INTERNATIONAL ART AND CULTURAL HERITAGE
Patty Gerstenblith

I. Introduction

In 2010, most of the significant legal developments in the cultural heritage field concerned questions of recovery of art works and other cultural materials that had been expropriated some time in the past, particularly during the Holocaust. International treaties concerning cultural property continued to gain acceptance, while controversies concerning the bilateral agreements concluded between the United States and other nations to restrict import of undocumented archaeological materials continued.

II. International Conventions and Agreements

A. New States Parties

There were no new States Parties to either the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict or its First Protocol. However, three new nations, Georgia, Belgium and Colombia, joined the Convention’s Second Protocol. The Guidelines for the implementation of the Second Protocol were adopted in November 2009, and the Committee for the Protection of Cultural Property in the Event of Armed Conflict was established. This enables the system of enhanced protection for particularly significant cultural property, established in Articles 10-14 of

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the Second Protocol, to come into effect.3

Two nations joined the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention")—Haiti and Equatorial Guinea—bringing the total number of States Parties to one hundred and twenty-three.4 Six nations, Italy, Gabon, Argentina, Honduras, Trinidad and Tobago, and the Democratic Republic of the Congo, ratified the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, bringing the number of States Parties to thirty-five.5

B. IMPLEMENTATION OF THE 1970 UNESCO CONVENTION

Pursuant to its implementing legislation for the 1970 UNESCO Convention, in 2010 Switzerland concluded new bilateral agreements with Colombia and Egypt. Switzerland now has agreements with five nations restricting the import of illegally exported cultural property.6 In accord with its agreement with Peru, Switzerland returned forty-eight Pre-Columbian artifacts, consisting of ceramics and textiles of the Chancay and Chimú cultures dated to the tenth to fourteenth centuries A.D., to Peru.7

The United States extended its bilateral agreements (Memoranda of

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6 Switzerland had previously concluded agreements with Italy, Greece and Peru. See http://www.bak.admin.ch/themen/kulturguetertransfer/01985/index.html?lang=en. Unlike the United States’ agreements, the Swiss agreements can last in perpetuity with no need for renewal.
Understanding) with El Salvador\textsuperscript{8} and with Nicaragua\textsuperscript{9} for additional five-year periods. Such agreements, which impose restrictions on the importation of archaeological and/or ethnographic materials into the United States, last for a maximum of five years but may be renewed an unlimited number of times. Article II of both agreements was revised. The United States Cultural Property Advisory Committee also considered extension of the bilateral agreements with Italy and with Colombia, but no decision has yet been announced.\textsuperscript{10} Finally, the Hellenic Republic (Greece) presented a new request to the United States for a bilateral agreement under Article 9 of the 1970 UNESCO Convention.\textsuperscript{11}

III. Foreign Sovereign Immunities Act Litigation

A. CASSIRER

Claude Cassirer sued the Kingdom of Spain and the Thyssen-Bornemisza Collection Foundation to recover a painting, \textit{Rue Saint-Honoré, après midi, effet de pluie}, by Camille Pissarro, owned by his grandmother, Lilly Cassirer.\textsuperscript{12} In 1939, when she sought to leave Germany because of Nazi persecution, she was forced to sell the painting, for which she never received payment. The painting was ultimately confiscated by the Gestapo, sold through several hands (including a New York gallery), and finally purchased by Baron Thyssen-Bornemisza some time after 1976. The painting is now in the collection of the Thyssen-Bornemisza Museum, an instrumentality of Spain, in

\textsuperscript{8} See http://exchanges.state.gov/heritage/culprop/esfact.html
\textsuperscript{9} See http://exchanges.state.gov/heritage/culprop/nifact.html.
\textsuperscript{10} See http://exchange\textsuperscript{s}.state.gov/heritage/whatsnew.html.
\textsuperscript{11} Id.
Madrid. In 2000, Cassirer learned the location of the painting and requested its return. In 2005, without having pursued any judicial proceedings in Spain, Cassirer filed suit in federal district court in California against the Foundation and Spain. In 2006, the district court denied motions to dismiss brought by Spain and the Foundation.\textsuperscript{13}

Of the issues raised on appeal, the Ninth Circuit considered only the question of whether the Foreign Sovereign Immunities Act (FSIA)\textsuperscript{14} permitted a suit against a foreign state under the FSIA’s expropriation exception\textsuperscript{15} even when the foreign state being sued did not effect the expropriation. In its 2009 decision, the Ninth Circuit affirmed the District Court’s holdings that the foreign state against whom the claim is made need not be the foreign state that expropriated the property,\textsuperscript{16} that the Foundation had engaged in commercial activity in the United States\textsuperscript{17} and that Congress did not impose an absolute requirement to exhaust local remedies in the FSIA.\textsuperscript{18}

