insights

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Cassirer v. TBC: Federal Common Law is Not Always a Common Denominator

Introduction

On April 21, 2022, the Supreme Court decided *Cassirer v. Thyssen-Bornemisza Collection Foundation*. This case asked a basic question about private parties' suits against foreign sovereign entities in U.S. courts—whose choice-of-law rules apply and which substantive law governs the case? Should the forum state's choice-of-law rules determine what substantive law governs the claims at issue and is a federal common law solution useful or necessary in situations where foreign sovereign interests are involved? In deciding how to apply choice-of-law doctrines to foreign entities, courts have been split. The Ninth Circuit has long been committed to applying a federal approach, in contrast to the Second, Fifth, Sixth, and D.C. Circuits, which agree that the law of the forum state governs the choice-of-law analysis for state law claims brought under the Foreign Sovereign Immunities Act (FSIA).

Case Background and Supreme Court Decision

Like many recent cases arising under the FSIA, this case concerned the recovery of World War II-era stolen art. Julius Cassirer, a German Jew purchased Camille Pissarro's *Rue Saint-Honoré in the Afternoon, Effect of Rain* in 1898. Julius's heirs, Fritz and Lilly Cassirer, inherited the painting and displayed it in their Berlin home. In 1939, they surrendered the painting for the equivalent of $360 to the Nazis in return for an exit visa. Lilly Cassirer eventually emigrated to the United States with her grandson and sole heir Claude, the plaintiff in this case.

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The Cassirer family initially brought proceedings in the United States Court of Restitution Appeals under the assumption that the painting had been lost or destroyed—but it wasn't destroyed. The Thyssen-Bornemisza Collection Foundation (TBC)—a public foundation and an agency or instrumentality of the Kingdom of Spain—purchased it in 1993. After TBC refused to return it to the Cassirer family, Claude filed suit against Spain and TBC in 2005.[1] Spain was voluntarily dismissed as a party in 2011,[2] and after his death, Claude's heirs continued the case.

Section 1605(a)(3) of the U.S. Code provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which rights in property taken in violation of international law are in issue and that property . . . is present in the United States in connection with a commercial activity carried on in the United States by the foreign state" or an "agency or instrumentality" thereof. The District Court determined in 2011 that TBC was not immune from suit because the painting was in the United States and had been taken in violation of international law.[3] The case then proceeded to trial on the merits. The plaintiffs argued that California law should govern because the case was being heard in a California federal court but did not arise under federal law.[4] TBC, on the other hand, argued that Spanish law should govern because federal common law provided the conflict of laws rule that should be used to decide what law substantively governed the claim.[5]

The district court judge sided with TBC and applied Spanish law.[6] TBC ultimately prevailed at trial, and the judgment was affirmed on appeal.[7] The plaintiffs asked the Supreme Court to review the question whether federal common law should govern the conflicts analysis, as the Ninth Circuit held, or whether the court should instead have applied California's conflict of laws rules, which would have been the result in the Second, Fifth, Sixth, and D.C. Circuits.[8]

From the standpoint of the text of the FSIA, the answer was relatively straightforward. The FSIA provides that in any case where the foreign sovereign defendant is not immune from jurisdiction—for example, where the state has waived its immunity,[9] where the action is based on certain commercial activity,[10] or where the claim concerns certain "rights in property taken in violation of international law"[11]—"*the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances*."[12] Put slightly differently by the Court in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, "where state law provides a rule of liability governing private individuals," once sovereign immunity is overcome, "the FSIA requires the application of that rule to foreign states in like circumstances."[13]

So, if TBC had not been an instrumentality of the Spanish state, which the FSIA tells us to *assume* once the immunity hurdle is cleared, California conflict of laws rules should have governed. This is because a lawsuit against a private museum would proceed under diversity of citizenship jurisdiction, and the choice of law would be determined by reference to state law under *Klaxon Company v. Stentor Electric Manufacturing Company*.[14] According to the Court, the choice-of-law rule "must mirror the rule that would apply in a similar suit between private parties. For only the same choice-of-law rule can guarantee use of the same substantive law—and thus . . . guarantee the same liability."[15] In other words, following *Klaxon* "is the only way to ensure" that the FSIA's command is obeyed.[16]

What of Federal Common Law?

This relatively straightforward decision elides a more difficult question: when can a federal court apply federal common law? As the United States pointed out in its amicus brief supporting the Petitioners in *Cassirer*, a special federal rule would be justified only where it is "necessary to protect uniquely federal interests."[17] But if a case involving the liability of a foreign sovereign entity regarding war-looted art does not present a "uniquely federal interest," what does?

