

Outside Counsel

A Comity of Error: Analyzing New York's Choice of Law Rules in Stolen Art Cases

The international art market is a multi-billion dollar, largely unregulated industry. Whether or not “good title” to a particular work of art exists is a critical question. That question can be answered in different ways according to the laws of different international jurisdictions.

For example, the Uniform Commercial Code, through its various state implementing acts, regulates the transfer of art in the United States, including in New York.¹ The UCC generally balances the rights of dispossessed owners of art with the rights of later, good faith purchasers of such art as follows: If the former owner parted with her/his art through a transaction that bears the hallmarks of a “voluntary” transaction but was, in fact, a transaction designed to trick the owner (e.g., a knowingly bounced check was used to pay for the work), then title is deemed “voidable” but may be transferred to a later good faith purchaser for value if not first recovered by the dispossessed owner.² If, however, the former owner was the victim of theft and parted with her/his work “involuntarily,” then title is deemed “void ab initio” and even a

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bona fide purchaser cannot acquire valid title to the art.³ Under New York law, therefore, stolen art must be restituted to the original owner almost without exception.⁴

Some jurisdictions outside the United States do not favor the rights of dispossessed, former owners over the rights of later, bona fide purchasers as starkly as New York law. For example, Israel and Switzerland permit the good faith acquisition of even stolen property under certain conditions.⁵ France permits the prescriptive or adverse possession of stolen property after a certain period of time, even if the buyer acted in bad faith.⁶ The differing international treatment of post-theft transactions often requires courts to engage in conflict of laws analyses.

Importance of ‘Comity’

Conflict of law analysis is rooted in the principle of comity: Local courts are encouraged to respect the laws of foreign jurisdictions, provided the foreign laws are not repugnant to the policies of the forum state.⁷ Conflict of law analysis is particularly important in cases addressing the extraterrito-

rial sale of goods, such as art, because buyers and sellers are entitled to certainty that their transactions overseas will be respected as legitimate, and the sales laws of foreign nations do not always accord with laws in the United States.

In civil claims against third-party purchasers of allegedly stolen art, the “tort” at issue is not the alleged theft itself (that would be an action against the thief), but rather the purchaser’s allegedly wrongful retention of property that is claimed to be owned by another.⁸ The question in such cases is whether title to the allegedly stolen property could have been validly transferred to the bona fide purchaser. As discussed above, different jurisdictions may answer that question differently.

In civil claims against third-party purchasers of allegedly stolen art, the “tort” at issue is the purchaser’s allegedly wrongful retention of property that is claimed to be owned by another.

The doctrine of international comity recognizes the need to respect the conflicting laws of foreign jurisdictions where allegedly stolen art may have been permissibly purchased.⁹ The Second Circuit has observed that the point of comity is to promote “harmony” among nations, which is

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“especially [important] where the workings of international trade and commerce are concerned.”¹⁰

Analysis Prior to ‘Bakalar I’

One of the most significant New York conflict of law decisions concerning art in recent years is the Second Circuit’s 2010 decision in *Bakalar v. Vavra* (*Bakalar I*). The court in *Bakalar I* acted in a difficult context: The case involved the sale of artwork that was alleged to have been stolen by the Nazis in 1938 from a Jewish citizen of Vienna named Fritz Grunbaum, who was a Holocaust victim. In later proceedings (*Bakalar II*), the allegation of Nazi theft was disproved upon evidence that the work of art at issue (a drawing by Egon Schiele) had avoided the Nazis and was sold by Fritz Grunbaum’s sister in-law, a woman named Mathilde Lukacs, to a Swiss art dealer in Switzerland in 1956.¹¹

Nevertheless, in the earlier proceeding that was *Bakalar I*, the Second Circuit credited the allegation of Nazi theft and shifted the burden under New York law to the good faith purchaser to disprove that allegation. The court found that Lukacs’ sale of the art in Switzerland did not control a conflict of laws analysis given the additional fact that the art eventually also was sold through a gallery in New York. That is where the art was purchased in good faith by an individual named David Bakalar in 1963.

Purporting not to reject Swiss sales laws as repugnant to New York public policy, the Second Circuit nonetheless held that New York law, not Swiss law, controlled the question of whether title to the allegedly stolen artwork could be cleared. Specifically, the court found that New York’s public policy against permitting the state to become an international marketplace for stolen goods is of paramount importance to a conflict of laws analysis. As discussed

below, the approach articulated in *Bakalar I* may undermine the doctrine of comity and unduly skew the choice of law analysis.¹²

The ‘Situs Rule’ and ‘Interests Analysis.’ Prior to *Bakalar I*, the rule had developed under New York law that “questions relating to the validity of a transfer of personal property are governed by the law of the state where the property is located at the time of the transfer.”¹³ The location at the “time of the transfer” for choice of law purposes is not the place of the alleged theft. “In applying the New York rule that a purchaser cannot acquire good title from a thief, New York courts do not concern themselves with the question of *where* the theft took place, but simply *whether* one took place.”¹⁴

New York’s policy is to protect the state as an international marketplace so that it remains a magnet for commerce without becoming a thruway for stolen goods. In that regard, New York generally accepts the application of laws from other nations that permit good faith transfers or adverse possession of stolen property within those jurisdictions’ borders.

