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Disputes over paintings in the Thyssen-Bornemisza Collection in Madrid have resurfaced recently in the national conversation. Below, please find an oral argument analysis of a seminal case on the issue *Cassirer v. Thyssen-Bornemisza Collection* Foundation (argued before the Supreme Court in January 2022).

In a unanimous opinion issued later that year, the Supreme Court ruled that—under the Foreign Sovereign Immunities Act—courts must apply the choice-of-law doctrines they would use to analyze suits against private parties. In a limited victory for a family seeking to recover Nazi-stolen art, the Court announced, "n a property-law dispute like this one, that standard rule is the forum State's (here, California's)—not any deriving from federal common law."

We're publishing this oral argument analysis in hopes that it will provide a better sense of the issues at play and how different justices have conceptualized them.

The Story of the Case:

The question the Supreme Court wrestled with this Tuesday may seem obscure: Whether a federal court hearing state law claims brought under the Foreign Sovereign Immunities Act must apply the forum state's choice-of-law rules to determine what substantive law governs the claims at issue, or whether it may apply federal common law. The case, *Cassirer v. Thyssen-Bornemisza Collection*, presents this question in the context of a decades-long dispute over ownership of an 1897 oil painting by Jacob Abraham Camille Pissarro, a famous French impressionist. In 1939, Nazis forced Lilly Cassirer to sell the painting, *Rue Saint-Honoré, Afternoon, Effect of Rain*, in exchange for the equivalent of $360 and permission to leave Germany. However, she never received any of the revenue since the account it was deposited in was blocked.

After World War II ended, the Allied Powers gave victims of Nazi art theft the ability to pursue compensation for their stolen property. Accordingly, the United States Court of Restitution Appeals ruled that Ms. Cassirer was the proper owner of this painting. However, until 2000, the location of the painting was unknown, and it was believed to have been lost in the war. Then, Ms. Cassirer's grandson, Claude Cassirer, discovered that the painting belonged to the Thyssen-Bornemisza Collection, the respondent in this case. A Holocaust survivor himself and a U.S. citizen since 1947, Mr. Cassirer filed a petition with the Spanish government and the museum to retrieve the painting.

Spain refused his petition, so Mr. Cassirer sued the museum in the District Court for the Central District of California in 2005. He brought his suit under the Foreign Sovereign Immunities Act (FSIA) and argued his claim for the painting under California law. When the district court decided the case on the merits (numerous procedural questions delayed the legal procedures, including two denials of certiorari from the Supreme Court), the key question became whether the collection had a "good title" to the painting. This essentially asks whether the painting was fully Spain's such that no other party had a claim to it. Notably, Spanish and

California law diverge on this question. Under Spanish law, people who purchase property in good faith can receive the title to personal property after they possess the property openly for six years (as the district court held that the collection did). Under California law, people who steal personal property—in this case, the Nazis—can never receive full ownership of it.

The Rules of Decision Act states that "The laws of the several states … shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." Pursuant to this, in diversity cases, when federal courts hear state-law disputes between parties residing in different states or between American and foreign citizens, the federal courts generally apply state law. In *Klaxon Co. v. Stentor Electric Manufacturing Co.* (1941), the Supreme Court held that "in diversity cases the federal courts must follow conflict of laws rules prevailing in the states in which they sit." The lower courts in this case chose not to apply this standard from *Klaxon* to suits brought under the FSIA.

The district court and Ninth Circuit applied Spanish law in this case, holding that their precedent interprets the FSIA to support the application of federal common law, not state law. The appeal court concluded that federal common law, the body of law developed on the basis of preceding rulings by federal judges, instructs that Spain's substantive law controlled Thyssen-Bornemisza Collection's claim to the painting. The Supreme Court will decide whether the Ninth Circuit was correct in making this determination or if California law should apply instead.

Oral Argument:

The lawyer for the Cassirer family, David Boies, began the argument by asserting three things: First, that the respondent is a foreign sovereign not entitled to immunity under Section 1605 of the Foreign Sovereign Immunities Act (FSIA); secondly, that Section 1606 of the FSIA states that a foreign state should be liable in the same manner and to the same extent as a private individual under like circumstances; and lastly, that if respondent were a private museum, California forum laws would apply to this case. Mr. Boies concluded by stating that without clear congressional intent, the Supreme Court should not interpret the FSIA as embedding federal common lawmaking.

