US Ninth Circuit rules in favor of Spain in a decades-long case concerning a painting looted by the Nazis

This interesting case comment has been kindly provided to the blog by ***Nicolás Zambrana-Tévar****, LLM, PhD, KIMEP University*

The United States Court of Appeals for the Ninth Circuit has found in favor of Spain as defendant in a property case spanning several decades. A panel of three judges has unanimously ruled that, applying California conflict of law rules, Spain has a stronger interest than the claimants in the application of its own domestic law, including its own rules on prescriptive acquisition of property and the statute of limitations, thus confirming the ownership of a stolen painting, now owned by a Spanish museum.

1. Background information

In 1939, Lilly Cassirer traded a Pissarro painting to the Nazis in exchange for her family´s safe passage out of Germany. In 1954, a tribunal set up by the Allied forces established that the Cassirer family were the rightful owners of the painting. However, believing that the painting had been lost during the war, the family accepted 13,000 US dollars in compensation from the German government, which would be the equivalent of 250,000 US dollars today.
After the painting was looted, it found its way into the United States and, in 1976, Baron Hans Heinrich Thyssen-Bornemisza bought it from the Hahn Gallery of New York, where the painting was publicly in display, allegedly ignoring its origin. The Museum Thyssen-Bornemisza purchased the painting from the Baron in 1993. Claude Cassirer – the grandson of Lilly Cassirer – found out that the painting was being exhibited in Madrid and commenced proceedings under the

Foreign Sovereign Immunities Act (FSIA) in 2005. The Museum is the actual defendant in the suit but it is considered an instrumentality of the Kingdom of Spain.

2. Court decisions

In 2019, a US District Judge for the Central District of California, applying Spanish law, found that court filings did not demonstrate a "willful blindness" on the part of the Museum, when it added the painting to its collection. Moreover, the judge found that it could not force Spain or the Museum to comply with the "moral commitments" of international agreements concerning the return of works of art looted by the Nazis.

In 2020, the US Court of Appeals for the Ninth Circuit found in favor of Spain, again applying Spanish law. The court ruled that, regardless of the test applied by the district judge to determine the degree of care employed by the purchaser to determine the origin of the painting, both the Baron in 1976 and the Museum in 1993, lacked actual knowledge of the theft. It is important to note that both the district judge and the court of appeals determined the application of Spanish law because they were applying federal choice of law rules.

In 2022, the US Supreme Court ruled that this case did not involve any substantive federal law issues because it basically dealt with property law. Therefore, the choice of law rules that the district judge and the court of appeals should have applied were the conflict rules of the forum state, i.e. the conflict rules of California. The Supreme Court argued that Spanish law "made everything depend on whether, at the time of acquisition, the Foundation knew the painting was stolen". On the other hand, the claimants argued that California conflict rules led to the application of California property law, in accordance with which "even a good-faith purchaser of stolen property cannot prevail against the rightful pre-theft owner." Basically, the Supreme Court said that in an FSIA case, the foreign state defendant has to be treated like a private defendant and that if the Museum had been a purely private entity, it would have had to return the painting. The case was returned to the Court of Appeals.

3. Conflict-of-law analysis

On 9 January 2024, the US Court of Appeals ruled that, even applying California choice of law rules, Spanish law was applicable. The court came to this conclusion applying the "governmental interest approach". In accordance with this approach,

the court first had to ascertain that the two laws in conflict – Spain and California law – were different. They were because the Spanish law provision that the defendant was relying on was article 1955 of the Spanish Civil Code, which provides that "Ownership of movable goods prescribes by three years of uninterrupted *bona fide* possession. Ownership of movable goods also prescribes by six years of uninterrupted possession, without any other condition". Therefore, in accordance with Spanish law "three years of uninterrupted possession in good faith" are enough for the acquisition of title whereas California law has not expressly adopted a doctrine of adverse possession for personal property – such as works of art – and, moreover, "thieves cannot pass good title to anyone, including a good faith purchaser". Besides, California law extends to six years the statute of limitations for claims involving the return of stolen property and Cassirer brought the claim only five years after it discovered the painting hanging at the Museum in Madrid.