In other words, New York’s choice of law rules are not driven by a policy against theft, which is universally condemned. Rather, New York’s policy is to protect the state as an international marketplace so that it remains a magnet for commerce without becoming a thruway for stolen goods. In that regard, New York generally accepts the application of laws from other nations that permit good faith transfers or adverse possession of stolen property within those jurisdictions’ borders (with two exceptions noted briefly below).¹⁵

Thus, for choice of law purposes, the

law of the location “at the time of the transfer” (of the allegedly stolen art) should be the law of the place where “title passed, if at all,” after the alleged theft.¹⁶ This is the “situs rule.”¹⁷

The situs rule also accords with an analysis of which jurisdiction has the most significant interest in having its law govern a post-theft transaction (i.e., an “interests analysis”), because the overriding interest should generally belong to the nation regulating a sale of post-theft property within its borders, and to having the international marketplace give full faith and credit to the legitimacy of that transaction.¹⁸ That is the essence of “comity.”

The ‘In-Transit’ Exception. One exception to the situs rule concerns transactions that are intended to occur within a particular jurisdiction only as a fleeting matter, without remaining in that jurisdiction’s stream of commerce, by parties who are not connected to that jurisdiction: i.e., the “in-transit exception.”¹⁹ In such cases, a territory’s “fortuitous” and brief connection with a transfer of allegedly stolen property does not outweigh the interests of other nations in which the property and/or the parties at issue reside on a more long-term basis.²⁰

The ‘Public Policy’ Exception. Another exception to the situs rule arises “where the application of foreign law ‘would be violative of fundamental notions of justice or prevailing concepts of good morals.’”²¹ A jurisdiction’s interest in having its sales laws apply can be disregarded by a New York court upon a finding that the foreign jurisdiction’s laws are fundamentally unjust or “commercially indifferent” to the prior theft. In other words, a nation that effectively offers a safe harbor for bad faith transactions has no genuine interest in having its laws afforded full faith and credit by the international marketplace.

Analysis in 'Bakalar I'

The district court in *Bakalar I* determined that Swiss law should govern the question of whether title to the artwork at issue could have passed to David Bakalar in New York in 1963, based upon the first documented post-“theft” sale of the art by Mathilde Lukacs in Switzerland in 1956.²² Switzerland was the first known location where title could have passed, “if at all,” after the artwork’s alleged theft by Nazis.

The Second Circuit vacated the district court’s choice of law ruling in *Bakalar I*, holding that New York law should have been found to apply.²³ In reaching this conclusion, the Second Circuit rejected the situs rule and adopted a pure “interests” analysis. The court then found that Switzerland’s interest in regulating title to the art was “tenuous” and “must yield to the significantly greater interest of New York...in preventing the state from becoming a marketplace for stolen goods.” This reasoning, however, raises a number of questions.

First, in rejecting the situs rule in stolen chattel cases, the Second Circuit relied on the 1991 New York Court of Appeals case of *Istim v. Chemical Bank*.²⁴ *Istim* dealt with asserted rights to a settlement fund under an attorney’s lien. While the Court of Appeals in that case found “no reason not to apply [the interests analysis] to the present turnover proceeding concerning competing claims to a settlement fund,” the court also stated that “the traditional situs rule—that the location of the property was controlling—continued to hold some sway” in other property conveyance cases. Indeed, the situs of a post-theft conveyance of property may claim the most significant interest in having its law apply and afforded international full faith and credit under principles

of comity. *Bakalar I* does not address this point.

Second, by elevating the interests of New York over those of Switzerland in regulating the artwork’s title, *Bakalar I* may be read as expanding the “in-transit” exception beyond its purpose. The court reasoned that “the resolution of an ownership dispute... between parties who otherwise have no connection to Switzerland does not implicate any Swiss interest simply because the [art] passed through there.”²⁵ Yet, the delivery and sale of the artwork by Mathilde Lukacs to an art dealer in Switzerland was not a “fortuitous” transaction. *Bakalar I* does not address Switzerland’s interest in having that transaction respected, regardless of an unplanned, later sale of the art in New York.

Third, *Bakalar I* may be read as effectively per se elevating New York’s public policy above the policies of those jurisdictions that have chosen to recognize the rights of bona fide purchasers. The court stated that it was not purporting to address the question of whether Swiss law is unjustly indifferent to the rights of dispossessed owners. Without making such a finding, however, there is little basis to allow New York’s policy preferences to trump those of Switzerland (or similar jurisdictions). Had the court found Swiss law to reflect commercial indifference to the possibility of theft, then application of New York law would have been justified on public policy grounds.

