Kluwer Arbitration Blog

International Arbitration and the Future of Holocaust Restitution in the Aftermath of Republic of Hungary v. Simon and Federal Republic of Germany v. Philipp

Kathryn (Lee) Boyd (Hecht Partners LLP) · Thursday, March 4th, 2021

Investor-state international arbitration may provide a way forward for Survivors and their heirs after the U.S. Supreme Court's decision denying claims in two restitution cases regarding Holocaust-era stolen property: *Federal Republic of Germany v. Philipp* (for return of Medieval art stolen by the Nazis) along with the companion case of *Republic of Hungary v. Simon* (for return of personal property stolen from fourteen Holocaust survivors). Both were bellwether cases for those of us who have advocated with halting success in U.S. courts on behalf of the true owners of Nazi-stolen property still in the hands of foreign governments. Decided in favor of the sovereigns, the decisions may be the fatal blow to restorative justice in the United States—not only for U.S. citizen heirs to Holocaust victims, but also victims of other genocides and human rights catastrophes, such as the Armenian and Darfur genocides.

The blow fell on February 3, 2021. A unanimous Supreme Court declined to exercise jurisdiction over Germany, holding that a sovereign's theft of its own citizens' property during a genocide is not in violation of international law. Then the Court remanded *Simon* to be decided by the lower court in accordance with *Philipp*, rather than decide whether the "international comity" doctrine, based on foreign policy considerations, required dismissal even if there was jurisdiction over the sovereign under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330, *et seq.* ("FSIA").

Writing for a unanimous Court, Chief Justice Roberts declined to extend jurisdiction over foreign sovereigns under the "takings exception" of the FSIA, lest it "transform[] the expropriation exception into an all-purpose jurisdictional hook for adjudicating human rights violations." The FSIA was the means by which heirs to Holocaust survivors sued for return of property stolen by the Nazis, such as Maria Altmann, made famous for her quest for return of Gustav Klimt's "*Woman in Gold*." (*See Republic of Austria v. Altmann*, 541 U.S. 677 (2004).) While Ms. Altmann's ancestor happened to hold Czech citizenship at the time of the Austrian confiscation, thereby falling outside of the *Philipp* decision, human rights violations were also committed by states against their own citizens. Thus, the vast majority of Holocaust survivors, whose own governments stole their property during the course of mass human rights violations, and their heirs, have no recourse in U.S. courts after *Philipp*.

In both *Simon*'s and *Philipp*'s (virtual) hearings on December 7, 2020, the focus of the questioning by the Justices concerned offending foreign states and inviting reciprocal treatment of the United

States as a consequence of providing a forum to pass judgment on a sovereign's retention of victims' property, even after mass human rights abuses. As Germany's counsel argued: "Almost 700 judges, as several of you have noted, would sit as new world courts, judging the nations of the world for alleged violations of international human rights and the law of war." Apparently, that sentiment translated at least in part to the reasoning of the Court in the *Philipp* decision:

> As a Nation, we would be surprised—and might even initiate reciprocal action—if a court in Germany adjudicated claims by Americans that they were entitled to hundreds of millions of dollars because of human rights violations committed by the United States Government years ago. There is no reason to anticipate that Germany's reaction would be any different were American courts to exercise the jurisdiction claimed in this case. (*Id.*, slip op. at 13.)

At the hearings, the Justices spent considerable time discussing the foreign policy implications of U.S. courts offending foreign sovereigns by adjudicating conduct committed on foreign soil—even conduct arising out of genocide. However, the Justices clearly exhibited discomfort about the notion of intruding into the purview of the political branches by weighing foreign policy implications vis-à-vis the "international comity" doctrine. After all, the FSIA's objective was to lay to rest one-off foreign policy decisions being made by the Executive Branch in favor of legal standards set forth in the statute, to be applied by the courts. Justice Kagan remarked to counsel for the United States (appearing as *amici*) that it seemed they wanted courts to do the government's "dirty work." Justice Gorsuch in particular appeared to be exploring other doctrines that would allow dismissal without courts weighing foreign policy, such as the "exhaustion of local remedies" doctrine, based on the notion that claimants should first seek remedies in the courts of the country where the expropriation occurred. Indeed, courts had dismissed Holocaust restitution cases even where they held jurisdiction existed under the FSIA and required the parties instead to bring the claims in the foreign jurisdiction first, with the opportunity to return if the forum proved unfair or inadequate. (*See, e.g.*, *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012).) After *Philipp*, such prudential doctrines need not be considered, since jurisdiction will not be exercised by courts in the first place.