The Ninth Circuit reconsidered this decision en banc\textsuperscript{19} and affirmed the panel decision on these three main issues.\textsuperscript{20} Relying on the plain meaning rule in statutory interpretation and viewing the language of § 1605(a)(3) of the FSIA as clear, the court concluded that there is no requirement that the foreign state being sued also be the

\begin{footnotes}
\item[13] 461 F. Supp. 2d at 1162-63.
\item[14] 28 U.S.C. §§ 1602 \textit{et seq.}
\item[15] 28 U.S.C. § 1605(a)(3) provides, in part, 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 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."
\item[16] 580 F.3d at 1056.
\item[17] 580 F.3d at 1057-1059.
\item[18] \textit{Id.} at 1062.
\item[19] Cassirer v. Kingdom of Spain and Thyssen-Bornemisza Collection Foundation, 616 F.3d 1019 (9\textsuperscript{th} Cir. 2010).
\item[20] \textit{Id.} at 1022.
\end{footnotes}
foreign state that took the property at issue in violation of international law.\(^{21}\) In defining what activity is commercial in nature, the en banc decision agreed with the District Court that commercial activity is defined by its nature, not its purpose, and therefore need not be carried out for profit. The defining criterion for commercial activities is that they are “the type of actions by which a private party engages in trade and traffic or commerce.”\(^{22}\) Drawing upon the precedent established in Altmann v. Republic of Austria,\(^{23}\) the en banc decision concluded that the defendant Foundation engaged in sufficient commercial activity in the United States, including advertising of the defendant museum that utilized an image of the Pissarro painting and sales of posters, books and catalogues including images, to satisfy the FSIA’s requirement.\(^{24}\)

A forceful dissent focused on statutory interpretation and, in particular, whether the expropriation exception applies to a foreign sovereign that was not in any way engaged in or complicit with the wrongful taking of the property.\(^{25}\) The dissent argued that the language of § 1605(a)(3) of the FSIA is not clear, because it uses the passive voice and does not state who has taken the property, and it therefore gave the FSIA’s legislative history greater weight in interpreting the statute. The dissent viewed § 1605(a)(3) of the FSIA as parallel to the Hickenlooper exception to the act of state doctrine, which states that “disputes over expropriated property were justiciable when rights in property were asserted on the basis of a taking ‘by an act of that state in

\(^{21}\) Id. at 1028-30. \\
^{22}\) Id. at 1032 (quoting Republic of Argentina v. Weltower, Inc., 504 U.S. 607, 614 (1992)). \\
^{23}\) 317 F.3d 954 (9th Cir. 2002). \\
^{24}\) 616 F.3d at 1032-34. \\
^{25}\) Id. at 1038.
violation of the principles of international law.”26 Further, the dissent argued that the FSIA is intended to be consistent with international law; a taking of property in violation of international law is no longer a sovereign act and the foreign sovereign therefore loses its immunity. However, a foreign sovereign that did not expropriate the property or was not otherwise complicit in the expropriation did not violate international law and therefore should not lose its immunity.27 The defendants are filing a petition for certiorari to the Supreme Court.

B. AGUDAS CHASIDEI CHABAD OF UNITED STATES V. RUSSIAN FEDERATION

An interesting case involving both the FSIA and the act of state doctrine came to a close this year. Agudas Chasidei Chabad of United States v. Russian Federation involves the disposition of a collection of religious books and manuscripts belonging to Chabad. One part of the collection is composed of religious books and manuscripts seized during the Russian Revolution (the “Library”) and a second part (the “Archives), consisting of 25,000 pages of handwritten materials, seized by Nazi Germany during the 1941 invasion of Poland and subsequently taken by the Red Army to Russia as war “trophies” and “booty”. Both the Archives and Library are still held in Russia today.28

In earlier proceedings, the District Court had granted the defendants’ motion to dismiss the claim as to the Library, finding that the defendant was entitled to sovereign immunity, but denied the motion as to the Archives.29 The District Court had found that

26 Id. at 1040 (quoting 22 U.S.C. § 2370(e)(2)(emphasis added) and citing De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1395 (5th Cir. 1985)).
27 Id. at 1040-41.
29 466 F. Supp. 2d at 31.
the taking of the Library was not in violation of international law, one of the prongs required under the exception to foreign sovereign immunity in Section 1605(a)(3); however, it came to this conclusion based on the assertion that the Library was owned individually by the Rebbe, who was a citizen of Russia, rather than by Chabad as a whole.\textsuperscript{30} The Court of Appeals for the District of Columbia Circuit reversed this holding and also the District Court’s holding that the Library had not been “retaken” in 1991-92, when Chabad was unable to regain possession of the Library.\textsuperscript{31} The appellate court affirmed the District Court’s holdings that the commercial use prong of the Section 1605(a)(3) exception was satisfied through activities of the Russian State Library and the Russian State Military Archive in the United States and that there was no need for the plaintiff to exhaust remedies in Russia before suing in the United States.\textsuperscript{32}

