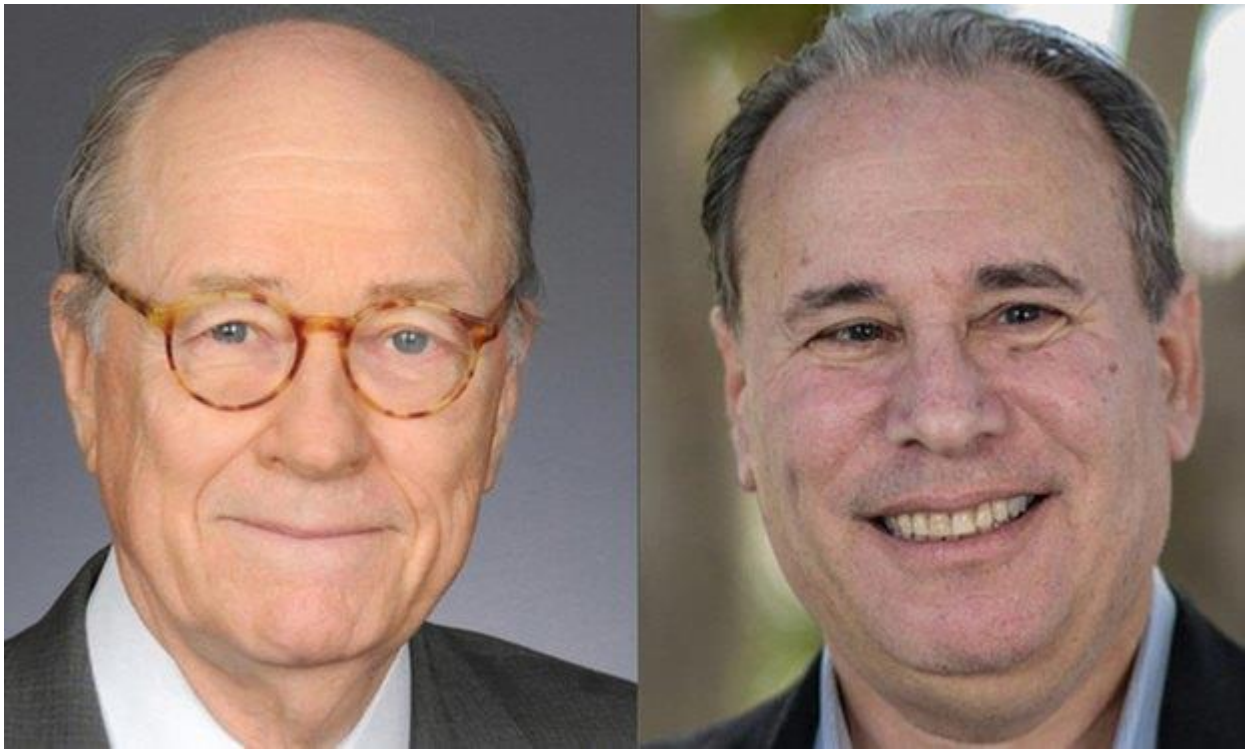
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On Some Issues, Sovereigns Are Just Like You and Me

In their International Litigation column, Lawrence W. Newman and David Zaslowsky discuss a recent Supreme Court decision that resolved a split among the Circuits and held that, in a case under the Foreign Sovereign Immunities Act raising non-federal claims against a foreign state or instrumentality, a court should determine the substantive law by using the same choice-of-law rule that would have been applicable in a similar suit against a private party.

By **Lawrence W. Newman and David Zaslowsky** | May 25, 2022 at 12:00 PM



Suing foreign sovereigns in the courts in the United States raises certain issues that are of no concern if there is a non-sovereign on the other side. In this column, we look at a recent Supreme Court decision in which the court made clear that, at least with respect to choice of law, a sovereign should be treated exactly the same as a private party. See *Cassirer v. Thys sen-Bornemisza Collection Foundation*, 596 U.S. ___ (2022).