The vast majority of the property stolen during the Holocaust has not been restituted. Poland, where almost half of the six million Jewish victims of the Holocaust lived, has not even passed comprehensive restitution legislation. So, adopting the position that these cases belong in the courts of the countries where the abuses occurred ignores practical realities. The victims have usually fled discrimination, the vestiges of which remain within the legal systems. Especially in Eastern European countries where there are double confiscations by both the Nazi regime and then the subsequent communist regime, property restitution has fallen well short of basic international law standards. (*See* Bazyler, M., Boyd, K.L., Nelson, K., Shah, R., *Searching for Justice After the Holocaust: Fulfilling the Terezin Declaration and Immovable Property Restitution* (Oxford U. Press, 2020) (providing a comprehensive inventory of Holocaust Restitution measures across Eastern European countries).) Before *Philipp*, U.S. courts were thought to offer a fair and just alternative.

Further, former Eastern-bloc countries which were the situs of massive property confiscations during the War, followed Western European countries, and many times as a condition for entry into the European Union, provided for a domestic legal regime for restitution of Nazi- and

Communist-era stolen property. The commitments to do so were codified in the Terezin Declaration on Holocaust Era Assets and Related Issues of 2009 signed by 47 countries. Unfortunately, Eastern European states have been slow in meeting the Declaration's aspirations, if at all.

Thus, it bears thinking and revisiting alternative remedies and protections for claimants who fall victim to foreign courts' often failing, if not corrupt, restitution regimes. Claimants like Rosalie Simon and Alan Philipp, if indeed their claims are to be heard in foreign domestic courts following the Supreme Court decisions, may have an additional protection not previously considered: international law as provided by Bilateral Investment Treaties (BIT), including with the United States, Israel, Canada, and Australia, the home to the majority of the Holocaust survivor diaspora. These states have a broad array of BITs, many of which were negotiated post-Communist revolution with Eastern European countries such as Poland, Hungary, Romania, Bulgaria, Croatia, Lithuania, and the Czech Republic, where there is a significant amount of unrestituted property stolen during the Holocaust and post-World War II by communist regimes. Those BITs provide broad protection for investors in the countries where the Holocaust Survivors fled, post-World War II: The United States, Canada, Israel, and Australia.

As I have previously written elsewhere, such BITs could provide an international arbitration forum, where a BIT is violated by, for example, failure of the domestic courts or administrative agencies to provide basic due process for a foreign claimant's "claims for money and property" under international standards. (Boyd, K.L., Watson, T., Valenzuela, K., *Justice for Nazi and Communist Era Property Expropriation Through International Investment Arbitration*, Loyola L.A. Int'l and Comp. L. Rev. (2018).). Moreover, as I have previously written, such BITs also may provide a remedy for violations by the State to properly protect such "investments" (*i.e.*, claims for money and/or restitution of property), including: just compensation for expropriation of those claims by the state, protection through guarantees of "fair and equitable" and non-discriminatory treatment—including "effective means" to protect the investment—and broad "umbrella clauses" that encompass a range of investor protections. *See id.* at 683-84.

States may argue that the actual wrongful conduct predated the BITs and therefore should not be covered. However, a claim to restitution of private property is arguably one where original ownership never lawfully passed to the subsequent Communist regimes because the original taking violated international law. Similarly, claims to money were in existence "at the time of entry into force" so they too could be covered "investments." *See id*. at 686. This means that, even if the original property has been destroyed, a claimant could still bring a claim under the BIT because her claim to money still exists as a valid investment. Moreover, Survivors and their heirs may have another "investment" as a result of a State's actions in connection with restitution. A State may create a new right to property, or revive a right, by passage of a restitution law or, where claims are brought in a state, by acknowledging the claim to the property or compensation. *Id.* at 686. The State thereby recognizes a proprietary interest that is an "investment" since it is a "claim to money" or a "claim to performance having economic value." *Id*. at 686-87.

International law supports such a theory. The European Court of Human Rights ("ECHR") has found that these types of actions by the State are sufficient to give rise to a proprietary interest protected by the Convention on Human Rights. *Id*. at 687. The ECHR has also found that "failure to enforce an administrative decision recognizing entitlement to compensation and fixing the amount" and that "failure to enforce a court decision recognizing entitlement to compensation, even where the amount of the award has not been fixed" constitute violations of Article 1 of

Protocol No. 1 to the Convention on Human Rights. *Id.* at 687-688.

From the recent Supreme Court decisions, we see at least one benefit of international arbitration tribunals as opposed to foreign domestic courts is that the foreign sovereign has consented to jurisdiction in the treaty and sovereign immunity is not a concern. Moreover, there are no concerns of upsetting foreign relations by rendering large money judgments against sovereigns by sister courts, since those concerns would have been considered at the time the sovereign entered the treaty. Issues addressed in *Philipp* and *Simon* would not arise in BIT arbitration.