Russia had also relied on the act of state doctrine\textsuperscript{33} as a defense to both claims. The District Court rejected this defense as to the Archive, because the Archive was expropriated outside of the territorial boundaries of the then-Soviet Union,\textsuperscript{34} and the D.C. Circuit affirmed.\textsuperscript{35} However, the District Court accepted the act of state defense as an alternative basis for dismissing the claim as to the Library.\textsuperscript{36} The D.C. Circuit reversed this holding. First, the District Court’s holding that the “retaking” of the Library in 1991-

\begin{itemize}
\item \textsuperscript{30} 528 F.3d at 943.
\item \textsuperscript{31} \textit{Id.} at 943-46.
\item \textsuperscript{32} \textit{Id.} at 946-50.
\item \textsuperscript{33} The act of state doctrine holds that “the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.” \textit{Id.} at 951 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964)).
\item \textsuperscript{34} 466 F. Supp. 2d at 26.
\item \textsuperscript{35} 528 F.3d at 951-52.
\item \textsuperscript{36} 466 F. Supp. 2d at 27.
\end{itemize}
92 was protected by the act of state doctrine is incorrect because the Second Hickenlooper Amendment\textsuperscript{37} normally bars use of the act of state doctrine with respect to expropriations of property that occurred after January 1, 1959.\textsuperscript{38} Second, the D.C. Circuit vacated the district court’s order that the act of state doctrine bars judicial examination of the taking of the Library in the 1917-1925 period.

While recognizing that this taking of the Library occurred within the sovereign territory of the Soviet Union, which would typically fit within the criteria of the act of state doctrine, the D.C. Circuit relied on language in \textit{Sabbatino} that the act of state doctrine is not a rigid rule but rather one that should take into account a variety of factors.\textsuperscript{39} In particular, the Circuit Court emphasized that the Soviet government is no longer in existence and has been “succeeded by a radically different regime.”\textsuperscript{40} The Circuit Court recognized that it could not evaluate the balance that should be given to this change in regime in determining whether the act of state doctrine should apply and therefore vacated and remanded to the District Court.\textsuperscript{41}

Upon remand to the District Court, the defendants refused to participate any further in the litigation and defaulted.\textsuperscript{42} The plaintiff still had to establish its right to relief by evidence satisfactory to the court. The plaintiff presented such evidence showing that rights in property are at issue; defendant took plaintiff’s property in violation of international law; the property is owned or operated by agencies or instrumentalities of the foreign state, and the defendants are engaged in commercial

\textsuperscript{37} 22 U.S.C. § 2370(e)(2).
\textsuperscript{38} 528 F.3d at 953.
\textsuperscript{39} 376 U.S. at 428.
\textsuperscript{40} 528 F.3d at 954.
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} 2010 U.S. Dist. LEXIS 78552 (D.D.C. 2010).
activity in the United States. A default judgment against all the defendants was therefore entered.\footnote{Id.}

Subsequent to the decision, Russia announced that it refuses to recognize the validity of the court’s ruling.\footnote{Commission for Art Recovery, \textit{Russia: Chabad Seeks to Recover its Archives and Library}, available at http://www.commartrecovery.org/russian_chabad.php.} It is not clear what steps the plaintiff will take to recover the Library and Archives, but it could attempt to attach Russian assets located in the United States. A decision on the act of state doctrine as applied to the Soviet Union’s nationalizations of art works and other forms of cultural property in the 1917-1925 period would have been interesting, as this question has arisen with respect to other disputed cultural objects. For example, the outcome of a dispute concerning a van Gogh painting, \textit{The Night Café}, currently in the collection of Yale University and previously owned by a Russian art collector, may turn on the applicability of the act of state doctrine.\footnote{Yale University and \textit{The Night Café}, a Painting, v. Konowaloff, Memorandum in Support of Motion to Dismiss Amended Counterclaims by Plaintiff-Counterclaim Defendant Yale University, Case No. 3:09-CV-00466 (AWT) (D. Conn., filed Oct. 5, 2009) at 25-34. \textit{See also} Gerstenblith, supra note 12, at 498-99.}

\textbf{C. ODYSSEY MARINE EXPLORATION}

Yet another case premised on the FSIA involves the disposition of a large quantity of coins recovered from an historic shipwreck off the coast of Spain. In 2007, Odyssey Marine Exploration, Inc., a Florida company engaged in deep-water exploration of historic wrecks and recovery of artifacts for commercial sale, announced the recovery of over 500,000 silver and gold coins and other artifacts from a Colonial era shipwreck code-named “\textit{Black Swan}”.\footnote{Odyssey Marine Exploration, Press Release, “Odyssey Marine Exploration Announces Third Quarter 2007 Results,” Nov. 7, 2007, available at} Odyssey Marine Exploration described the wreck’s
location as in international waters west of the Straits of Gibraltar, although it refused to disclose the exact location. Odyssey Marine imported the artifacts into the United States and then filed claims in admiralty, as a way of asserting its rights in the shipwreck, in federal district court in Florida. Spain subsequently entered the proceedings, claiming ownership of any Spanish property.