The lawsuit concerned the ownership of an Impressionist painting: Camille Pissarro's Rue Saint-Honoré in the Afternoon, Effect of Rain (now thought to be worth tens of millions of dollars). Paul Cassirer was a German Jew who owned an art gallery that owned the Rue Saint-Honoré. Paul's heir, Lilly Cassirer, inherited the painting and hung it in her Berlin home. In 1939, she conveyed the painting to the Nazis (for the equivalent of a few hundred dollars) in return for an exit visa. Lilly and her grandson, Claude Cassirer, eventually settled in the United States.

In the early 1990s, the painting was acquired by the Thyssen-Bornemisza Collection Foundation through an heir to the Thyssen Steel empire, Baron Hans Heinrich von Thyssen-Bornemisza. When Claude learned that the Foundation had the painting, he sued the Foundation, asserting various property-law claims based on the allegation that he owned the Rue Saint-Honoré (Claude passed away in 2010 and his heirs became the plaintiffs).

Plaintiffs alleged that the Baron did not act in good faith when he acquired the painting because he had actual and concrete reasons for suspicion that it was stolen, and because he failed to investigate its provenance. Plaintiffs further alleged that the Foundation was aware of the same red flags of theft, also failed to investigate, and was generally irresponsible under these circumstances.

Because the Foundation is an "instrumentality" of the Kingdom of Spain, the complaint invoked the Foreign Sovereign Immunities Act (FSIA) (28 U.S.C. §§1330, 1332, 1391(f), 1441(d), and 1602-1611), which provides the sole basis for jurisdiction over foreign states and their instrumentalities. The FSIA regime starts with the presumption that sovereigns are immune from the jurisdiction of the U.S. courts, unless the case falls within one of the enumerated exceptions to immunity. This lawsuit fell under the exception for expropriated property.

Turning to the substance of the claim, the court had to choose which law to apply to determine ownership. Plaintiffs urged the use of California's choice-of-law rule to make that determination; the Foundation advocated a rule based on federal common law. The courts below picked the federal option. Their rulings were based on Ninth Circuit precedent that held that, whenever jurisdiction is based on the FSIA, choice of law must be based on federal common law, which, the court said, follows the approach of the Restatement (Second) of Conflict of Laws.

Federal common law, the lower courts then held, commanded use of the property law of Spain, not California. Applying Spanish law, the courts determined that the Foundation was the rightful owner. The Supreme Court granted certiorari to resolve a conflict among the Courts of Appeals as to what choice-of-law rule a court should apply in an FSIA case raising non-federal claims. The four other circuits that considered the same issue had all rejected the Ninth Circuit's reliance on a federal choice-of-law rule and had chosen instead the law of the forum state as the source of choice-of-law principles.

At the center of this issue was §1606 of the FSIA, which provides: "As to any claim for relief with respect to which a foreign state is not entitled to immunity under [the FSIA], the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." To support their argument, plaintiffs hypothesized in their brief a case identical to their own, but brought against a private Spanish art dealer. If that suit were filed in state court, California's choice-of-law rule would govern. And if that private suit were filed in federal court, because a federal court sitting in diversity borrows the forum state's choice-of-law rule, once again, California's choice-of-law rule would apply.

Thus, according, to plaintiffs, if California's choice-of-law rule applies in the suit against a private dealer, it must also apply if that same lawsuit is brought under the FSIA against a museum owned by a state entity such as the Foundation. That is the only way, they contended, to ensure the foreign state can be "liable in the same manner and to the same extent as a private individual under like circumstances"—as §1606 demands.

At oral argument, the Chief Justice challenged this position. He posited that there could be situations—such as how "you manage your army" or whether asylum was denied properly—where it would make no sense to treat the relevant law for a sovereign the same as for a private citizen. But counsel properly pointed out in response that those hypotheticals could not arise under the FSIA; they are inherently sovereign conduct and would not fall under any of the FSIA exceptions to immunity.

Arguing on the other side, the Foundation did not deny that §1606 requires that sovereigns be treated the same way as private parties on the issue of liability. In the Foundation's view, however, that meant that the same substantive law should be applied—which is what happened here in that the Spanish laws that were applied in examining the Foundation's liability are identical to those that would apply to a private party. But, the Foundation argued, there was no need for §1606 to apply at the choice-of-law stage.

