Restitution of Cultural Objects Taken During World War II (Part II)

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This article is the continuation of Part I and discusses developments in the restitution of cultural objects taken during World War II. The remaining articles address: (1) the restitution of illicitly excavated and/or illicitly exported cultural objects, (2) repatriation of tribal and indigenous cultural objects, and (3) the return of cultural objects removed during colonial occupation.

**Museums’ Use of Technical Defenses: Von Saher and Beyond**

The question of museums waiving defenses, as the AAM Standards suggest, has emerged as an important point of conflict in Nazi-era restitution cases. In a few instances, museums have filed quiet title actions against restitution claimants, asking courts to issue declaratory judgments that the museums have good title to the objects and/or the claimants’ rights have been lost due to statutes of limitations or laches. [See, e.g., Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802 (N.D. Ohio 2006); Detroit Inst. of Arts v. Ullin, No. 06-10333, 2007 WL 1016996, at *1 (E.D. Mich. Mar. 31, 2007); Museum of Fine Arts, Boston v. Seger-Thomschitz, Case No. 08-10097-RWZ, 2009 WL 6506658 (D. Mass. June 12, 2009); Museum of Fine Art v. Schoeps, 549 F.Supp.2d 543 (S.D.N.Y. 2008).] Such cases remain rare, and are controversial. [See, e.g., Grosz v. Museum of Modern Art, 772 F.Supp.2d 473 (S.D.N.Y. 2010); Simon J. Frankel and Ethan Forrest, “Museums’ Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitations in Response to Nazi-Era Restitution Claims – A Defense,” 23 DePaul J. Art, Tech. & Intell. Prop. L. 279, 281 (2013).] However, museums asserting statutes of limitations and laches defenses – what have become known as “technical defenses” – rather than allowing cases to be decided solely on the merits is not less controversial. [1]

Statute of limitations and laches defenses are commonplace in stolen art litigation. [For a discussion of statutes of limitations and related issues in stolen art cases, see my earlier discussion in “Restitution of Stolen Cultural Objects,” available here.] The propriety of museums’ use of such technical defenses is highlighted in Von Saher v. Norton Simon Museum of Art at Pasadena. [Von Saher v. Norton Simon Museum of Art at Pasadena, 754 F.3d 712 (9th Cir. 2014).] Before the Second World War, Jacques Goudstikker was a preeminent Amsterdam art dealer. [See “Reclaimed: Paintings from the Collection of Jacques Goudstikker,” exhibition March 15 – August 2, 2009, Jewish Museum website, available here.] When the Nazis invaded the Netherlands in 1940, the Goudstikkers, as Jews, were endangered. They fled the country, leaving behind their possessions, including the contents of Jacques’s art gallery, which included more than 1,400 objects, including two life-size 16th-century panels by Lucas Cranach the Elder, titled “Adam and Eve.” Jacques Goudstikker had purchased the Cranach panels at auction in 1931. The auction was titled “The Stroganoff Collection,” and included objects that had been expropriated by the Soviet government from the Stroganoff family, as well as from other owners within the U.S.S.R. The Cranach panels had not been owned by the Stroganoff family, but had been in the collection of the Ukrainian Academy of Science in Kiev.

After the Nazis occupied Amsterdam, the Goudstikkers’ possessions were confiscated, with Hermann Goering selecting ca. 800 objects for his personal collection. Many of the Goudstikker objects were retrieved by Allied forces at the end of the war and were sent to the Central Collecting Point in Munich for cataloging and processing. Allied policy was to return Nazi-looted objects to the governments of the countries from which they had been taken, reasoning that those countries were in the best position to locate the original owners and return
the objects to them or to their heirs. Along with other Goudstikker objects, the Allies restituted the Cranach panels to the government of the Netherlands. However, in 1961, an heir of the Stroganoff family filed a claim against the Cranachs, and Netherlands erroneously restituted the panels to him. The heir sold the Cranach panels to the Norton Simon Museum of Art at Pasadena in the early 1970s.

