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Cassirer v. Thyssen-Bornemisza Collection Foundation 862 F. 3d 951, (9th Cir. 2017)

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CASSIRER V. THYSSEN-BORNEMISZA COLLECTION FOUNDATION

862 F.3d 951 (9th Cir. 2017)

Alyssa Pullara*

I. INTRODUCTION

This case concerns a painting by French Impressionist artist, Camille Pissarro, titled, *Rue Saint-Honoré, aprés midi, effet de plui,* which was expropriated by the Nazi government in 1939 through a forced sale from its owner, Lilly Cassirer Neubauer.[1] The painting entered into the art market and after several transactions in the United States and abroad, it ended up in the hands of Baron Hans-Heinrich Thyssen-Bornemisza.[2] After many years in his personal collection, the Baron later sold it to the Thyssen-Bornemisza Collection Foundation ("TBC" or the "Foundation") in Spain.[3] Except for instances when the painting was on loan to other public institutions, the painting has been on display in the Thyssen-Bornemisza Museum in Madrid since 1992.[4]

After two visits to the Ninth Circuit Court of Appeals in 2010 and 2013, the District Court was tasked with determining whether the Defendant had acquired title to the painting under

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[1] *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 862 F.3d 951, 955 (9th Cir. 2017).

[2] *Id.*

[3] *Id.*

[4] *Id.* at 956-57.

Spanish law governing adverse possession.[5] In this third appeal, the Ninth Circuit affirmed the District Court's application of Spanish law but remanded for reconsideration of whether Spain's law of adverse possession had been properly applied."[6]

II. BACKGROUND

A. Factual History

Claude Cassirer brought an action against the Kingdom of Spain ("Spain") and the Thyssen-Bornemisza Collection Foundation to recover a Camille Pissarro painting titled, *Rue Saint-Honoré, aprés midi, effet de plui* (the "Painting").[7]

Sold by the artist in 1898 to a successful German-Jewish businessman, Julius Cassirer, the Painting remained with the Cassirer family in Germany for over four decades.[8] In 1939, during a time of mass expropriation of property held by German Jews, Lilly Neubauer ("Lilly"), Claude Cassirer's great-grandmother, was forced to sell the Painting to Jackob Scheidwimmer ("Scheidwimmer"), a renowned Berlin art dealer.[9] Scheidwimmer had been appointed as an art appraiser by the Nazi government and was assigned to appraise the Pissarro painting.[10] After inspecting the painting, Scheidwimmer refused to allow Lilly to leave the country with the painting and demanded she sell the painting for $360 in Reichsmarks.[11] Fearing she would not be

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[5] *Cassirer v. Thyssen-Bornemisza Collection Foundation,* 2015 U.S. Dist. LEXIS 76590 (C.D. Cal. June 12, 2015).

[6] *Cassirer*, 862 F.3d at 955.

[7] Cassirer v. Spain, 461 F. Supp. 2d 1157, 1161 (C.D. Cal. 2006).

[8] Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1023 (9th Cir. 2010).

[9] *Cassirer*, 461 F.Supp. 2d at 1162.

[10] *Id.*

[11] *Id.*; In 1939, $360 German Reichsmarks was the equivalent of $896 United States Dollars. Adjusted with inflation, $896 U.S. dollars would equal $15,870 U.S. Dollars in 2018. The *Rue Saint-Honoré, aprés midi, effet de plui* Painting has been recently estimated to be worth over $40 million dollars. Isaac Kaplan, *Appeals Court Revives 16-Year Lawsuit over $40 Million Nazi-Looted Pissarro,*

allowed to leave the country if she refused the sale, she succumbed to Scheidwimmer's demand.[12]

Soon after its sale, the Gestapo confiscated the Painting.[13] For years it changed through several hand all over the world until 1976 when Baron Thyssen-Bornemisza purchased the Painting for $275,000 from a New York Gallery.[14] As a famous industrialist and avid art collector, the Baron kept the Painting in Switzerland as part of his collection, except when it was on public display in exhibitions outside of Switzerland.[15]