Just after the argument began, Justice Thomas asked, "if we think that the district court and the court of appeals did, in fact, apply Spanish law, would have applied Spanish law in the exact same way to a private person, wouldn't you lose?" Mr. Boies responded that this would only be the case if his third proposition were wrong that California forum laws would apply to a private museum. Since petitioners were asserting that the text of the FSIA would require Spain to be treated like a private party, the Chief Justice questioned how a foreign sovereign could be treated as a private person when they carry out functions that private individuals do not engage in such as managing an army and the nation's asylum system. The counsel for petitioners pushed back on

this question by stating that these types of claims would not come up in the FSIA context as "you have to have commercial activity to start with."

Later in the argument, Justice Alito chimed in with a hypothetical. "What would happen if the choice-of-law rule of a jurisdiction took into account the fact that the defendant is an instrumentality of a foreign state, as I think some choice-of-law regimes do?" he asked. He questioned how Section 1606 of the FSIA would be applied in that context since "1606 says that the foreign state shall be liable in the same manner and to the same extent as a private individual under the circumstances." He questioned if, under the petitioner's interpretation of the FSIA, a jurisdiction's choice-of-law rules would be partially preempted by Section 1606. Mr. Boies described that a state could not have a law that discriminated against a forum sovereign, though Justice Alito countered that in his hypothetical, the state law would actually work to the benefit of the foreign sovereign. He then concluded by asking whether the difficulty involved in this hypothetical suggests that Section 1606 should only become relevant to a court's analysis after the choice-of-law decision has been made. Justice Kagan queried Mr. Boies about whether there was federal common law on both sides of this case, stating "the *Klaxon* rule, which says look to state choice-of-law rules, that is itself a rule of federal common law, isn't it?" Justice Barrett chimed in to ask the basis of the *Klaxon* rule and the Chief Justice pointed out that *Klaxon* has been subject to criticism.

When Marsha Hansford, who was arguing in favor of petitioners on behalf of the United States, came up to the podium, Justice Thomas immediately asked her about the government's brief. He said that their brief seemed to suggest that if applying the state choice-of-law rules would be too dismissive of the interests of the foreign sovereign, courts should look to other sources. Ms. Hansford explained the government's view that applying state choice-of-law rules would present no issue across the board, but described that "application of a particular law could raise issues of such interest to foreign policy that that is a basis for creating federal common law on that particular issue." Justice Alito questioned why the government was not arguing in favor of petitioners based on the Rules of Decision Act that state law applies to state causes of action.

Then, Thaddeus Stauber came up to the podium to argue in favor of the museum. He argued that the FSIA does not require federal courts that are judging a foreign state's private or public acts to utilize the state's choice-of-law test when this forum is minimally related to the claims or basis for the court's jurisdiction. He asserted that "But for Mr. Cassirer's retirement to San Diego, California would have no interest in this case." The crux of his argument seemed to be that Section 1606 applies to the application of substantive law, not to the choice-of-law test. First, Mr. Stauber fielded questions from Justice Thomas about how his position treated the foreign sovereign like a private party. Justice Kagan pushed back by saying that his assertions "seem to be suggesting that we should understand this as a federal question case. But these are not federal question claims. These are state claims." In response to questioning from Justice Sotomayor, Mr. Stauber said that the petitioner's arguments would raise constitutional claims and international comity claims. He said these arguments might come into play if the Ninth Circuit decided to apply California's choice-of-law test in a way that applied California law. That

instance, he posited, would be “an extraterritorial reach of California state law” because “California state has no interest in this case but for an individual, in this case a U.S. citizen.” Stauber maintained that in a subsequent case, “it could be a non-U.S. citizen who chooses to move to Alabama or Florida or anywhere else for that matter.”

Toward the end of a dense argument about the FSIA and common law forum analysis, Justice Breyer sparked a more lighthearted note, asking “Can everyone agree that this is a beautiful painting?”