Having determined that the laws in conflict were different, the court of appeals then examined and agreed that both jurisdictions – Spain and California – "have a legitimate interest in applying their respective laws on ownership of stolen personal property". "Spanish law assures Spanish residents that their title to personal property is protected after they have possessed the property in good faith for a set period of time, whereas California law seeks to deter theft, facilitate recovery for victims of theft, and create an expectation that a bona fide purchaser for value of movable property under a 'chain of title traceable to the thief,' … does not have title to that property." Therefore, there was a true conflict of laws, as both jurisdictions had real and legitimate interests in applying their respective law. Additionally, the court had to determine which jurisdiction's interest "would be more impaired if its policy were subordinated to the policy of the other state." Otherwise said, "which jurisdiction should be allocated the predominating lawmaking power under the circumstances of the present case".

To do this, the interests of each jurisdiction were to be measured based on "the circumstances of the particular dispute, not the jurisdiction's general policy goals expressed in the laws implicated". The factors to be taken into consideration in this analysis were the "current status of a statute… the location of the relevant transactions and conduct… and the extent to which one jurisdiction's laws either impose similar duties to the other jurisdiction's laws, or are accommodated by the other jurisdiction's laws, such that the application of the other jurisdiction's laws would only partially—rather than totally—impair the interests of the state whose law is not applied".

With respect to the first factor, the court said that it was inappropriate to judge which law is better. Also, in reply to the alleged archaism of the Spanish rule, that says that property is acquired after six years of possession, regardless of the stolen nature of the asset, the court replied that the defendant was relying on the possession with good faith during three years.

With respect to the second factor, the court of appeals reasoned that, in accordance with several precedents from the Supreme Court of California, a "jurisdiction ordinarily has the predominant interest in regulating conduct that occurs within its borders", i.e. on Spanish territory, whereas "where none of the relevant conduct occurs in California, a restrained view of California's interest in facilitating recovery for one of its residents is warranted." In the case at hand, "California's sole contact to the dispute was the happenstance of the plaintiff's residence there." Similarly, "California's governmental interest rests solely on the fortuity that Claude Cassirer moved to California in 1980, at a time when the Cassirer family believed the Painting had been lost or destroyed." Therefore, "California's interest in facilitating recovery for that resident was minimal and the extraterritorial reach of its laws was restrained." Since "no relevant conduct with respect of the Painting occurred in California, the impairment of California's interest that would result from applying Spanish law would be minimal."

The court went on to say that, in contrast, "applying California law would significantly impair Spain's interest in applying Article 1955 of the Spanish Civil Code. For one, because the relevant conduct [the purchase of the painting] occurred in Spain" so that "Spain has the "predominant interest in applying its laws to that conduct." Furthermore, "applying California law would mean that Spain's law would not apply to property possessed within Spain's borders, so long as the initial owner (1) happened to be a California resident (a fact over which… the defendant has no way of knowing or controlling…, and (2) the California resident did not know where the property is located and who possessed it. Applying California law based only on Claude Cassirer's decision to move to California would strike at the essence of a compelling Spanish law."

With respect to the third factor and also in accordance with past precedents of the California Supreme Court, "the court should look to whether one jurisdiction's laws accommodate the other jurisdiction's interests or imposes duties the other jurisdiction already imposes… A state's laws can more readily be discarded if the failure to apply its laws would only partially—rather than totally—impair the policy interests of the jurisdiction whose law is not applied…. Here, the failure to apply California's laws would only partially undermine California's interests in

deterring theft and returning stolen art to victims of theft, which provides further support for limiting the extraterritorial reach of California's laws to this dispute. On the other hand, "applying Spanish law would only partially undermine California's interests in facilitating recovery of stolen art for California residents. California law already contemplates that a person whose art—or other personal property—is stolen may eventually lose the ability to reclaim possession: namely, if the person fails to bring a lawsuit within six years after he discovers the whereabouts of the art… Similarly, Article 1955 of the Spanish Civil Code accommodates California's interest in deterring theft. As we have explained, Spanish law makes it more difficult for title to vest in an "encubridor," which includes, "an accessory after the fact," or someone who "knowingly receives and benefits from stolen property…. If the possessor is proven to be an encubridor, Spanish law extends the period in which the property must be possessed before new prescriptive title is created."

4. Concluding remarks

This complex and interesting case seems to be coming to an end. In brief, and despite the complexity of the application of the theory of interest analysis, it seems that the US court has given the same solution which a civil court would have given, applying the usual rule that the law applicable to property rights is the law of the place where the property is located at the time of the transfer. So far, it appears that the increasing sensitivity towards cultural property and towards unraveling war crimes has not fully displaced this conflicts rule.