In 1988, Baron Thyssen-Bornemisza leased his extensive collection to the Kingdom of Spain for a period of ten years, but halfway into the lease, the Spanish state purchased the entire collection comprising of 775 paintings for $350 million.[16] After being purchased, the painting found its home in the collections of the Thyssen-Bornemisza Museum, an instrumentality of Spain, in Madrid.[17] The Painting has been on display in Madrid since 1993, except for brief periods when it was on loan to other public institutions.[18]

In 2000, Claude Cassirer, Lily's grandson, discovered the location of the Painting in Madrid and petitioned the Spanish

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https://www.artsy.net/article/artsy-editorial-lawsuit-40-million-nazi-looted-pissarro-painting-revived (last visited Mar. 8, 2018).

[12] *Cassirer v. Spain,* 616 F.3d 1019, 1023 (9th Cir. 2010).

[13] *Id.*

[14] *Cassirer*, 862 F.3d at 956; In 1943, the Painting was sold to an unknown consignor at the Lange Auction in Berlin to an unknown purchaser for 95,000 Reichsmarks. In 1951, the Frank Perls Gallery of Beverly Hills arranged to move the Painting out of Germany and into California to sell to collector Sidney Brody for $14,850. In 1952, Sydney Schoenberg, a St. Louis art collector, purchased the Painting for $16,500. In 1976, the Baron purchased the Painting through the Stephen Hahn Gallery in New York.

[15] *Id.* at 956-57.

[16] *Cassirer*, 461 F. Supp. 2d at 1161.

[17] *Id.*

[18] *Cassirer*, 862 F.3d at 955.

government to have the Painting returned, which was ultimately rejected.[19]

B. Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act of 1976("FSIA")[20] establishes the limitations as to whether a foreign sovereign nation (or its political subdivisions, agencies, or instrumentalities) may be sued in U.S. courts.[21] The federal jurisdictional statute indicates that a foreign defendant (qualified as a 'Foreign State" under the Act) shall be immune to suit in any U.S. court, unless a statutory exception to immunity applies.[22] The Cassirer's argued that the Foundation was subject to suit in the U.S. under the Expropriations Exception.[23] To establish subject matter jurisdiction pursuant to the Expropriation Exception, a plaintiff must demonstrate: (1) rights in property are at issue; (2) the property was "taken"; (3) the taking was in violation of international law; and *either* (4)(a) the property... is present in the United States in connection with a commercial activity carried on in the United States by that foreign state"; or (4)(b) the property... is owned by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.[24]

In their 2010 en banc opinion, the Ninth Circuit determined that Cassirer had set forth compelling evidence to show that Spain and the Foundation were subject to suit under the expropriations

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[19] *Cassirer*, 616 F.3d at 1023.
[20] 28 U.S.C. § 1605 (2016).
[21] *Cassirer*, 616 F.3d at 1026.
[22] *Id.*
[23] *Id.*
[24] 28 U.S.C. § 1605(a)(3). "Taken" refers to acts of a sovereign, not a private enterprise, that deprive a plaintiff of property without adequate compensation. Abelesez v. Magyar Nemzet Bank, 692 F.3d 661, 673 (7th Cir. 2012). "Taking in Violation of International Law" refers to "the nationalization or expropriation of property without payment of the prompt and effective compensation required by international law." Zappia Middle E. Consts. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 251 (2d Cir. 2000). The Foundation is an instrumentality of Spain. *Cassirer*, 616 F.3d at 1027. The author has broken the Act down for to simplify analysis.

exception.[25] The Foundation countered that the takings exception only applies to the foreign state that expropriated the property and not to the later purchaser who was not complicit in the taking.[26] However, the panel held that § 1605(a)(3) does not require Spain to be the entity that expropriated the painting in violation of international law, and that the Foundation engaged in sufficient commercial activity in the United States to satisfy the FSIA.[27]

C. Holocaust Expropriated Art Recovery Act of 2016

The thousands of artworks and other property misappropriated by the Nazis during World War II is considered to be the "greatest displacement of art in human history."[28] Victims of Nazi persecution have attempted to take legal action in the United States to recover their stolen property but are faced with procedural obstacles due to State statute of limitation requirements.[29] As a result, claims are typically barred from either the date of loss or the date the claim should have been discovered.[30]

In an attempt to alleviate the burden for those seeking recovery, Congress passed the Holocaust Expropriated Art Recovery Act ("HEAR Act").[31] The federal statute preempts "any other provision of Federal or State law or any defense at law relating to the passage of time."[32] It also allows a claim "to

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[25] *Cassirer*, 616 F.3d t 1027-28.

