

U.S. Supreme Court to consider proper choice-of-law test in action involving a foreign sovereign entity



Madrid, 1st October 2021. Recently, without any comment on the merits decision of the case, the U.S. Supreme Court granted the petition for a writ of certiorari in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, No. 20-1566. The petition identifies a split of authority among the federal circuits as to the proper choice-of-law test to apply when the Foreign Sovereign Immunities Act permits a U.S. federal court to hear a case involving the agency or instrumentality of a foreign sovereign, here, the Kingdom of Spain. The Madrid-based Foundation, whose ownership of the Pissarro painting at issue was confirmed after a U.S. court trial, has acknowledged the split. But the split is of limited import in this action, as the district court considered both choice-of-law tests and recognized, in a lengthy decision, that both tests mandate the application of Spanish law. Examining only one of the two choice-of-law tests—the test applied for two decades in the

Ninth Circuit—the appellate court affirmed the district court’s finding that Spanish law must apply.

In 2020, after conducting a full trial on the merits, the district court confirmed that, under Spanish law, the Foundation is the painting’s owner. The evidence demonstrated that in 1958, the German Government paid plaintiff’s predecessor, Lily Cassirer, her requested compensation (the then-fair market value of the painting) to compensate her for her loss. Thereafter, no further claims to the painting were pursued for more than 40 years. In 1993, the Foundation, after conducting a thorough review of Baron Heinrich Thyssen-Bornemisza’s internationally exhibited art collection, acquired the collection (which included the painting) for public display in Madrid. The district court also recognized that the Baron acquired the painting from a reputable gallery in 1976—for its then-fair market value—and shared the painting with the public in numerous international exhibitions and publications. The district court’s finding that the Foundation is the owner under Spanish law was unanimously affirmed by the U.S. Court of Appeals for the Ninth Circuit.

The petition does not assert that either court misapplied or misinterpreted Spanish law. Instead, it asserts that the appellate court erred in applying its longstanding choice-of-law test rather than the choice-of-law test adopted by other courts. At the conclusion of the case, regardless of which choice-of-law test is applied, the Foundation anticipates that its ownership of the painting—already recognized by the district court and the Ninth Circuit—will be affirmed.

Illustration: Camille Pissarro. *Rue Saint-Honoré, in the Afternoon. Effect of Rain*, 1897. Museo Nacional Thyssen-Bornemisza, Madrid.

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THYSSEN-BORNEMISZA
MUSEO NACIONAL



Background

In August 2020, the US Court of Appeals for the Ninth Circuit has ruled that Camille Pissarro's painting *Rue Saint-Honoré in the Afternoon. Effect of Rain* (1897) is rightfully owned by the Fundación Colección Thyssen-Bornemisza. The Court of Appeal's decision confirms that of the district court which found that, after a full trial on the merits, the Fundación is the owner of the painting. The painting will remain on public display at the Museo Nacional Thyssen-Bornemisza, as it has been since the museum's opening in 1992.

Evelio Acevedo, managing director of the Fundación Colección Thyssen-Bornemisza, has responded to the court's decision: "We are pleased with the Court of Appeal's unanimous confirmation of the Fundación's legitimate ownership of the Pissarro painting. It is a further pronouncement that confirms this issue. I would like to express our thanks to all the institutions that have supported us in this court case and acknowledge the excellent work of our team of lawyers: Nixon Peabody in the United States and Pedro Alemán Abogados in Madrid."

In April 2019 in Los Angeles, US District Court Judge John F. Walter issued a lengthy decision recognising that the Fundación's documented and extensive pre-acquisition due diligence proved that when the Spanish State bought the painting from Baron Hans Heinrich Thyssen-Bornemisza in 1993 it did not know about the circumstances of the painting during World War II. In 2005 the American heirs of the original owner, Lilly Cassirer Neubauer, filed a complaint alleging, without any evidence, that the Fundación and its prior owners knew the painting's earlier history. The plaintiffs did not disclose that Lily Cassirer Neubauer had been compensated for the loss of the painting by the German government in 1958, as she requested at the time, in the form of a monetary payment equivalent to the painting's then fair market value. After a public trial in December 2018, Judge Walter issued his precedent-setting decision of April 2019, explaining that the allegations were unfounded and ruling that the Fundación properly acquired and owned the painting.

On 17 August 2020, the Court of Appeals unanimously rejected the plaintiffs' arguments. In addition, it held that the district court applied the correct standard in judging the historical evidence and that its determination that the Fundación properly owned the painting was supported by the evidence. The Court of Appeals also confirmed the district court's finding that the Baron himself was not aware of the painting's World War II history when he acquired it in 1976 from a reputable gallery in New York.