In mid-2009, the magistrate judge decided the issues in favor of Spain, and the district court judge issued an opinion adopting this decision in late 2009. The court concluded that, based on the location of the wreck, historical accounts, and the types and age of the coins, the types of cannons, and other artifacts, there was no genuine factual question as to the identification of the wreck as the Spanish naval vessel *Nuestra Senora de las Mercedes*, which exploded in an engagement with the British in 1804. Asserting the immunity to which foreign sovereigns are entitled, Spain argued that the U.S. court could not exercise subject matter jurisdiction over the wreck because none of the FSIA exceptions to immunity applied.

Courts traditionally exercise jurisdiction over shipwrecks, even if not within the territorial waters of the nation where the court sits, based on constructive possession established through actual possession of some of the contents of the wreck located within the court’s jurisdiction. However, the court’s exercise of jurisdiction over the wreck is


48 Id. at 1133-36.

49 Id. at 1137. However, in another decision this past year, also involving Odyssey Marine Exploration, the same district court judge refused to allow the theory of construction possession of a wreck’s res to establish in rem jurisdiction over the entire
limited, particularly where the wreck is the property of a foreign sovereign. The only means by which a U.S. court can obtain jurisdiction over a foreign sovereign is through one of the FSIA’s enumerated exceptions; Odyssey Marine failed to show that one of these exceptions applies.\textsuperscript{50}

In addition to the question of foreign sovereign immunity, the Treaty of Friendship and General Relations between the United States and Spain of 1902 calls on each nation to accord to the vessels of the other nation the same protection and immunities which would be granted to its own vessels.\textsuperscript{51} The district court cited several treaties and U.S. statutes, including the Sunken Military Craft Act,\textsuperscript{52} stating that the law of finds does not apply to any foreign sunken military craft in U.S. territorial waters and no salvage rights or awards will be granted with respect to such vessels without the express permission of the foreign state.\textsuperscript{53}

An interesting aspect of this litigation is that Peru intervened to assert its rights to the cargo of specie. Peru argued that the specie originated from the area of Peru and was removed by Spain as a result of colonialist exploitation.\textsuperscript{54} The court rejected the notion that it could resolve Peru’s claim for the same reason that it rejected Odyssey Marine’s

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\textsuperscript{50} 675 F. Supp. 2d at 1138-39.
\textsuperscript{51}  Id. at 1143-44.
\textsuperscript{52} 10 U.S.C. § 113 note.
\textsuperscript{53} 675 F. Supp. 2d at 1143-44.
\textsuperscript{54}  Id. at 1145-46.
claim—that the court lacks jurisdiction over the wreck and its cargo because of Spain’s right to sovereign immunity for its property.\textsuperscript{55}

In its substantive argument, Peru attempted to rely on Article 149 of the United Nations Convention on the Law of the Sea, which calls for preservation of “objects of an archaeological and historical nature” with “particular regard being paid to the preferential rights of the State or country of origin …”.\textsuperscript{56} The court, however, rejected this argument since neither Peru nor the United States has ratified this treaty and the court did not view this provision as a part of customary international law.\textsuperscript{57} Finally, the court concluded that this dispute was best resolved through direct negotiations between Spain and Peru, rather than through a suit in the courts of a third, otherwise uninvolved nation.\textsuperscript{58} The court thus rejected the claims of both Odyssey Marine and Peru and ordered Odyssey Marine to turn the ship’s property over to Spain. This order has, however, been delayed, pending Odyssey Marine’s appeal.

Despite the considerable variety of factual circumstances and legal arguments, these three cases all center on the applicability of the FSIA and, to a lesser extent, the act of state doctrine. It is worth considering why the FSIA has become such a focus of

\textsuperscript{55} Id. at 1146.
\textsuperscript{56} 21 I.L.M. 1245 (Dec. 10, 1982).
\textsuperscript{57} 675 F. Supp. 2d at 1146-47. The court rejected the use of customary international law because it concluded that international law contains little practice with respect to jurisdiction over shipwrecks and there is no customary international law at all with respect to disputes among sovereigns concerning underwater cultural heritage discovered in international waters.
\textsuperscript{58} Id. at 1147-48. The court also relied on the act of state doctrine as an affirmative defense by Spain as a reason to refrain from evaluating the actions of Spain in exploiting its former colony.
litigation concerning cultural property.\textsuperscript{59} There is no simple explanation, although one may note that, in several of these cases, the FSIA seems to serve more as a basis for finding jurisdiction over the foreign sovereign in U.S. courts than as a means of protecting the foreign sovereign from suit. This statute will continue to be tested not only through appeals\textsuperscript{60} but also in a new case filed this past year. The heirs of the Hungarian banker, Baron Mor Lipot Herzog, filed suit in federal court in Washington, demanding return of a collection of art works which they allege was placed in Hungary for safekeeping during World War II or placed there when art works stolen by the Nazis were returned to Hungary at the end of the war.\textsuperscript{61} This, and other decisions, will continue to elucidate when a foreign sovereign can be brought to account in a U.S. court.