[26] *Id.*

[27] *Id.* at 1028; The Cassirer's argued that the Foundation had engaged in commercial activity through: "borrowing art works from American museums; encouraging United States residents to visit the museum and accepting entrance fees from them; selling various items to United States citizens including images of the Painting; and maintaining a web site where United States citizens may buy admission tickets using United States credit cards and view the paintings on display, including *Rue Saint-Honoré, aprés midi, effet de plui.* Nicholas M. O'Donnell, *A Tragic Fate: Law and Ethics in the Battle Over Nazi-looted Art*, 243 (2017).

[28] *Holocaust Expropriated Art Recovery Act*, 22 U.S.C. §1621 (2016).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] 22 U.S.C. §1621 (5)(a).

recover any artwork or other property that was lost during the covered period because of Nazi persecution" to go forward if commenced within six years after actual discovery (defined as "knowledge") of the identity and location of the property and the claimant has a possessory interest in the artwork or other property.[33] Thus, the Ninth Circuit applied the HEAR Act to supply the statute of limitations and to preempt California's statute of limitations.[34]

D. Procedural History

In 2005, the Cassirer's brought suit in a California district court.[35] Since then, the case has been tied up in complex issues ranging from jurisdiction to the statute of limitations.[36] In 2015, the case moved on to the issue of choice of law.[37] The Foundation moved for summary judgment on the ground that under Spanish law, the Foundation has good title to the painting.[38]

The District Court applied the federal common law approach traditionally used by the Ninth Circuit to decide the conflicts of law issue.[39] The federal common law approach is based on which place "has the most significant relationship to the thing and the parties...."[40] The presiding judge ruled that Spain had the greatest interest in determining ownership of the Painting and that Spanish substantive law should therefore apply.[41]

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[33] *Id.* at § 4(2) The statute applies to a wide category of types of cultural property, including pictures, paintings, drawings, prints, lithographs, engravings, books, archives, musical objects and manuscripts and sacred and ceremonial objects; § 4(3), 22 U.S.C. § 1621 (2016) (The term "covered period" refers to the period between January 1, 1933, and December 31, 1954).

[34] *Cassirer,* 862 F.3d at 960.

[35] *Id.* at 957.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 958.

[39] *Id.* at 961.

[40] Restatement (Second) of Conflict of Laws § 222 (Am. Law Inst. 1971).

[41] *Cassirer,* 862 F.3d at 963 (The court justified its conclusion by relying on the location of the Painting in Spain for more than twenty years, and the relatively weak relationship between the Painting and California).

Under Spanish Law of adverse possession (also termed *usucapio* or acquisitive prescription), a possessor can gain title to movable property if the possessor possessed the property (1) for the statutory period; (2) as owner, and (3) "publicly, peacefully and without interruption."[42] The required statutory period is three years if the possessor acts in good faith and in six years if in bad faith.[43]

The District Court determined that the second element was met because the Foundation outwardly acknowledged ownership of the painting since its acquisition in 1993 and the Foundation's display and publication of its possession of the Painting was considered public, peaceful and uninterrupted.[44] However, to counter the summary judgement motion, the Cassirer's argued that Article 1955 of the Spanish Civil Code was inapplicable, because Article 1956 barred the acquisition of ownership by acquisitive prescription in the event that: (1) the Painting was misappropriated by theft or robbery; (2) the possessor was a principal, accomplice or accessory to the crime committed; and (3) the statute of limitations for that crime must not have expired.[45]