In the larger context, the position of the Foundation was that plaintiffs viewed the FSIA too narrowly in saying that it should essentially apply only to the initial determination of immunity. Rather, the Foundation said, the

FSIA is broader and contemplates the application of federal law at various stages of the litigation. Moreover, it argued that the FSIA directs that foreign sovereigns should be subjected to uniform treatment and acknowledges that foreign sovereigns are entitled to respect—even when they have lost immunity from suit.

Thus, at oral argument, counsel for the Foundation argued that, in the absence of a uniform federal choice-of-law rule, a sovereign could be subject to disparate treatment, depending on where the case was brought. In this case, there could have been one outcome if the suit had been brought in New York (to which Mr. Cassirer moved when he came to the United States), a different outcome had the case proceeded in Ohio (after he moved there in the 1950s), and a still different outcome for a case brought in California (where Mr. Cassirer chose to retire). Predictability and uniformity are supposed to be basic tenets of the FSIA, the Foundation said, and that, plus the respect to be given a foreign sovereign, could be achieved only through the application of a single federal standard. The Chief Justice did not seem impressed with this argument, responding:

Welcome to the United States. That's how the courts work.

And a private citizen of the United States moves from New York to Ohio, the law that applies to him is going to change as well. And we're dealing with a law that says you apply this—the law to—to—to the foreign sovereign as if a private party.

And the alternative is what we have said is an unusual situation where you're asking the courts to devise their own body of law that's going to apply in this situation.

Indeed, this comment portended what the court would do. A unanimous Supreme Court ultimately reversed the decision of the Ninth Circuit and ruled against the Foundation.

As the Supreme Court explained, "the FSIA was never intended to affect the substantive law determining the liability of a foreign state or instrumentality deemed amenable to suit." Section 1606 accomplishes that purpose. When a foreign state is not immune from suit, it is subject to the same rules of liability as a private party, which is to say that the substantive law applying to the latter also applies to the former. Thus, §1606 also dictates that the choice-of-law rule must mirror the rule that would apply in a similar suit between private parties—because only the same choice-of-law rule can guarantee use of the same substantive law, and thus guarantee the same liability.

The Supreme Court then used a variation of the same hypothetical noted above that plaintiffs had included in their brief, comparing the facts of the instant suit to one brought against a private museum. If the choice-of-law rules in the two suits should differ, so might the substantive law that was applied, And if the substantive law should differ, so might the suits' outcomes. Thus, whatever choice-of-law rule applies in the private-museum suit, so too must apply in the suit against the Foundation. That is the only way to ensure—as §1606 demands—that the Foundation, although an instrumentality of the Spanish government, will be liable in the same way as a private party. In this case, that was California choice-of-law principles. There was no basis for the Ninth Circuit's use of a federal choice-of-law rule in FSIA cases, which the Supreme Court described as "a solution in search of a problem."

Statistics compiled each year by the Harvard Law Review show that the Supreme Court decides about one FSIA case a year. See, e.g., *The Supreme Court, 2019 Term—The Statistics*, 134 Harv. L. Rev. 610, 624 (2020). Those decisions often wade into important issues of international law, such as last year's decision in *Federal Republic of Germany v. Philipp*, 529 U.S. ___ (2021), holding that the expropriation exception does not apply to a foreign sovereign's takings of its own nationals' property, and *Samantar v. Yousuf*, 560 U.S. 305 (2010), holding that "foreign state" within the FSIA should not be understood to include an official acting on behalf of that state. Or some cases involve an array of opinions with justices joining different parts of different opinions. See, e.g., *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). But the *Cassirer* decision was different. It was a unanimous decision. And, the issue was a simple one, in the view of the court. As Justice Kagan made clear: "The path of our decision has been as short as the hunt for *Rue Saint-Honoré* was long; our ruling is as simple as the conflict over its rightful owner has been vexed. A foreign state or instrumentality in an FSIA suit is liable just as a private party

would be. See §1606. That means the standard choice-of-law rule must apply." As this quotation indicates, sometimes the court takes on FSIA cases with issues that are not controversial within the members of the court, but resolve, without drama, conflicts among the circuits, one of its important roles

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