**Von Saher I**

With *Von Saher* the question of whether a statute of limitations defense is appropriate in the case of Nazi-looted objects has been extensively litigated. Concerned that California’s three-year statute of limitations was presenting an unfair burden on claimants with respect to Holocaust and in Nazi-era looting cases, the California legislature extended that statute of limitations, but only for such Holocaust and Nazi-era looting claims. Marei Von Saher, the heir of Jacques Goudstikker, filed a replevin action in California in May 2007 against the museum, and the museum filed a motion to dismiss, arguing that the California statute extending the limitations period unconstitutionally intruded upon the federal government’s “exclusive power to make and resolve war, including the procedure for resolving war claims.” [*Von Saher v. Norton Simon Museum of Art at Pasadena*, Case No. CV-07-2866-JFW, 2007 WL 4302726 (C.D. Cal. Oct. 18, 2007).] The district court agreed, and dismissed the case. Ms. Von Share appealed the decision to the 9th Circuit Court of Appeals, which issued a decision finding the California extension of its statute of limitations unconstitutional but allowing Ms. Von Saher leave to amend her complaint to allege that her claim was brought within the existing three-year statute of limitations measured by the discovery rule. [*Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016 (2009).] That decision was reheard en banc, with the full court again holding the extended limitations period to be unconstitutional, and remanding the case to the district court to allow the plaintiff to amend her complaint. [*Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (2010).]

**Von Saher II**

Following the 9th Circuit’s decision, Ms Von Saher filed an amended complaint. The California legislature amended its statute of limitations, this time avoiding the foreign affairs conflict, and providing generally that claims for the recovery of artworks must be brought within six years after “actual discovery” by the plaintiff of the current location and current possessor of the object (provided that the object has been taken within the last 100 years). The constitutionality of this limitations period was challenged in a wholly separate Nazi-confiscated art case, and the statute was upheld. [*Cassirer v. Thyssen-Bornemisza Collection Foundation*, 737 F.3d 613 (9th Cir. 2013).] However, the district court granted the museum’s second motion to dismiss the case, holding that Ms Von Saher’s claims were preempted by the foreign affairs doctrine. [*Von Saher v. Norton Simon Museum at Pasadena*, 862 F.Supp.2d 1044 (2012).] Quoting the Solicitor General’s brief with approval, the district court found that “[w]hen a foreign nation, like the Netherlands here, has conducted bona fide post-war internal restitution proceedings following the return of Nazi-confiscated art to that nation under the external restitution policy, the United States has a substantial interest in respecting the outcome of that nation’s proceedings.” [Id. at 1051.]

On appeal, the 9th Circuit reversed that decision, finding that the Dutch post-war internal restitution proceedings that resulted in the Cranachs being given to the Stroganoff heir were not adequate, and were, in fact, criticized and disavowed by the Netherlands in a reassessment in the 1990s. The court further found that the later Dutch restitution proceedings concerning objects from the Goudstikker collection (which resulted in the return to Ms. Von Saher of several hundred objects) were not internal restitution proceedings with respect to the Cranach panels, since those panels were no longer located within the Netherlands at that time and could not be returned. The 9th Circuit rejected the Solicitor General’s position that U.S. policy supported the finality of countries’ internal restitution decisions, without further considerations. Rather, the court stated:

> U.S. policy on the restitution of Nazi-looted art includes the following tenets: (1) a commitment to respect the finality of ‘appropriate actions’ taken by foreign nations to facilitate the internal restitution of plundered art; (2) a pledge to identify Nazi-looted art that has not been restituted and to publicize those artworks in order to facilitate the identification of prewar owners and their heirs; (3) the encouragement of prewar owners and their heirs to come forward and claim art that has not been restituted; (4) concerted efforts to achieve expeditious, just and fair outcomes when heirs claim ownership to looted art; (5) the encouragement of everyone, including public and private institutions, to follow the Washington Principles; and (6) a recommendation that every effort be made to remedy the consequences of forced sales.” [*Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d at 721.]

While museums and their trustees certainly have a duty to protect and preserve the objects in their collections, as well as an obligation to evaluate claims made against objects that they hold, the *Von Saher* case has become a touchstone for critics of museums’ use of technical defenses to delay or foreclose resolution of bona fide claims on their merits. In *Von Saher*, the parties have been in court for seven years and have not yet reached the merits.
Objects Held by Foreign Museums: The Foreign Sovereign Immunities Act

Most U.S. museums are private charitable organizations, but that is not the norm in most other parts of the world, where museums are state-owned or state-affiliated. That means that parties asserting claims for the restitution of objects held in foreign museums frequently involve questions of foreign sovereign immunity.