The United States noted in its amicus brief that "there could be instances" where the application of state law would be hostile to federal interests thereby requiring federal law to step-in.[18] This could happen, for instance, where a state seeks to restrict public entities from doing business with specific foreign countries,[19] or where a state overreaches and seeks to apply its own law to "foreign controversies on slight connections."[20] These are all situations where federal courts should "[r]ely on rules that limit the scope and reach of state law in particular instances, rather than adopting a federal choice-of-law rule across the board."[21] Indeed, there do remain cases where federal common law may supplant the applicable state law and provide the rule of decision. A defendant state-owned entity's juridical status separate from its constituent sovereign cannot be determined by that foreign state's own law; here "principles of equity common to international law and federal common law" determine the question.[22] Similarly, federal common law sometimes governs whether a non-signatory to an arbitration agreement can be bound to arbitrate under the New York Convention; "proceeding otherwise would introduce a degree of parochialism and uncertainty into international arbitration that would subvert the goal of simplifying and unifying international arbitration law."[23]

The *Cassirer* case did not require an "across the board" federal solution to protect national interests or ensure a non-parochial outcome. Subjecting a non-immune foreign state

entity to state law has been consistent practice outside the Ninth Circuit, "yet the Government says it knows of no case in which that practice has created foreign relations concerns."[24] This, along with the clear statutory directive in the FSIA, was enough to decide the case.

What Comes Next?

The Cassirer family's case moves on to the merits; the judgment in favor of TBC will be vacated and the case remanded for further proceedings. Applying California's conflict of laws rules, the district court could determine that California has a governmental interest in the dispute, and that that interest would be "more severely impaired" if California law "were not applied in the particular context presented by the case."[25] Indeed, the State of California has already sought leave from the District Court to file an amicus brief asserting its "strong interest in seeking justice for art theft victims," as reflected in its "specifically crafted and recently amended statutory and legal framework" regarding Holocaust-era art.[26] On the other hand, the district court could again conclude that California conflicts rules point to applying Spanish substantive law; the museum owns the painting under that law, which would lead to the same outcome as before (just on a proper choice-of-law analysis).

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[1] *Cassier v. Kingdom of Spain*, 461 F.Supp.2d 1157 (C.D. Cal. 2006).

[2] Order granting dismissal of Defendant, Kingdom of Spain, *Cassier v. Kingdom of Spain* (2011).

[3] *Id.*

[4] Mot. of Pl's for Summary Adjudication Re Choice of California Law, *Cassirer v. Thyssen-Bornemisza Collection Found.* (Mar. 23, 2015).

[5] Thyssen-Bornemisza Collection Foundation's Opp'n to Pl's Mot. for Summary Adjudication, *Cassirer v. Thyssen-Bornemisza Collection Found.* (Apr. 20, 2015).

[6] *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148, 1160 (C.D. Cal. 2015).

[7] *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 981 (9th Circ. 2017).

[8] *Cassirer v. Thyssen-Bornemisza Collection Found*, pet. cert., No. 20-1566 (filed May 6, 2021).

[9] 28 U.S.C. sec. 1605(A)(1)

[10] 28 U.S.C. sec. 1605(A)(2)

[11] 28 U.S.C. sec. 1605(A)(3)

[12] 28 U.S.C. § 1606.

[13] *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983).

[14] 313 U.S. 487 (1941). In *Klaxon*, the Supreme Court held that a U.S. federal court exercising diversity jurisdiction under 28 U.S.C. sec. 1332 must apply the choice-of-law rules of the U.S. state where the court sits.

[15] *Cassirer v. Thyssen-Bornemisza Collection Found.,* No. 20-1566, slip op. at 2 (2022).

[16] *Cassirer*, slip op. at 3.

[17] *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020) (quoting *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

[18] Brief for the United States as Amicus Curiae Supporting Petitioners, at 22, *Cassirer v. Thyssen-Bornemisza Collection Found.,* No. 20-1566, slip op. (2022).

[19] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-88 (2000).

[20] *Lauritzen v. Larsen*, 345 U.S. 571, 590-91 (1953).

[21] Brief for the United States, *supra* note 18, at 22.

[22] *National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

[23] *Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc.,* 198 F.3d 88, 96-98 (2d Cir. 1999).

[24] *Cassirer*, slip op. at 8.

[25] *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 107-08 (2006).

[26] Mot. of State of California for Leave to File Br. as Amicus Curiae in Support of Plaintiffs-Appellants in Support of Reversal 2, Case No. 19-55616 (filed July 6, 2022). In 2002, California enacted its Code of Civil Procedure section 354.3, which allowed the rightful owners of confiscated Holocaust-era artwork to recover their items from museums or galleries.