In the case held on 4 December 2018 in Los Angeles the plaintiffs focused their argument on an attempt to demonstrate that at the time of the painting's acquisition in 1976 the late Baron Hans Heinrich Thyssen-Bornemisza knew of the work's illegal past. However, it has been fully established that the Baron bought the painting for a fair market price at the reputable Stephen Hann gallery in New York where it was on public display and with the aim of exhibiting it in public, as he did for some years before he sold it to the Fundación. All this is conclusive proof that the Baron had no knowledge whatsoever of the painting's illegal past.

It has also been demonstrated that the painting had previously belonged, among other owners, to two Second World War veterans decorated by the US Government, one of them a prominent member of the Jewish community, and to another prestigious collector. At no point during that period was any claim made on the work.

All the witnesses and experts called by the defence, with the additional support of numerous documents of the period, catalogues of the Baron's collection and international exhibition catalogues in which the painting was included, revealed that there were no indications of bad faith in the acquisition of the painting by the Baron nor in its subsequent purchase by the

Fundación Colección Thyssen-Bornemisza (FCTB). In addition, both the Spanish Ministry of Justice and the Ministry of Culture and Sport presented reports throughout the proceedings that supported the Fundación's legitimate ownership.

Conclusions. The sentence confirms that:

1. The Cassirer family was financially compensated by the German State in 1958

The Cassirer family was compensated for the loss of the work. After World War II, Mrs Cassirer sued the German State for the seizure of the painting. This process ended in 1958 with an agreement through which Mrs Cassirer received an amount equivalent to what she acknowledged to be the work's market value. She indicated at the time that with this compensation any claim deriving from these facts was satisfied.

2. Even if the sale of the painting by the Baron and its purchase from him had not fully satisfied all requirements, the Fundación would have acquired the legal ownership of the work through acquisitive prescription (usucaption)

Even if the Baron's title to sell was called into question, in accordance with Spanish legislation the Fundación would have acquired the right of ownership by prescription due to the fact of owning the work for three years in an uncontentious and uninterrupted manner, in good faith and with full title, or six years without those requisites. In effect, the Fundación had no knowledge that the painting had been seized by the Nazis until Lilly Cassirer's heirs contacted the Fundación in 2001. At that date more than eight years had passed since the Fundación had purchased the Thyssen-Bornemisza Collection in 1993. The Collection, and in particular the painting by Pissarro, had been on display to the public since 1979 on the initiative of Baron Thyssen and since 1992 by the Fundación at the Museo Thyssen-Bornemisza without any objection of any type being raised.

The plaintiffs argued that the Fundación had not acquired rights of ownership with the argument that, in accordance with article 1956 of the Spanish Civil Code, if in the acquisition of the painting in 1993 the Fundación might have been an accomplice or accessory to a crime against property, it could not have acquired the painting through usucaption. This argument is not sustainable, as Judge Walter has concluded, as neither the Baron nor the Fundación were aware of the painting's illegal origin.

Chronology of events

1939: Lilly Cassirer Neubauer sold the painting for below its market value to Jakob Scheidwimmer, an art dealer and a member of the Nazi party, in order to obtain a visa to escape from Germany and avoid a concentration camp. The painting was subsequently acquired by Julius Suizbacher, from whom it was then seized by the Gestapo.

1950: Lilly Cassirer Neubauer brought a court case in Germany to recover the painting, the whereabouts of which she did not know.

1951: The painting was acquired at the Frank Perls gallery in Beverly Hills (USA) by the American collector Sydney Brody.

1952: Frank Perls was commissioned by Sydney Brody to place the painting on sale at the Knoedler gallery in New York (USA). That same year the painting was purchased in that gallery by Sydney Schoenberg, a prominent collector from Missouri (USA).

1958: Lilly Cassirer Neubauer reached an agreement with the German government, with the art dealer Jakob Scheidwimmer and with Julius Sulzbacher, through which she accepted compensation of 120,000 German Marks from the Federal German government, an amount agreed to correspond to the market value of the work at that time. She gave 14,000 Marks of that compensation to Sulzbacher's heir. This agreement brought all claims among the parties to an end. From that date onwards, neither Lilly Cassirer Neubauer nor her heirs made any further attempts to locate or recover the painting.

1976: Baron Thyssen-Bornemisza acquired the painting from another prestigious gallery, the Stephen Hahn Gallery in New York. Over the following years the work was exhibited as part of the Thyssen-Bornemisza Collection in Lugano (Switzerland) and until 1990 was included in widely-publicised temporary exhibitions in seven countries (Australia, Japan, the UK, Germany, France, Italy and Spain). The Collection was widely publicised and was the subject of much interest and numerous publications. At no point were the Baron's title to the painting nor his good faith in its acquisition called into question.