Generally, a foreign state is immune from the jurisdiction of federal and state courts in the U.S. [See Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).] However, the Foreign Sovereign Immunities Act (FSIA) [28 §§ U.S.C. 1602-1611.] allows U.S. courts to exercise jurisdiction over foreign sovereigns and their agencies and instrumentalities, but only within certain statutorily-defined exceptions. Although the FSIA was not enacted until 1976, it applies to all cases filed after its enactment, regardless of when the alleged wrongdoing occurred. [See Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004) (holding that the FSIA applies to conduct “that occurred prior to 1976 and, for that matter, prior to 1952 when the State Department adopted the restrictive theory of sovereign immunity.”).] Under the FSIA, state-owned or state-affiliated museums are considered agencies or instrumentalities of their foreign sovereigns. [4]

The most commonly applied FSIA exception in cultural property restitution cases is the “expropriation exception.” [See, e.g. Altmann v. Republic of Austria, 317 F.3d 954, (9th Cir. 2002), aff’d, 541 U.S. 677 (2004); Cassirer v. Kingdom of Spain, 580 F.3d 1048, (9th Cir. 2009); Agudas Chasidei Chabad of United States v. Russian Federation, 528 F.3d 934 (D.C. Cir. 2008); Malewicz v. City of Amsterdam, 362 F.Supp.2d 298 (D.D.C. 2005).] Under the expropriation exception, a foreign sovereign (or its agency or instrumentality) is amenable to suit in U.S. courts where property has been taken in violation of international law and either (1) “that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state,” or (2) 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.” [28 U.S.C. § 1605(a)(3).]

Foreign Sovereign-Owned Property in the U.S.

The first prong of the expropriation exception has typically been applied in cases where objects owned by foreign museums are temporarily located in the U.S. For example, in Malewicz v. City of Amsterdam, [Malewicz v. City of Amsterdam, 362 F.Supp.2d 298 (D.D.C. 2005); Malewicz v. City of Amsterdam, 517 F.Supp.2d 322 (D.D.C. 2007).] the heirs of artist Kazimir Malewicz sought the return of 14 Malewicz paintings from the City of Amsterdam, whose Stedelijk Museum had placed the paintings on temporary loan to the Solomon R. Guggenheim Museum and the Menil Collection. Amsterdam argued that because the paintings on loan were immune from seizure under the U.S. Department of State’s Mutual Educational and Cultural Exchange Program, the court should dismiss the case. The court, however, disagreed, holding that “[i]mmunity from seizure is not immunity from suit for a declaration of rights or for damages arising from an alleged conversion if the other terms for FSIA jurisdiction exist.” [Malewicz v. City of Amsterdam, 362 F.Supp.2d at 312.]

The court found that the requirements for FSIA jurisdiction were satisfied, because (1) the museum’s taking of the paintings violated international law, and (2) the paintings were present in the U.S. in connection with commercial activity. For purposes of determining whether jurisdiction exists under the FSIA, the court “need not decide whether the taking actually violated international law; as long as a claim is substantial and non-frivolous, it provides a sufficient basis for the exercise of [the court’s] jurisdiction.” For purposes of the FSIA, a taking violates international law if it is not for a public purpose, or is discriminatory, or does not provide for just compensation. The City of Amsterdam argued that FSIA takings jurisdiction cannot exist unless the plaintiffs have first exhausted local remedies. The court, however, agreed with the heirs that exhaustion of local remedies was not required because no local remedies were available to the heirs since, under Dutch law, no claim for the return of property (or damages for its taking) can be brought later than 30 years after the date of the taking. Therefore, the heirs had no remedy available to them in Dutch courts. The court found that the museum’s loan of the paintings to the U.S. museums satisfied the commercial activity requirement.

Foreign Sovereign-Owned Property Outside the U.S.

The expropriation exception’s second prong has proven to be an even more powerful tool in cultural property restitution cases, and has provided the basis for U.S. jurisdiction in many of the highest-profile cases of the last decade. They have included the restitution from the Austrian state museum of several Gustav Klimt paintings, the best-known of which is his portrait of “Adele Bloch-Bauer I” (which was then acquired by the Neue Galerie for $135 million), to the heir of the Bloch-Bauers. [Altmann v. Republic of Austria, 142 F.Supp.2d 1187 (C.D. Cal. 2001); Altmann v. Republic of Austria, 317 F.3d 954, (9th Cir. 2002), aff’d, 541 U.S. 677 (2004).] The Altmann case went to the U.S. Supreme Court and established the principle that jurisdiction under the FSIA applies to cases filed after enactment of the FSIA, regardless of when the actions that give rise to the case occurred. In fact, these cases have been instrumental in the development of FSIA jurisprudence. The case has been the subject of

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n numerous articles and books, and is the basis for a forthcoming film, “Woman in Gold,” with Helen Mirren as Maria Altmann.