While it was undisputed that the Foundation was neither the principal nor the accomplice of the crime in question, the Court examined whether the Foundation could be seen as an accessory (*encubridor*) to the Nazi's crime.[46] After analyzing the Spanish Civil Code and related Spanish case law, the District Court concluded the Foundation was not an accessory because it did not possess the intent or purpose to prevent the crime from being discovered.[47] Thus, as a matter of Spanish law, the Foundation acquired ownership of the painting.[48]

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[42] *Spain Civil Code* 220 (2009) (English Translation).
[43] *Id.*; *See, Spain Civil Code* 220 (2009) (English Translation).
[44] *Cassirer,* 862 F.3d at 265.
[45] *Id.* (*citing Spain Civil Code* 220)
[46] *Id.* at 966.
[47] *Cassirer,* 862 F.3d at 267.
[48] *Id.* (concluding that the Foundation had acquired ownership of the Painting on June 21, 1999, six years after it had purchased the Painting from Baron Hans-Heinrich Thyssen-Bornesmisza).

III. ANALYSIS

A. Statute of Limitations

While the current appeal was pending, Congress passed the Holocaust Expropriated Art Recovery Act in December of 2016.[49] In light of this new legislation, the Ninth Circuit dismissed the issue of whether California, as the forum state, supplied the statute of limitations for the Cassirer's claims and concluded that the Cassirer's had filed their claims timely under the HEAR Act.[50]

However, the court ultimately held that the District Court had incorrectly granted the Foundation's motion for summary judgment based on its erroneous application of Spain's acquisitive prescription law.[51]

B. Application of Spanish Law

As a preliminary step, the Ninth Circuit agreed with the District Court that Spanish Law applied based on the direction of the Restatement (Second) of Conflict of Laws.[52] Section 222 of the Second Restatement advances a "most significant relationship" test.[53] Meaning courts should consider which state "has the most significant relationship to the *thing and the parties*."[54]

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[49] *Id.* at 959-602.

[50] *Id.* at 960 (Cassirers acquired actual knowledge of the Painting's location in 2000 when Claude Cassirer learned from a client that the Painting was in the Museum. After the Cassirer Family's 2001 petition in Spain was denied, the family filed this action in 2005. Since the suit was filed within six years of actual discovery, the claims are timely under the HEAR Act.)

[51] *Id.* at 965.

[52] *Id.* at 961 (*citing Schoenberg v. Exportadora de Dal. S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991) (holding that "when jurisdiction is based on the FSIA, 'federal common law applies to the choice of law rule determination. Federal common law follows the approach of the Restatement (Second) of Conflict of Laws").

[53] *Cassirer*, 862 F.3d at 962.

[54] *Id.* (*citing* Restatement (Second) of Conflict of Laws § 222 (Am. Law Inst. 1971)) (emphasis added).

Additionally, the Second Restatement has a specialized rule for claims of acquisition by adverse prescription of an interest in chattel (also referred to as the *situs rule*).[55] Section 246 provides:

> The state where a chattel is situated has *the dominant interest* in determining the circumstances under which an interest in the chattel will be transferred by adverse possession or by prescription. The local law of this state is applied to determine whether there has been such a transfer and the nature of the interest transferred.[56]

In considering both sections, the Court recognized that Spain has a significant interest in having its substantive law applied to determine whether the Painting was transferred to TBC via acquisitive prescription because the Painting was bought and remains in Spain.[57]

However, after analyzing the District Court's application of Spanish law, the Ninth Circuit concluded that it had erred in deciding that TBC had acquired title to the Painting pursuant to Article 1955.[58] The Ninth Circuit found a triable issue of fact as whether TBC is an *encubridor* (an "accessory") within the meaning of Article 1956.[59]

C. Defining "encubridor" under Spanish Law

If it were to be read alone, Article 1955 would support the District Court's finding that Spanish law vested title in TBC after fulfilling the six-year possession requirement.[60] However, the Ninth Circuit found that "the very next article in the Spanish Civil

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[55] *Cassirer*, 862 F.3d at 963.
[56] Restatement (Second) of Conflict of Laws § 246, cmt. a. (Am. Law Inst. 1971) (emphasis added).
[57] *Cassirer*, 862 F.3d at 964.
[58] *Id.* at 965.
[59] *Id.* at 966.
[60] *Id.* at 965.