IV. Legal Developments concerning Art Works Looted during the Holocaust

A. Bakalar v. Vavra

The heirs of Franz Friedrich Grunbaum, a Viennese cabaret performer whose collection consisted of 449 artworks, claimed an Egon Schiele drawing, \textit{Seated Woman with Bent Left Leg (Torso)}, dated to 1917.\textsuperscript{62} Grunbaum executed a power of attorney, authorizing his wife to deal with his assets, while imprisoned at Dachau, where he died in

\textsuperscript{59} The Supreme Court’s decision in Altmann v. Republic of Austria, 541 U.S. 677 (2004), in which the Supreme Court concluded that the FSIA applied to actions that predated the FSIA’s enactment, seems to have provided some of the impetus. The \textit{Altmann} decision ultimately led to the restitution of four Klimt paintings to the descendants of Adele Bloch-Bauer.

\textsuperscript{60} The Seventh Circuit has yet to decide Iran’s appeal, which was argued in October 2009, concerning its right to immunity under the FSIA, in Rubin v. Islamic Republic of Iran, 349 F. Supp. 2d 258 (N.D. Ill. 2004); see also Patty Gerstenblith, Laina Lopez & Lucille Roussin, \textit{International Legal Developments in Review 2008: International Art and Cultural Heritage}, 43 \textit{Int’l.Law.} 811, 822-23 (2009).


1941. Galerie Gutekunst, a Swiss art gallery, purchased the drawing in 1956, apparently from Grunbaum’s sister-in-law, Mathilde Lukacs-Herzl. Later in 1956, the drawing was sold to the Galerie St. Etienne in New York, from whom Bakalar bought the drawing in 1963. Bakalar consigned the drawing to Sotheby’s for sale in 2004, which subsequently froze the sale when the Grunbaum heirs challenged Bakalar’s title. Both parties brought suit in federal court in New York seeking a declaratory judgment.

The District Court awarded the drawing to Bakalar based on Swiss law, which the judge deemed controlling. Under Swiss law one who acquires an object in good faith becomes the owner. Galerie Gutekunst was entitled to rely on a presumption that Lukacs-Herzl was the owner and it therefore qualified as a good faith purchaser; furthermore, even if the drawing had been stolen, the original owner’s ability to recover the drawing expired five years after Galerie Gutekunst acquired it.\textsuperscript{63}

On appeal, the Second Circuit first established the significant difference between Swiss and New York law on the question of whether a good faith purchaser can acquire title to stolen property. A good faith purchaser can acquire title to stolen property in Switzerland, and, at least at the time of the Galerie Gutekunst purchase, Swiss law presumed that a purchaser acted in good faith. In addition, the court noted the difficulties that Holocaust victims and their heirs have had in recovering stolen art works under Swiss law.\textsuperscript{64} However, under New York law, a good faith purchaser does not acquire title to stolen property, although a claim for recovery may be barred by the statute of

\textsuperscript{63} 619 F.3d at 139.  
\textsuperscript{64} Id. at 140.
limitations or the equitable defense of laches. Because of this difference in Swiss and New York law, the court then had to address the question of choice of law.

The district court judge had adopted the law of the situs where the drawing was located at the time of its alleged transfer, i.e., Switzerland. However, the Second Circuit rejected this rule and held that under New York choice of law rules, the appropriate law is the law of the jurisdiction with the greater interest in the transaction. The court then concluded that Switzerland’s interest in the outcome based on a sale that took place decades ago and with no present impact on the Swiss gallery was tenuous in contrast to New York’s interest “in preventing the state from becoming a marketplace for stolen goods.” Once New York law is chosen as the correct law, the question of whether the drawing had been stolen, a question that the district court judge had deemed irrelevant under Swiss law, becomes a crucial element to determine upon remand; further, once the claimants have met a threshold showing, the burden falls on Bakalar to prove that a theft did not occur.