Conclusion

Every forum jurisdiction may wish to see its policy preferences apply. But if that were a dispositive “interest” for choice of law purposes then the doctrine of comity would have no meaning. The specific context for the decision in *Bakalar I* was unquestionably compelling. But viewed as

a general authority in cases before the federal courts of New York, *Bakalar I* may undermine the principle of comity and inject uncertainty into the international marketplace for art and other movable chattels.

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1. E.g., N.Y. U.C.C. §2-403(1).

2. E.g., *Morgold v. Keeler*, 891 F.Supp. 1361, 1365-66 (N.D. Cal. 1995).

3. E.g., *Bakalar v. Vavra*, 619 F.3d 136, 141-42 (2d Cir. 2010) (*Bakalar I*).

4. New York law provides some counter-balance to good faith purchasers through the availability of an equitable “laches” defense, which bars original owners or their successors from reclaiming allegedly stolen property if they unduly delayed in seeking to recover such property and if important evidence that could have been used to rebut an inference of theft was lost in the process. See, e.g., *Bakalar v. Vavra*, 819 F.Supp.2d 293 (S.D.N.Y. 2011), aff’d, 500 F. App’x 6, 8 (2d Cir. 2012), cert. denied, No. 12-1160, 2013 WL 1193864 (U.S. April 29, 2013) (*Bakalar II*).

5. E.g., *Bakalar I*, 619 F.3d at 140 (analyzing Swiss law); *Gemological Institute of Am., v. Zarian*, No. 03 Civ. 4119 (RLE), 2006 WL 2239594, at *2 (S.D.N.Y. Aug. 4, 2006) (analyzing Israeli law).

6. E.g., *Greek Orthodox Patriarchate v. Christie’s*, NO. 98 Civ. 7664 (KMW), 1999 WL 673347, at *5 (S.D.N.Y. Aug. 30, 1999) (analyzing French law).

7. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

8. See, e.g., *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 317-18 (1991).

9. See *Warin v. Wildenstein & Co.*, No. 115143/99, 2001 WL 1117493, 2001 N.Y. Slip Op. 40127(U) (Sup. Ct. Sept. 4, 2001), aff’d, 297 A.D.2d 214, 746 N.Y.S.2d 282 (1st Dept. 2001) (“If New York statutes and caselaw were held to always be an expression of fundamental public policy, there would be no point in engaging in a conflicts of law analysis....”) (citation omitted).

10. *In re: Maxwell Comm’n*, 93 F.3d 1036, 1053 (2d Cir. 1996) (“It should be remembered that the interest of the system as a whole—that of promoting ‘a friendly intercourse between sovereignties’—also furthers American self-interest,”) (citations omitted).

11. See generally *Bakalar II*.

12. See also Laurie Frey, “*Bakalar v. Vavra* and the Art of Conflicts Analysis in New York: Framing a Choice of Law Approach for Moveable Property,” 112 Colum. L. Rev. 1055 (2012).

13. *Kunstsammlungen zu Weimar v. Elicofon*, 536 F.Supp. 829, 845-46 (E.D.N.Y. 1981), aff’d, 678 F.2d 1150 (2d Cir. 1982).

14. *Id.* at 846 (emphases supplied); accord *Zarian*, 2006 WL 2239594, at *2; *Spanierman Gallery v. Merriitt*, No. 00 Civ. 5712 (THK), 2004 WL 1781006, at *1, 3 & n.4 (S.D.N.Y. Aug. 10, 2004).

15. See *Greek Orthodox*, 1999 WL 673347, at *5; *Zarian*, 2006 WL 2239594, at *5; *Warin*, 2001 WL 1117493.

16. *Greek Orthodox*, 1999 WL 673347, at *5; *Zarian*, 2006 WL 2239594, at *2.

17. *Bakalar*, 619 F.3d at 143.

18. See *Elicofon*, 678 F.2d at 1160.

19. *Schoeps v. Museum of Modern Art*, No. 07 Civ. 11074 (JSR), 2009 WL 195949, at *5-6 (S.D.N.Y. Jan. 27, 2009); *Autocephalous Greek-Orthodox Church v. Goldberg*, 717 F.Supp. 1374, 1394 (S.D. Ind. 1989), aff’d, 917 F.2d 278, 287 (7th Cir. 1990).

20. *Schoeps*, 2009 WL 195949, at *5-6; *Autocephalous*, 917 F.2d at 287.

21. *Greek Orthodox*, 1999 WL 673347, at *5 (citation omitted).

22. *Bakalar*, 2008 U.S. Dist. LEXIS 66689, at *16-18.

23. *Bakalar*, 619 F.3d at 146-47.

24. 78 N.Y.2d 342 (1991).

25. *Bakalar*, 619 F.3d at 144.