Code, Article 1956, modifies how acquisitive prescription operates."[61]

Article 1956 extends the time of possession required for acquisitive prescription only as to those chattels (1) robbed or stolen from the rightful owner and (2) to the principals, accomplices or accessories after the fact with actual knowledge.[62] Therefore, as to any principals, accomplices, or accessories (*encubridors*) to a robbery or theft, Article 1956 extends the period of possession necessary to vest title.[63] In effect, taking the period of possession necessary under Article 1955 (six years), adding, first, the criminal statute of limitation prescribed in Spain's Penal Code (five years), and second, the civil statute of limitation also prescribed in Spain's Penal Code (fifteen years).[64] Thus, if the Cassirer's could show that the Foundation was an *encubridor* under Article 1956, the period of possession required to vest title would be a total of twenty-six years, instead of six years.[65] Consequently, the Cassirer's would not gain lawful title until the year 2019.[66]

The Ninth Circuit considered the lower court's assessment of the term *encubridor*, and observed that the District Court simply followed the Foundation's argument that the term should be defined following the reference in the Spanish Penal Code of 1973, which was in force at the time the Foundation acquired the Painting.[67] Therefore, defining *encubridor* to include "only persons who, after the commission of the underlying crime, acted in some manner to aid those who committed the crime to avoid penalties or prosecutions."[68]

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[61] *Id.*
[62] *Id.* at 966.
[63] *Cassirer,* 862 F.3d. at 966.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Cassirer,* 862 F.3d at 967

The Court, however, felt compelled to assess the Cassirer's claim that the term should be defined following the reference in the 1870 Penal Code, since that was the definition of *encubridor* the Spanish Legislature had in mind when Article 1956 was enacted.[69] After applying the Spanish rules of statutory interpretation and looking to the historical and legislative background of the term "*encubridor,*" the Court agreed with the Cassirers that the term should be construed consistently with the definition found in the 1870 Penal Code.[70] Therefore defining *encubridor* as "one who knowingly benefits himself from stolen property."[71]

This, in effect, widened the definition of *encubridor* and opened the door for the Court to find the Foundation capable of being an accessory of the crime simply because it knowingly benefited from the stolen property (the Painting).[72] Assuming now that Article 1956 applies to someone who knowingly benefits from stolen property, the Foundation had not established, as a matter of law, that it acquired title to the Painting through acquisitive prescription.[73] Since it is undisputed that the Foundation benefited from having the Painting in the Museum, the Court reviewed the evidence pertaining to the actual knowledge requirement of Article 1956.[74] The Court concluded their discussion by stating that the Cassirers had adduced enough evidence to create a genuine issue of material fact whether the Foundation knew the Painting had been stolen when they acquired it from Baron Hans-Heinrich Thyssen-Bornemisza.[75]

With the triable issue of material fact present, the Ninth Circuit concluded that the District Court's interpretation of

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[69] *See generally Cassirer*, 862 F.3d.
[70] *Id.* at 971.
[71] *Id.* at 972.
[72] *Id.*
[73] *Id.* at 968-73.
[74] *Id.*
[75] *Cassirer*, 862 F.3d at 972.

encubridor was too narrow and needed to be revisited in the lower court once again.[76]

D. Lawful Title Under Swiss Law

The Ninth Circuit also addressed the Foundation's argument that they were the lawful owner of the Painting because the Foundation purchased the Painting in a lawful conveyance from the Baron, who had valid title to convey.[77] The Court once again followed the Second Restatement and looked to Spanish law to determine whether there was a lawful conveyance.[78] Since Spain would apply the law of situs for moveable property, Spanish courts would look to New York Law to determine the status of the Baron's 1976 purchase of the Painting and Switzerland's "acquisitive prescription" law to determine whether the Baron acquired valid title while possessing the Painting between 1976 and 1993.[79]