65 Id. at 140-42 (describing New York’s demand and refusal rule in relation to the statute of limitations for the recovery of stolen property and the Court of Appeals decision in Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991)).
66 619 F.3d at 142-44. The Second Circuit relied on Istim, Inc. v. Chemical Bank, 581 N.E.2d 1042 (N.Y. 1991), rejecting the traditional situs rule in favor of an interest analysis. The interest analysis “begins with an examination of the contacts each jurisdiction has with the event giving rise to the cause of action.” 619 F.3d at 143-44. The Second Circuit also criticized the District Court’s reliance on Elicofon v. Kunstsammlungen zu Weimer, 678 F.2d 1150 (2d Cir. 1982), in concluding that the law of the place of the transaction should apply. According to the Second Circuit, the choice of New York law in Elicofon is better explained as an application of the greater interest rule.
67 Id. at 145.
68 Id. at 147. Judge Korman, sitting by designation with the Second Circuit panel, wrote a separate concurring opinion, id. at 148-52, to emphasize that once the court concludes that Grunbaum gave up the drawing involuntarily, title could not pass to a subsequent purchaser under New York law.
B. GROSZ V. MUSEUM OF MODERN ART

The heirs of George Grosz, an early twentieth-century German artist whose art works were considered by the Nazis to be “degenerate” and who was forced to flee Germany in 1933, sued the Museum of Modern Art (MoMA) for the recovery of three of Grosz’s caricatural paintings, *Hermann-Neisse with Cognac*, *Self-Portrait with Model*, and *Republican Automatons*.69 The plaintiffs alleged that Grosz consigned each of the paintings to Grosz’s art dealer, Alfred Flechtheim, and that each was then either stolen or subject to some other form of malfeasance. MoMA acquired the paintings at different times during the late 1940s and 1950s.70 On November 24, 2003, Ralph Jentsch, “managing director” of the Grosz estate, asked MoMA to return the paintings to the Grosz estate. The plaintiffs filed their complaint on April 12, 2009. MoMA moved to dismiss the complaint on the grounds that the three-year limitations period had expired.71

Because in New York the cause of action for the recovery from a good faith purchaser of stolen property, including art works, accrues at the time the claimant demands return of the property and the demand is refused,72 the question in this case focused on when MoMA refused the demand. The court defined refusal as words or actions that are inconsistent with the claimant’s possession or use of the property,

70 2010 U.S. Dist. LEXIS 1667, at *5-16.
71 Id. at *16-17; see NY CPLR § 214(3).
72 See, e.g., Kunstatmlungen zu Weimar v. Elicofon, 678 F.2d 1150, 1161 (2d Cir. 1982). In contrast, the cause of action against the thief or one who acquires the stolen property in bad faith runs from the time of the theft or wrongful acquisition. The court held that the question of a claimant’s alleged unreasonable delay is not relevant to the statute of limitations analysis but is relevant to the equitable defense of laches. Id. at *21-22 (citing Republic of Turkey v. Metropolitan Museum of Art, 762 F. Supp. 44, 46 (S.D.N.Y. 1990)).
regardless of whether the possessor explicitly refuses the demand. Because the purpose of the “demand and refusal” rule is to give the good faith possessor an opportunity to relinquish the property once informed of the claimant’s rights, a failure in any form to turn over the property constitutes a refusal.73

The parties agreed that Jentsch’s 2003 letter constituted the demand. The court concluded that MoMA’s failure to turn over the paintings or a letter MoMA sent to the claimants in 2005 communicating its refusal to turn over the paintings meant that the refusal was made, at the latest, in 2005.74 This case is one of the few to address the precise definition of what constitutes a refusal of a demand to return an allegedly stolen work of art.

C. In re Flamenbaum

In re Flamenbaum75 presents atypical facts concerning a cultural object stolen during the Holocaust. German archaeologists excavated a gold cuneiform tablet dated to the reign of the Assyrian King Tukulti-Ninurta I (1243-1207 B.C.) in the foundation of the Ishtar Temple in the city of Ashur, now in Iraq, in 1913; the tablet was later placed in the Vorderasiatisches Museum in Berlin. At the beginning of World War II, the tablet was put in storage, but, at the conclusion of the war, was missing. However, some sixty years later, it appeared in a safe deposit box of Riven Flamenbaum, a Holocaust survivor and resident of Long Island, New York. In the process of accounting for the estate, the Berlin museum was notified of the tablet’s presence, and the museum filed a claim to the tablet.

73 Id. at *24-26.
74 Id. at *27-35. The claimants disagreed with this interpretation of the 2005 letter and characterized a 2006 letter as constituting the refusal.
75 In re Flamenbaum, 899 N.Y.S.2d 546 (N.Y. Misc. 2010).
The court concluded that the museum had title superior to that of the Flamenbaum estate and that, under New York’s demand and refusal rule, the statute of limitations did not bar the museum’s claim but the equitable defense of laches did.\textsuperscript{76} The court concluded that the museum’s delay in bringing its claim was unreasonable by looking at the museum’s failure to report the tablet as missing to any law enforcement agency or registry or to undertake any investigation as to its whereabouts; the museum failed to pursue a report that the tablet was seen in the hands of a New York dealer in 1954.\textsuperscript{77} On the second prong of the laches defense, the court concluded that this unreasonable delay prejudiced the possessor\textsuperscript{78} because the museum’s inaction meant that good faith purchasers did not receive notice of possible defects in title and the death of Riven Flamenbaum foreclosed his ability to establish title.\textsuperscript{79} This decision is currently on appeal.

