmer was an agent of Germany in taking the Painting, the taking was not in violation of international law since Lilly Cassirer was a German national and such taking did not violate international law. The Court agreed that expropriation by a sovereign state of the property of its own nationals did not violate international law. However, the court accepted the evidence of the plaintiff that she was not a German citizen at the time of the taking of the Painting since according to German citizenship laws persons of Jewish origin could not be German citizens. Accordingly, Ms Cassirer's alleged German "citizenship" did not preclude the application of the expropriation exception.

It is a well-established rule of international law that where a State presents a claim against another State for a violation of international law committed against a citizen of the claimant State then the claim can normally only be admitted where all local remedies have been exhausted. Spain accordingly argued that to take advantage of the FSIA exception to immunity the plaintiff must exhaust his judicial remedies in the foreign State where the property is situated. (As noted above the plaintiff never sought to recover the painting through judicial proceedings in Spain).³ The Court held on the plain wording of Section 1605(a)(3) that there was no exhaustion of foreign remedies requirement. The Court contrasted this provision with that of Section 1605(a)(7)(B)(i) which requires that any claim under that section (claims against states designated as sponsors of terrorism for death or personal injury) must first be pursued through arbitration. This absence of a similar exhaustion requirement in Section 1605(a)(3) strongly suggested that Congress did not intend to include an exhaustion requirement in that section.

As to the substantive issue, namely whether the taking violated international law, the Court drew upon the US Restatement of Foreign Relations Law which stated that the taking by the state of the property of a national of another state violates international law if it is not for a public purpose, it is discriminatory, or is not accompanied by provision for just compensation. In this case the Court concluded that the taking was discriminatory and without just compensation. Under the German laws applicable at the time persons of Jewish origin were deprived of their citizenship and their property was forfeit to the State. The \$360 provided for the Painting now worth millions of dollars was not just compensation, particularly when viewed with the claim that Ms Cassirer could never withdraw the funds since they had to be paid into a blocked bank account, thereby ensuring that she received nothing for the Painting. In any event the Court did not consider that at the jurisdictional stage at which the present case was, it had to decide whether the taking actually violated international law. As long as the "claim is substantial and non-frivolous it provides a sufficient basis for the exercise of our jurisdiction".

Agency or instrumentality

The FSIA defines an "agency or instrumentality" of a foreign state as any entity:

- 1) which is a separate legal person, corporate or otherwise, and

³ Spain sought to rely on a *dicta* by Justice Breyer in a concurring opinion in *Altmann* that an exhaustion requirement "may exist". However, the majority decision, which stated the rule in the case, included no holding that the statute required exhaustion.

- 2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
- 3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

Spain argued (rather half-heartedly) that the T-B Foundation was not an agency or instrumentality of the Spanish Government. The Court found as a matter of fact that:

- a) Spain arranged and was a party to the contract for the original loan of the collection that included the Painting and Spain paid the \$50 million lease price for the collection;
- b) Spain later paid the \$327 million to fund the purchase of the entire collection;
- c) Spain provided the facility, the Villhermosa Palace, to be used as the museum to house the collection;
- d) Spain paid the cost of refurbishing that facility;
- e) Two-thirds of the Foundation's directors must be representatives of Spain, appointed by the Spanish government and freely removable by royal decree;
- f) Many of Spain's government ministers serve as directors on the Foundation's board.

In view of these considerations the Court had no difficulty in concluding that the property in dispute was owned by an "agency or instrumentality" of Spain.

Engaged in commercial activity in the United States

The third question the Court had to consider was whether Spain and/or the T-B Foundation was engaged in "a commercial activity in the United States". The statute defines "commercial activity" as:

"either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose".

Referring to case law the Court stated that regardless of motive, an activity is "commercial" if it is the type through which a private party engages in trade or commerce. Thus the establishment of a trade tariff would be sovereign since because private parties cannot regulate foreign trade, but contracting to purchase boots for an army would be "commercial activity" because it is the type of conduct in which private parties may engage.⁴

The Court noted that that the exception applies not only to continuous and systematic commercial activity but also to a particular commercial transaction or act. Nor is it limited to commercial activities that occur entirely within the United States. It includes a commercial transaction or act having a "substantial contact" with the

⁴ See *Altmann*, 142F.Supp.2d at 1204.