The Foundation's claim to valid title from the 1976 purchase fails because under New York law, "a thief cannot pass good title."[80] Therefore, regardless of the knowledge of subsequent buyers, all artwork stolen during World War II would never be possessed with valid title.[81] As for Swiss law, a purchaser could acquire title to movable property through acquisitive prescription if possessed in good faith for a five year period.[82] While the Baron completed the five-year period of possession between 1976-1981, his ability to gain title rests solely in whether he acted in good faith.[83] After reviewing the record, however, the Ninth Circuit concluded that there was a triable issue of fact as to the Baron's good faith due to several "red flags" including: the questionable

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[76] *Id.* at 981.
[77] *Id.* at 974.
[78] *Id.*
[79] *Id.*; *See supra* note 11.
[80] *Id.*
[81] *Cassirer*, 862 F.3d at 974-75.
[82] *Id.* at 975.
[83] *Id.* (a good faith purchaser is one who is *honestly* and *reasonably* convinced that the seller is entitled to transfer ownership).

past of the Stephen Hahn Gallery, the extremely low purchase price of the Painting, and the minimal amount of provenance information given by the Gallery.[84]

Therefore, the Ninth Circuit reversed the District Court's grant of summary judgment on the basis that, as a matter of law, the Baron acquired title to the Painting under Swiss Law.[85]

IV. FUTURE IMPLICATIONS

The *Cassirer* decision is one of many Nazi-looted art restitution cases plagued with complicated procedural and substantive constraints. However, this decision added several new elements to the way courts analyze and contextualize art restitution cases and could have significant implications for future cases.

This case is notable for being the first circuit court to apply the Holocaust Expropriated Art Recovery Act after being passed in 2016.[86] In addition to the court's holding that the statute of limitations begins to run upon *actual* discovery, not constructive discovery, the court also concluded that it can be applied retroactively to claims filed prior to its passage.[87] However, the important takeaway in the decision is that the Ninth Circuit made clear the HEAR Act does not alter the substantive choice-of-law analysis.[88]

Furthermore, this decision is primarily significant due to the choice of law issue. Since its enactment in 1976, the Foreign Sovereign Immunities Act has opened the door to thousands of

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[84] *Id.* at 975-76. The Stephen Hahn Gallery has a documented history of dealing in Nazi-looted Art. *See* Blair Clarkson, *Judge Oks Pursuit of Stolen Art,* The Daily Journal, January 21, 2005, http://www.bslaw.net/news/050121.html.
[85] *Cassirer,* 862 F.3d at 976.
[86] Clarkson, *supra* note 84.
[87] *Id.* at 954-60.
[88] *Id.* at 964.

suits against foreign states in American courts.[89] Where a foreign sovereign is not immune, FSIA indicates that the defendant sovereign should be "held liable in the same manner and to the same extent as private individuals under like circumstances."[90] However, when it comes to which choice of law rules to apply in FSIA claims, neither Congress or the Supreme Court have addressed the issue.[91] Consequently, a U.S. court may end up applying either state, federal, or foreign substantive law depending on the court's choice of law analysis.[92] Accordingly, there appears to be an inconsistent standard for choosing choice of law rules between the federal circuits.[93]

Both the Ninth Circuit and Second Circuit resolve conflicts of law under FSIA differently.[94] Because Section 1606 of FSIA specifies that a defendant sovereign be "held liable in the same manner and to the same extent as private individuals under like circumstances," the Second Circuit determined that Congress intended for a universal choice of law standard for FSIA cases.[95] Therefore, the Second Circuit believes in order to achieve Congress's "goal of applying identical substantial laws to foreign states and private individuals," a federal court must use choice of law rules from the state in which it sits to ensure that the court conducts "the same choice of law analysis in FSIA cases as it would apply if all the parties to action were private."[96]

Conversely, as we have seen in the *Cassirer* decision, the Ninth Circuit chooses a "modern" approach to choice of law issues