While the Altmann case was ultimately resolved by settlement, many cases seeking restitution of cultural objects held by foreign state museums or entities are on-going. These include actions by (i) heirs seeking return of a Nazi-confiscated painting currently owned by a Spanish state-affiliated museum [Cassirer v. Kingdom of Spain, 461 F.Supp.2d 1157, 1163-64 (C.D. Cal. 2006); Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1032 (9th Cir. 2010); Cassirer v. Thyssen-Bornemisza Collection Foundation, No. CV 05-03459 GAF, 2014 WL 5510996, *5 (C.D. Cal. Oct. 31, 2014).] (which established the principle that the foreign state against whom suit is brought need not be the same foreign sovereign responsible for taking the property); (ii) heirs for the return of a collection of paintings, including works by Lucas Cranach the Elder, El Greco, Francisco de Zurbaran and Gustave Courbet, from the Hungarian National Gallery (which relies upon the breach of a post-war bailment agreement between the family and the museum); [de Csepel v. Republic of Hungary, 714 F.3d 591, (D.C. Cir. 2013).] (iii) a religious organization for return of a religious library and archive from the Russian State Library and Russian State Military Archive, which objects were first confiscated by the Nazis and later seized by Soviet troops and taken back to the Soviet Union (where the organization brought suit in the U.S. after Russia frustrated litigation there. The organization obtained a default judgment against Russia, and has imposed sanctions of $50,000 per day for Russia’s failure to comply with the court’s order directing it to return the objects); [Agudas Chasdei Chabad v. Russian Federation, 466 F.Supp.2d 6, 16 (D.D.C. 2006); Agudas Chasdei Chabad of U.S. v. Russian Fed’n, 528 F.3d 934, 948 (D.C. Cir. 2008).] and (iv) the Welfenschatz described earlier in this article.

The Washington Conference Principles, the museum ethics guidelines and standards, and the succession of court decisions (particularly those brought under the FSIA) have significantly transformed not only the law in the area of cultural property restitution, but perhaps more importantly, they have transformed awareness and behavior. These developments have the potential to affect a normative shift that extends beyond the historical specifics of World War II, and to change the way we think of rights and ownership of cultural property in a wide range of contexts. They are, and will continue to be, touchstones in a broader and continuing discussion.

This article is the second in a five-part series discussing the restitution, repatriation, and return of cultural objects. Each part addresses a different category of return. The first article in the series available here, addressed the restitution of stolen cultural objects.


[2] Laches is an equitable defense “designed to promote diligence and prevent enforcement of stale claims” by those who have “slumber[ed] on their rights.” Gull Airborne Instruments, Inc. v. Weinberger, 694 F.2d 838, 843 (D.C.Cir.1982). To invoke the defense of laches to bar a claim, a defendant must demonstrate that (1) “the plaintiff has unreasonably delayed” in asserting its claim, and (2) “there was ‘undue prejudice’ to the defendant as a result of the delay.” Jeanblanc v. Oliver Carr Co., No. 94–7118, 1995 WL 418667, at *4 (D.C. Cir. June 21, 1995).

[3] See, e.g., Patty Gerstenblith, “Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public,” 11 Cardozo J. Int’l & Comp. L. 409 (2003) (noting that “Use of either the laches defense or the discovery rule will necessitate a lengthy trial that would consume museum resources. It will lead to losses in terms of finances, efforts of staff, and, in many cases, negative publicity. It is thus reasonable for a board of trustees to determine that its chances of retaining an art work through litigation and use of these affirmative defenses are not likely to succeed and thus to seek settlement, while saving the expense of litigation.”).

[4] See Cassirer v. Kingdom of Spain, 461 F.Supp.2d 1157, 1163-64 (C.D. Cal. 2006) (holding that the Thyssen-Bornemisza Collection Foundation is an agency or instrumentality of the Kingdom of Spain, because it arranged and was a party to the original loan of the artworks, contributed toward the purchase price paid for the artworks, provided a facility to house the artworks, paid the cost of refurbishing that facility, and Spain’s governmental ministers were required to form part of the Collection’s directors); de Csepel
v. Republic of Hungary, 714 F.3d 591, (D.C. Cir. 2013) (the Hungarian National Gallery); Agudas Chasidei Chabad of United States v. Russian Federation, 528 F.3d 934 (D.C. Cir. 2008) (Russian State Library and Russian State Military Archive); and Altmann v. Republic of Austria, 142 F.Supp.2d 1187 (C.D. Cal. 2001) (Austrian Gallery which was formerly an agency or instrumentality of Austria and was subsequently privatized).

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