United States. In fact the threshold for “substantial contact” is not a high one, as seen by the *Siderman* case cited by the Court.⁵ In that case the plaintiffs, a Jewish family residing in Argentina in the 1970s, were persecuted, tortured, harassed, and forced to leave the country by an anti-semitic military junta that had seized control of the country. Included among their family business was the Hotel Gran Corona in Tucuman, Argentina. The Argentine dictatorship altered the official records to show the family’s land holdings as 127 acres of land instead of 127,000 acres and ultimately seized the family business, including the Hotel Gran Corona, through sham judicial proceedings. Some time later a member of the family, a US citizen, brought proceedings in a federal court against Argentina asserting that the expropriation exception applied. The court noted that the Hotel Gran Corona had solicited and entertained American guests at the hotel, and accepted their credit cards and travellers cheques for the costs of lodging. This was enough for jurisdictional purposes to show that Argentina was engaged in a “commercial activity” in the United States.

Similar reasoning was applied by the court in the *Altmann* case where the court stated:

“Because Appellants profit from the Klimt paintings in the United States, by authoring, promoting, and distributing books and other publications exploiting these very paintings, these actions are sufficient to constitute “commercial activity” for the purpose of satisfying the FSIA, as well as the predicates for personal jurisdiction”.

The court noted that the key commercial behaviour of the Austrian Gallery was not the operation of the museum exhibition in Austria, but its publication and marketing of that exhibition and its books (such as *Klimt’s Women*) in the United States.⁶

Turning now to the activities of the T-B Foundation, the Court found that the Foundation had engaged in a number of activities that fell under the heading of “commercial”. First, it had made a number of purchases and sales in the United States. As a purchaser it had entered into media licensing agreements with United States museums: it entered into transactions with US businesses to purchase posters, post cards and related materials: the Foundation had used its credit card to purchase books from Amazon.com and book stores in New York and California.⁷ As a seller the Foundation sold to United States residents and businesses posters and books and licensed reproductions of images to various United States businesses. Included among the sales was a reproduction of the Painting purchased by a resident of the Central District of California and charged to her American Express credit card.

Other commercial activities included the hiring of a lecturer from the Institute of Fine Arts in New York to lecture at the Foundation’s Museum in Spain, the granting by the Foundation permission to make a film about the Museum and the Painting that was

⁵ *Siderman de Blake v Republic of Argentina* 965 F.2nd 699 (9th Cir.1992)

⁶ The court added that it was the activity of selling the books, rather than the appearance of particular paintings in the books, that warranted the exercise of jurisdiction. While three of the Klimt paintings were not featured in *Klimt’s Women*, which was published in English and distributed in the United States, the court found jurisdiction to exist as to the dispute over all six paintings.

⁷ Ironic examples of books purchased were, *The Lost Museum: The Nazi conspiracy to Steal the World’s Greatest Works of Art*, Abe 566 *Pisarro* (sic) and *Museum Policy and Procedure for Nazi Era Issues*.

shown on Iberia flights between the United States and Spain, marketing and commercial promotion of the Foundation in the United States, entering into loan agreements to borrow works of art from US museums or lend the Foundation's exhibits to US museums⁸, and selling advance tickets in the United States through links to third-party vendors.

In the light of the above the Court had no difficulty in establishing that the "commercial activity" element of the expropriated property exception was easily established. In this case there were countless sales to United States residents of reproductions of the Painting and hundreds of other contacts involving the purchase and sale of merchandise, some of which directly related to Pissarro and even the Painting itself. The Court noted that the term "commercial activity" in Section 1603 (c) included a broad spectrum of endeavour *from an individual commercial transaction or act* to a regular course of commercial conduct. Accordingly the Court concluded that the evidence submitted was more than sufficient to support the Plaintiff's contention that there existed a "commercial activity" for the purposes of the expropriated property exception.

The conclusion of the Court

In the light of its rulings above the Court concluded that the conditions for the application of the expropriation exception in Section 1605(a)(3) of the FSIA had been met. The Court also ruled that it had personal jurisdiction over both Defendants and that the Central District was a proper venue for a trial of the action. Accordingly the Defendants' motions for dismissal of the action on grounds of lack of jurisdiction were denied.

It should perhaps be stressed that the Court's judgement related solely to the question of *jurisdiction*. The substantive issue of who has ownership of the Painting remains to be settled in subsequent proceedings.