1993: The Spanish State agreed the purchase of the Thyssen-Bornemisza Collection, which came about through a contract signed on 21 June 1993 between the Fundación Colección Thyssen-Bornemisza and Favorita Trustees Limited, the legitimate owner of the work and with full rights to transfer ownership. This transaction was carried out after due diligence investigations regarding the legitimacy of the seller's title to sell the Collection. This due diligence process did not reveal any irregularity in the seller's title. The acquisition by the Fundación in virtue of that contract is thus fully valid, effective and incontestable in conformance with Spanish law, which is the law applicable to the sale and purchase transaction.

2002: Forty-four years after the compensation agreement between Lilly Cassirer Neubauer and the German government, twenty-six years after the acquisition of the painting by the Baron and nine years after its acquisition by the Fundación, the Cassirer family made its first claim for its return. The Fundación rejected that claim.

2005: Claude Cassirer brought a legal action in California.

2010: Claude Cassirer died aged 89. His children David and Ana continued with the suit, supported by the United Jewish Federation (of San Diego County).

2012 (June): The Court of the Central District of California rejected the claim made in 2005 by the Cassirer family against the Spanish State and the Fundación Colección Thyssen-Bornemisza due to the prescription of the action.

2014 (July): The Court of Appeals of California revoked the decision of the District Court and returned the case to it. The Court of Appeal's decision was based on a procedural issue and did not prejudge the central issue of the case.

2015 (June): The District Court issued its ruling on the principal issue of the case, rejecting the claim as it considered that in all cases the Fundación would have acquired the painting through usucaption, in accordance with Spanish law. Claude Cassirer's heirs lodged an appeal with the United States Court of Appeals for the Ninth Circuit.

The Jewish Community in Madrid and the Federation of Jewish Communities in Spain entered the case as interested parties. At this point the plaintiffs first introduced the argument that if the

Baron did not have the valid title to sell (which he did, in the Fundación's opinion), the Fundación could not have acquired title through usucaption if it is understood, on the basis of article 1956 of the Spanish Civil Code, that in the acquisition of the painting in 1993 the Fundación could be considered an accomplice or accessory to a crime against property. In the Fundación's opinion this argument is not sustainable as neither the Baron nor the Fundación have ever been accused, and far less found guilty, of such a crime.

2017 (July): The Court of Appeals overturned the sentence, and without prejudging the essential basis of the issue, ordered the District Judge to re-examine the case to determine if there were reasons for considering the Fundación an accomplice or accessory to a crime against property. For the Court of Appeals, the law applicable to the acquisition of the painting by the Fundación is the Spanish law, and according to the Spanish Civil Code the Fundación would own the painting in any case, even if the Baron had not been the legitimate title-holder to it when he sold it, for reasons of usucaption (ownership in good faith and with good title for three years or for six years without those requisites), except in the case that the Fundación were considered to be an accomplice or accessory to the above-mentioned crime.

(September): The Fundación Thyssen-Bornemisza formally requested a reconsideration of the decision of July of the Court of Appeals for the Ninth Circuit and the Spanish State entered the case as *amicus curiae* (a third party not involved in the litigation) in order to support the Fundación Thyssen. The Kingdom of Spain also appeared as *amicus curiae* in order to explain on the basis of a report by the Solicitor General's Office that the interpretation of the Spanish Civil Code argued by the Cassirer family was unsustainable as article 1956 of the Civil Code is not applicable in the absence of a sentence that declares there to have been a crime.

(December): The Court of Appeals turned down the request for a reconsideration.

2018 (April): Supported by the Solicitor General's Office, the Fundación Colección Thyssen-Bornemisza presented the case before the United States Supreme Court.

(May): The Supreme Court declined jurisdiction.

(December): The case was held before the District Judge.

2019 (April): Judge John Walter handed down his judgment on the case with regard to all the allegations and evidence offered. He entirely dismissed the plaintiffs' complaint and declared the Fundación to have legitimate ownership of the painting.

(December): The Judge John F. Walter has dismissed the case brought by the Cassirer family and has confirmed that the Fundación Colección Thyssen-Bornemisza is, in accordance with Spanish law, the rightful owner of the painting. The Court considers that neither Baron Thyssen-Bornemisza nor the Fundación were aware at the moment of acquiring the painting that it had been stolen or that there was any risk or probability that it had been, and rejected the allegation on the plaintiffs' part that the Fundación be considered an "accessory" to a crime against property.

2020 (August): The Court of Appeals unanimously rejected the plaintiffs' arguments and rules that the Fundación Colección Thyssen-Bornemisza is the legitimate owner of the painting.

*The English version of this text is for informational purposes only and has no legal validity.