The Flamenbaum estate raised an interesting argument alleging that the tablet might have been taken by the Soviet Union from Berlin as spoils of war and that the museum’s title was extinguished under international law and the laws of the Soviet Union and its successors.\textsuperscript{80} The museum argued, correctly, that the tablet could not be considered the legitimate property of the Soviet Union under the 1907 Hague Convention and, it might be added, under customary international law. The court chose not to resolve this legal question because it could resolve the case more easily under the laches defense.

\textsuperscript{76} \textit{Id.} at 552. Laches is an equitable defense “based on an unreasonable delay by a victim in bringing a claim, which in turn causes prejudice to the possessor ….” \textit{Id.}

\textsuperscript{77} \textit{Id.} at 552-53.

\textsuperscript{78} \textit{Id.} at 554 (stating that to assert a defense of laches, the defendant must also allege “injury, change of position, intervention or equities, loss of evidence, or other disadvantage resulting from such delay”).

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.} 551.
It is, however, unfortunate that the court left this argument unanswered because it conflicts with both New York State precedent\textsuperscript{81} and international law.\textsuperscript{82}

D. Claims of Seger-Thomschitz

In 2009,\textsuperscript{83} two district court decisions denied claims by Claudia Seger-Thomschitz, the legatee under the will of a son of Viennese art collector, Oskar Reichel, to recover two Kokoschka paintings, \textit{Two Nudes (Lovers)}, currently in the collection of the Boston Museum of Fine Arts,\textsuperscript{84} and \textit{Portrait of a Youth}, possessed by Sarah Blodgett Dunbar.\textsuperscript{85} Both decisions were affirmed this year. In the \textit{Museum of Fine Arts} case,\textsuperscript{86} the First Circuit, applying the Massachusetts three-year limitations period for tort and replevin actions, agreed with the district court that the claim would accrue when the claimant knew or reasonably should have discovered the location of the stolen property.\textsuperscript{87} Because the Reichel family knew the location of the painting for decades before Seger-Thomschitz claimed it, her claim is barred by the statute of limitations. The First Circuit rejected Seger-Thomschitz’s arguments that use of the Massachusetts statute of limitation conflicts with and is preempted by federal policies that encourage restitution of art works.

\begin{footnotesize}
\begin{enumerate}
\item See Menzel v. List, 267 N.Y.S.2d 804, 810-12 (Sup. Ct., N.Y. Cty 1966).
\item See, \textit{e.g.}, Art. 56, 1907 Hague Convention respecting the Laws and Customs of War on Land (stating that “[a]ll seizure of, destruction or wilful [sic] damage done to … works of art and science, is forbidden, and should be made the subject of legal proceedings.).
\item See Gerstenblith, \textit{supra} note 12, at 495-96.
\item 2010 U.S. App. LEXIS 21250 (1st Cir. 2010).
\item \textit{Id. at *16.}
\end{enumerate}
\end{footnotesize}
looted during the Holocaust era and discourage use of technical defenses to bar such claims.  

The Fifth Circuit reached a similar conclusion in barring Seger-Thomschitz’s claim. Seger-Thomschitz’s argument here was primarily that U.S. foreign policy, as articulated in the Terezin Declaration, preempted prescription under Louisiana law. However, the court held that Louisiana’s prescription periods apply generally to any movable property claim and does not represent any state policy specific to Holocaust victims.

E. PORTRAIT OF WALLY SETTLEMENT

Litigation concerning the disposition of Egon Schiele’s painting Portrait of Wally began in early 1998, while it was on loan from the Leopold Museum in Vienna to the Museum of Modern Art in New York, and lasted until this past summer. After heirs of the painting’s original owner, Lea Bondi Jaray, identified the painting, the New York District Attorney held it as evidence in a criminal investigation. When the New York Court of Appeals quashed the subpoena in 1999, federal agents seized the painting on

88 Id. at *27-36. It is ironic to note the court’s concluding thoughts, id. at *36-38, that statutes of limitation are not technicalities and that museums should follow the guidelines of the American Association of Museums—even though those same guidelines state that “in order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses.” AAM Guidelines Concerning the Unlawful Appropriation of Objects during the Nazi Era, Par. 4(f), available at: http://www.aam-us.org/museumresources/ethics/nazi_guidelines.cfm.

89 615 F.3d 574 (5th Cir. 2010).