Comparison with English law

The question arises as to what would have been the outcome if a similar case had been brought before the English courts. The relevant UK statute is the State Immunity Act 1978. The 1978 Act in section 1(1) provides, "A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act". The Act then sets out a number of exceptions to this general rule, the most important being an exception for commercial transactions. It does not include any provision equivalent to section 1605(a)(3) of the FSIA providing for an exception to state immunity where there is an expropriation in violation of international law. However the House of Lords did have occasion recently to consider whether State immunity should extend to tortious acts (torture) in *Jones and others v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi*

⁸ In some cases a nominal fee was paid. Although these exchanges were designed to promote the international understanding and appreciation of art the Court pointed out that the purpose is not relevant in assessing commercial activity. In *Malewicz* 362F Supp. 2d at 314 the court held that the loan of paintings to museums in the United States..constituted a commercial activity since "there is nothing 'sovereign' about the act of lending art pieces, even though the pieces might belong to a sovereign".

Arabia) [2006] UKHL 26 14 June 2006. In that case the claimants issued High Court proceedings against two defendants: the Ministry of Interior of the Kingdom of Saudi Arabia ("the Kingdom") and Lieutenant Colonel Abdul Aziz, sued as servant or agent of the Kingdom. They claimed aggravated and exemplary damages for assault and battery, trespass to the person, false imprisonment and torture in the Kingdom between March and May 2001. The issue before the Court was whether the general principle of state immunity in Section 1(1) of the 1978 Act should be subject to a further exception in the case where proceedings are brought against a State for gross violations of international law, such as torture. The claimants contended that to apply the 1978 Act according to its natural meaning and tenor by upholding the Kingdom's claim to immunity for itself and the individual defendants would be incompatible with the claimants' well-established right of access to a court implied into article 6 of the European Convention on Human Rights. To recognise the claimants' Convention right, the House of Lords was accordingly asked by the claimants to interpret the 1978 Act under section 3 of the Human Rights Act 1998 in a manner which would require or permit immunity to be refused to the Kingdom and the individual defendants in respect of the torture claims, or, if that was not possible, to make a declaration of incompatibility under section 4.

The House of Lords referred to the decision of the Grand Chamber of the European Court of Human Rights in the case of *Al-Adsani v United Kingdom* (2001) 34 EHRR 273. In his opinion Lord Hoffman said:

The Grand Chamber's decision in *Al-Adsani* is very much in point, since it concerned the grant of immunity to Kuwait under the 1978 Act, which had the effect of defeating the applicant's claim in England for damages for torture allegedly inflicted upon him in Kuwait. The claimants are entitled to point out that a powerful minority of the court found a violation of the applicant's right of access to a court under article 6 of the European Convention. The majority, however, held that the grant of sovereign immunity to a state in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between states through the respect of another state's sovereignty (para 54); that the European Convention on Human Rights should so far as possible be interpreted in harmony with other rules of international law of which it formed part, including those relating to the grant of state immunity (para 55); and that some restrictions on the right of access to a court must be regarded as inherent, including those limitations generally accepted by the community of nations as part of the doctrine of state immunity (para 56). The majority were unable to discern in the international instruments, judicial authorities or other materials before the court any firm basis for concluding that, as a matter of international law, a state no longer enjoyed immunity from civil suit in the courts of another state where acts of torture were alleged (para 61). While noting the growing recognition of the overriding importance of the prohibition of torture, the majority did not find it established that there was yet acceptance in international law of the proposition that states were not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum state (para 66). It is of course true, as the claimants contend, that under section 2 of the 1998 Act this decision of the Strasbourg court is not binding on the English court. But it was affirmed in *Kalogeropoulou v Greece and Germany* (App No 50021/00) (unreported) 12

December 2002, when the applicant's complaint against Greece was held to be inadmissible, and the House would ordinarily follow such a decision unless it found the court's reasoning to be unclear or unsound, or the law had changed significantly since the date of the decision. None of these conditions, in my opinion, obtains here.⁹

It follows from the reasoning of the House of Lords in *Jones* that the general principle of state immunity in section 1(1) of the 1978 Act prevails even where the defendant state may have committed gross violations of international law, such as torture, and even though the effect of this would be to deny access to justice, thus engaging article 6 of the Human Rights Convention. *A fortiori* this would apply to other violations of international law such as the expropriation of property without payment of adequate compensation.¹⁰