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[89] Hannelore Sklar, *Choice of Law Under the Foreign Sovereign Immunities Act: Cassirer v. Thyssen-Bornemisza Collection Foundation and the Unresolved Disagreement Among the Circuits*, 47 GEO. J. INT'L. L. 1198 (2016).
[90] *Id.* at 1200.
[91] *Id.*
[92] *Id.* at 1200-01.
[93] *Id.* at 1201.
[94] *Id.* at 1208.
[95] Sklar, *supra* note 89 (*citing Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China,* 923 F.2d 957, 959 (2d Cir. 1991) (stating that "FSIA implicitly requires courts to apply the choice of law provisions of the forum state with the respect to all issues governed by state substantive law").
[96] *Id.*

by basing its decision on the examination of the different states' interests in having their own laws applied.[97] Because the FSIA does not contain explicit guidance on choice of law, the Ninth Circuit preferred to resort to federal common law for a choice-of-law rule.[98] In support of its decision, the court highlights the distinction between FSIA jurisdiction and a federal court's diversity jurisdiction. Pursuant to the Supreme Court's decision in *Erie v. Tompkins*, "the use of federal common law in specialized areas where jurisdiction is not based on diversity" is permitted.[99] In applying the federal common law, the court therefore looked to the Second Restatement's "most significant relationship" test.[100]

While both the Circuit's approaches to choice of law under FSIA are valid, the inconsistent approach fails to achieve Congress's objective while also accounting for the international complications FSIA produces.[101] Therefore, this issue is one that would benefit from a Supreme Court judgment delineating a universal approach.

Because FSIA cases evoke such international considerations, a universal application of federal choice of law rules would remedy any confusion between the federal circuits. Furthermore, the consistent application of federal common law rules would better address political sensitivity concerns and facilitate the creation of a more "uniform jurisprudence."[102] The inconsistencies between courts has the ability to undercut any remedies for violations of international law that the FSIA seeks to provide. Likewise, using the Ninth Circuit approach would conserve judicial resources, saving courts like the one in *Cassirer* from conducting two choice of law analyses. Lastly, with this uniform choice of law standard in all U.S. courts, foreign defendants will be able to better anticipate what choice of law

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[97] *Cassirer,* 862 F.3d at 964.
[98] *Id.* at 961.
[99] Sklar, *supra* note 67 at 1210 (*citing Cassirer v. Thyssen-Bornemisza Collection Found.,* 862 F.3d 951, 976 (9th Cir. 2017)).
[100] *Id.* at 1211.
[101] *See generally,* Sklar, *supra* note 67.
[102] *Id.* at 1215 (*citing* H.R. Rep No. 94-1487, at 32 (1976)).

rules apply to their case and could help curb the possibility of venue shopping.

V. CONCLUSION

The Ninth Circuit's decision is yet another illustration of the complexity of litigation surrounding FSIA and the Nazi-looted art restitution field.[103] As the most recent FSIA decision to come out a federal circuit, *Cassirer* illustrates the divergent methods in selecting choice of law rules under FSIA cases.[104]

In order to achieve the drafter's intent of holding a foreign state liable in the same manner as a private individual, the Second Circuit chooses to apply the choice of law rules of the forum state.[105] Therefore, maintaining that FSIA implicitly requires courts to analyze these cases similarly to cases brought under federal diversity jurisdiction.[106] However, due to the federal implications, the Ninth Circuits rejects that notion and looks to federal common law rules when deciding FSIA cases.[107]

As a legal discipline, conflict of law stresses the "importance of predictability, certainty, and uniformity of results."[108] While Congress did not provide guidance for deciding conflict of law issues in FSIA cases, federal circuits should work toward creating a universal approach with these values in mind. Since FSIA cases implicate federal concerns like international law, the collective application of the Ninth Circuit approach would carefully balance these concerns and Congressional objectives, while simultaneously cutting out any uncertainty for future courts in deciding FSIA cases.

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[103] *See generally,* Sklar, *supra* note 67.
[104] *See generally Cassirer*, 862 F.3d 957.
[105] *Id.*
[106] *Id.*
[107] *Cassirer,* 862 F.3d at 961.
[108] Sklar, *supra* note 67 at 1219.