It remains to be seen if international arbitration can provide a true alternative to U.S. and foreign domestic courts for restorative justice for victims of mass human rights violations. This path is untested and certainly departs from traditional investor-state arbitration. There are sure to be hurdles for claimants and tribunals, including whether state-created restitution regimes establishing claims for compensation or restitution fall with the BITs' definitions of "investment;" whether states are entitled to carve out foreign nationals' claims to receive less than "just compensation" as that term is defined under the BITs; whether states may treat foreign nationals' claims differently if they are citizens of countries who entered into post-World War II claims treaties; and whether foreign claimants seeking compensation can afford the expense of international arbitration fees and costs. Over two decades ago, when the prospect of U.S. courts providing a forum for Holocaust survivors and their heirs to bring claims for property was hopeful, wealthy individuals sympathetic to the cause of restorative justice for the crimes of the Holocaust provided financial support for those cases. In the new world of third-party funding for international arbitration, there may be equivalent benefactors.

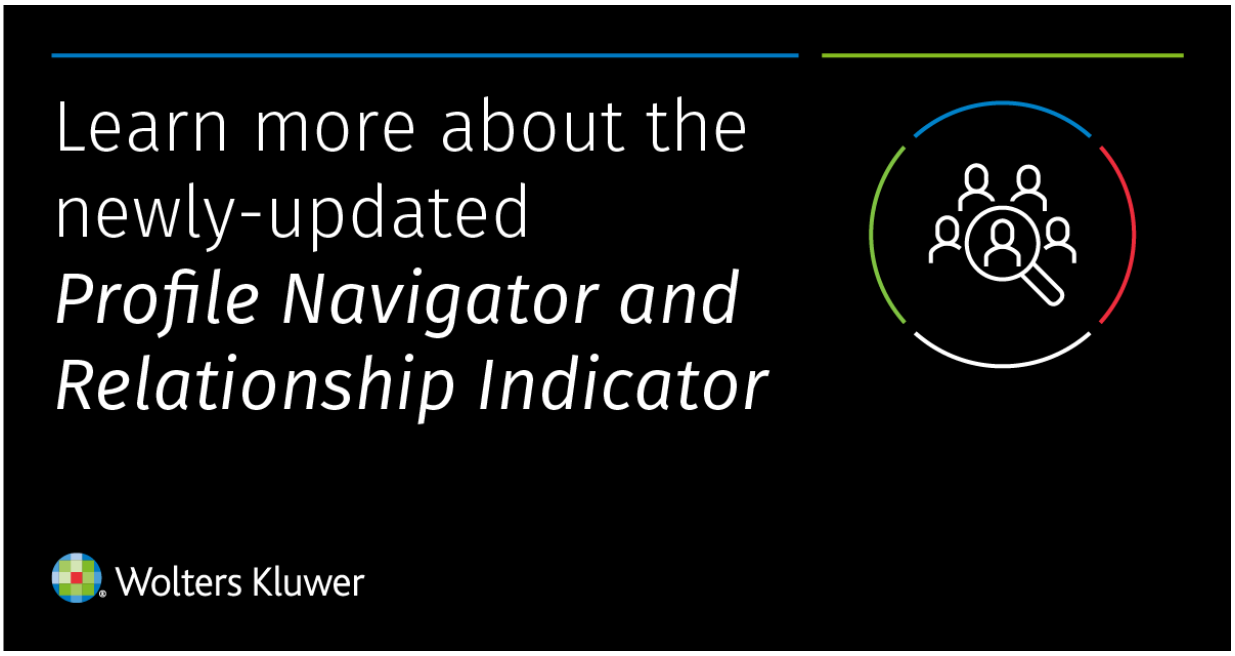
But now that the prospects are gone for the United States to provide such a forum, and while states remain reticent to provide meaningful restitution of property to their citizen victims who have fled state-sponsored violence, investor-state international arbitration may offer an alternative for advocates to consider.

Kathryn (Lee) Boyd is a managing and founding partner of Hecht Partners LLP, a litigation and international arbitration boutique, and a founding member of Victoria Associates, an international dispute resolution network. She is a litigator and arbitration advocate specializing in complex transnational cases, human rights, class actions, and property restitution, and is a former academic, having authored and co-authored several articles and a book discussing Holocaust restitution (cited herein).

---

uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.



This entry was posted on Thursday, March 4th, 2021 at 8:00 am and is filed under Investor-State arbitration, ISDS, SCOTUS, United States, United States Courts
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.