A further difference between the FSIA and the State Immunity Act 1978 is the application of state immunity to agencies and instrumentalities of a foreign state (or "separate entities" in the UK Act). As noted above the FSIA defines "agencies and instrumentalities" as including a body which is a separate legal person, corporate or otherwise, and which is an organ of a foreign state or political subdivision thereof, *or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof*. The State Immunity Act is narrower. It provides in Section 14(1) that the reference to a State shall not apply to any separate entity which is distinct from that State and is capable of suing and being sued. However a separate entity is immune from the jurisdiction of the UK courts if, and only if, the proceedings relate to anything done by it in the exercise of sovereign authority and the circumstances are such that a State would have been immune (section 14(2)). The effect of this is that under the FSIA there is a presumption that State-owned or State-controlled entities enjoy immunity unless a commercial transaction is at issue, whereas under the UK Act a separate entity would not normally enjoy immunity unless acting in exercise of sovereign authority and the circumstances are such that the State would be immune. The effect of this is that an entity such as the T-B Foundation would not be entitled to claim immunity from jurisdiction in the event of any claim against the Foundation for any of its normal activities, such as exhibiting its collection, mounting special exhibitions, lending works of art to other institutions etc.

What if the T-B Foundation had not been a separate entity but an organ of the Spanish State, would the English courts have had jurisdiction to entertain a claim against the Foundation similar to that mounted by Mr Cassirer? Given that section 3(3) of the 1978 Act defines commercial transaction as including any transaction or activity into which a state enters or in which it engages *otherwise than in exercise of sovereign authority*, there can surely be little doubt that the answer must be in the affirmative.

⁹ Para.18

¹⁰ The case should perhaps be contrasted with the case of *Kuwait Airways Corporation v Iraqi Airways* [2002] UKHL 19 16 May 2002 where the issue there was not state immunity but whether an Iraqi decree transferring ownership of Kuwaiti Airways to Iraqi Airways should be recognised. In that case the House of Lords declined to give recognition to the Iraqi decree on the grounds that seizure and assimilation were flagrant violations of rules of international law, in particular of the relevant Security Council Resolutions.

As noted above, the United States Court assumed jurisdiction in the *Cassirer* case because the commercial transactions or acts had a “substantial contact” with the United States. As noted from the *Siderman* case the threshold for “substantial contact” is a low one: jurisdiction was established merely because the hotel in Argentina provided a service to United States guests and accepted payment by their credit cards. Such a basis for jurisdiction does not exist in the United Kingdom, where the rules for jurisdiction are those laid down in Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgements on civil and commercial matters and for non EU Member States under CPR 6.20 (formerly Order 11 rule 1). The 1978 Act does not affect existing principles of jurisdiction where a State is not immune: it merely lays down special rules for service out of the jurisdiction where the defendant is a State.

This analysis does not deal with the question of enforcement against the property of a State where there is no immunity from jurisdiction because of the commercial nature of a particular transaction. This merits a separate article! Suffice to mention that when it comes to enforcement the rules are far more restrictive. Under the State Immunity Act 1978 pre-judgement relief can only be granted against the assets of a foreign state where the State has given prior written consent and post-judgement relief can only be granted in case of prior consent or in respect of property in use or intended to be used for commercial purposes (section 13(4)). Section 13(5) provides for the head of a State’s diplomatic mission to certify that any property of the State is not in use or intended for use for commercial purposes. And this is to be treated as sufficient evidence of that fact unless the contrary is proved. This places a hard burden of proof on anyone seeking to enforce a judgement against State property.¹¹ Furthermore there seems to be a growing acceptance under international law that the cultural property of a state should not be subject to measures of enforcement. For example, Article 18 of the recently signed United Nations Convention on Jurisdictional Immunities of States and their Property prohibits pre-judgement measures of constraint against the property of a State. Article 19 prohibits post-judgement measures of constraint against the property of a State except, *inter alia*, in cases it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes, is in the territory of the State of the forum and has a connection with the entity against which the proceeding was directed. However, under Article 21 property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale and property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale, shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes. An English court could be invited to take the same view if faced with the prospect of enforcement against the cultural property of a foreign State.¹²

¹¹ These provisions should be contrasted with section 1610 of the FSIA where the rules on enforcement of State-owned property, both at the pre-judgement and post-judgment stages appear to be more liberal. For example, enforcement may be sought where the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law (section 1610 (a)(3)) or against the property of a State designated as a State sponsor of terrorism section 1610(a)(7)).

¹² See also Fox *The Law of State Immunity* (OUP), p. 381.