90 Id. at 577-79. For the Terezin Declaration (June 10, 2009), see http://www.holocausteraassets.eu/en/news-archive/detail/terezin-declaration/. See also Gerstenblith, supra note 12, at 491-92.

91 Id. at 578-79.

the ground that, as stolen property, it had been imported in violation of the U.S. Customs statute.93

In 2009, the District Court resolved most of the issues in favor of the U.S. government and set a trial on the sole remaining issue—whether the Leopold could rebut the government’s showing that Rudolf Leopold knew the painting had been stolen.94 Before the trial could commence, however, the claim was settled.95 After being displayed at the Museum of Jewish Heritage in New York, the painting was returned to Vienna. The Leopold Museum paid the Bondi heirs a settlement of $19 million.

V. California Statute of Limitations for Recovery of Stolen Art Works

In 2009 the Ninth Circuit Court of Appeals struck down as unconstitutional the California Holocaust Art Recovery Statute of Limitations96 on the grounds that a statute of limitations that applies exclusively to art works looted during the Holocaust infringed on the federal government’s exclusive power to conduct foreign affairs.97 This year, the California legislature amended its statute of limitations in several ways.

The California statute of limitations is unique in explicitly providing a discovery rule for the accrual of a cause of action for the recovery of “any article of historical, interpretive, scientific or artistic significance”.98 However, it was not clear whether this discovery rule, enacted in 1983, applies to the recovery of property stolen before 1983.

93 See 19 U.S.C. § 1595a(c) and 18 U.S.C. § 545.
95 Randy Kennedy, With the End of a Legal Dispute, a Schiele Comes to Manhattan, N.Y. TIMES, Jul. 30, 2010, at C3.
96 CAL. CIV. PROC. CODE § 354.3.
97 Von Saher v. Norton Simon Museum of Art at Pasadena, 578 F.3d 1016, 1025-29 (9th Cir. 2009); see also Gerstenblith, supra note 12, at 494.
98 CAL. CIV. PROC. CODE § 338(c)(2).
This year’s amendment clarifies that the discovery rule applies to claims based on pre-1983 thefts, thus acknowledging that the interpretation of the statute given in Naftzger v. American Numismatic Society\textsuperscript{99} is correct.\textsuperscript{100}

Of perhaps greater significance, the amendment to Section 338 provides for a six-year limitations period and an actual discovery rule for an action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer.\textsuperscript{101} It further applies to fine art removed from its owner by “a taking or theft by means of fraud or duress”.\textsuperscript{102} The cause of action will accrue when the claimant or his or her agent actually discovers both the identity and whereabouts of the work of fine art and information or facts “sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art”.\textsuperscript{103} This section of the amended statute applies to pending and future actions commenced on or before December 31, 2017, including actions that have been dismissed if the judgment is not yet final or the time for filing an appeal has not expired, so long as the taking of the work of fine art occurred within one hundred years before enactment of the amended statute.\textsuperscript{104} Finally, the amended statute provides

\textsuperscript{99} Cal. Rptr. 2d 784 (Ct. App. 1996).
\textsuperscript{100} AB 2765, An act to amend Section 338 of the Code of Civil Procedure, Section 1(a)(3) and (b).
\textsuperscript{101} \textsc{Cal. CIV. PROC. CODE} § 338(c)(3)(A).
\textsuperscript{102} \textit{Id.} § 338(c)(3)(A). Duress is defined as “a threat of force, violence, danger, or retribution against an owner … sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act that otherwise would not have been performed or to acquiesce to an act to which he or she would otherwise not have acquiesced.” \textit{Id.} § 338(c)(3)(C)(iv).
\textsuperscript{103} The statute further specifically precludes from actual discovery any constructive knowledge imputed by law. \textit{Id.} § 338(c)(3)(C)(i).
\textsuperscript{104} \textit{Id.} § 338(c)(3)(B).
that a party may raise all equitable and legal affirmative defenses, including the equitable defenses of laches and unclean hands.\textsuperscript{105}

This amended legislation is notable for several reasons. California has long been the only state that provides a specific statutory provision for the recovery of works of fine art and other forms of cultural objects. However, there had been disagreement among the California appellate courts concerning to which actions this provision applied and whether it incorporated a constructive or actual discovery rule. The California legislature acted this year not only to remove these ambiguities but, more importantly, apparently to overturn the Ninth Circuit’s striking down of the statute that had extended the time period for the recovery of art works stolen during the Holocaust. By removing any reference to the Holocaust, the legislature has eliminated the argument that the extension of the statutory limitations period is preempted by the federal foreign affairs power. On the other hand, the amended statute will clearly apply to the recovery of art works looted during the Holocaust, although it may apply in other scenarios as well. It remains to be seen whether a statute extending limitations period that has already expired for the recovery of a specific work of art will receive further constitutional challenge.

\textsuperscript{105} \textit{Id.} § 338(c)(5).