



UNIVERSITÉ
DE GENÈVE

FACULTÉ DE DROIT
Centre du droit de l'art



In partnership with
UNESCO

United Nations
Educational, Scientific and
Cultural Organization

Alessandro Chechi, Anne Laure Bandle, Marc-André Renold

May 2012

Case View of Les Saintes-Maries-de-la-Mer – Mauthner Heirs v. Switzerland

Margarethe Mauthner – Switzerland/Suisse – Oskar Reinhart Foundation – Oskar Reinhart Collection – Artwork/œuvre d'art – Nazi looted art/spoliations nazies – Judicial claim/action en justice – Judicial decision/décision judiciaire – Jurisdiction/conflit de juridiction – Ownership/propriété – Procedural issue/limites procédurales – State immunity/immunité des Etats – Request denied/rejet de la demande

Andrew Orkin sued the Swiss Confederation, the Oskar Reinhart Foundation and the Oskar Reinhart Collection in the United States in order to recover possession of the drawing “View of Les Saintes-Maries-de-la-Mer”. Orkin alleged that his great-grandmother, Margarethe Mauthner, sold the painting under duress during the Nazi era. Based on the Foreign Sovereign Immunities Act (FSIA), the action was dismissed for lack of subject matter jurisdiction on the ground that a court of law can affirm jurisdiction only when the initial taking of an object was committed by a State or a person or entity acting on a State’s behalf.

I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.

ART-LAW CENTER – UNIVERSITY OF GENEVA

PLATFORM ARTHEMIS

art-adr@unige.ch – <https://unige.ch/art-adr>

This material is copyright protected.

I. Chronology

Nazi looted art

- **1906: Margarethe Mauthner**, a German of Jewish descent, purchased the Vincent van Gogh pen-and-ink drawing named “**View of Les Saintes-Maries-de-la-Mer**”.
- **1933:** Margarethe Mauthner **sold** the drawing to the Swiss art collector **Oskar Reinhart** in order to help fund her family’s escape from **Nazi persecution**. Mauthner’s family fled to South Africa as early as 1933. She followed in **1939**. She died in South Africa in **1947**.
- **1945:** Oskar Reinhart **created** the **Oskar Reinhart Foundation** (the “Foundation”), to which he donated part of his art collection, but not the van Gogh drawing.
- **1958:** Oskar Reinhart **donated** the rest of his collection – including the drawing “View of Les Saintes-Maries-de-la-Mer” – to the **Swiss Confederation**. Since then, the drawing has been displayed at the **Oskar Reinhart Collection “am Römerholz”** (the “Collection”) in Winterthur.¹
- **2009: Andrew Orkin**, a Canadian national and one of Margarethe Mauthner’s heirs, **sued** the Swiss Confederation, the Foundation and the Collection to recover possession of the drawing. Andrew Orkin alleged that his great-grandmother sold it under duress at an artificially low price.
- **March 2011:** The United States District Court for the Southern District of New York **dismissed the action** for lack of subject matter jurisdiction.² Andrew Orkin appealed.
- **October 2011:** The United States Court of Appeals for the Second Circuit **affirmed the judgment of the District Court** in favour of the Swiss Confederation.³

II. Dispute Resolution Process

Judicial claim – Judicial decision

- Andrew Orkin sued to recover the drawing “View of Les Saintes-Maries-de-la-Mer” upon discovery that it had been sold in 1933 by his great-grandmother Margarethe Mauthner. He alleged that Reinhart took advantage of Mauthner’s desperation as a Jew in Nazi Germany to purchase the drawing for a fraction of its fair market value.⁴ Accordingly, Orkin contended that, as Reinhart’s purchase was invalid, the subsequent donation as well as the retention of the drawing by Switzerland, the Foundation and the Collection, were unlawful.⁵

¹ The name of the collection comes after the name of the villa which was also donated by Reinhart to the Swiss State.

² *Andrew Orkin v. The Swiss Confederation, et al.*, 770 F. Supp. 2d 612, 2011 U.S. Lexis 24507 (S.D.N.Y., March 11, 2011).

³ *Andrew Orkin v. The Swiss Confederation, et al.*, 2011 U.S. App. Lexis 20639 (October 12, 2011), 4.

⁴ Catherine Cossy, “Le musée ‘Am Römerholz’ peut garder son dessin de Van Gogh,” *Le Temps*, February 23, 2012, accessed May 22, 2012, http://www.letemps.ch/Page/Uuid/201a0626-5e44-11e1-9d26-32e99746e1f6/Le_mus%C3%A9_Am_R%C3%B6merholz_peut_garder_son_dessin_de_Van_Gogh.

⁵ *Andrew Orkin v. The Swiss Confederation, et al.*, 770 F. Supp. 2d 612, 2011 U.S. (S.D.N.Y., March 11, 2011), 4.

- In order to sue a foreign State in the United States, Orkin founded subject matter jurisdiction on the Foreign Sovereign Immunities Act (“FSIA”)⁶ of 1976. This codified several exceptions to the doctrine of immunity of foreign States.⁷ In particular, he asserted that his claims came within the “takings” exception.⁸ According to this exception, in order to establish subject matter jurisdiction a plaintiff had to demonstrate each of four elements: “(1) that rights in property are at issue; (2) that the property was taken; (3) that the taking was in violation of international law; and either (4)(a) that property is present in the United States in connection with a commercial activity carried on in the United States by the foreign State, or (4)(b) that property [...] is owned or operated by an agency or instrumentality of the foreign State and that agency or instrumentality is engaged in a commercial activity in the United States”.⁹ Orkin alleged that the “takings” exception applied because the Swiss Confederation was a foreign State and the Foundation and the Collection were among its “agencies and instrumentalities”. Hence, his jurisdictional contention depended upon whether the drawing was owned by an agency or instrumentality of the Swiss Confederation that was engaged in commercial activity in the United States – regardless of the actual location of the painting.
- The plaintiff further asserted that the Alien Tort Statute (“ATS”)¹⁰ was an alternate source of subject matter jurisdiction. The ATS applied to “(1) tort actions, (2) brought by aliens (only), (3) for violations of the law of nations (customary international law)”.¹¹
- The defendants moved to dismiss the action on the grounds that United States courts lacked jurisdiction to decide the case. In particular, it is worth noting that the Swiss Federal Council rejected the initial restitution claim brought by the plaintiff after a careful review of the facts of the case and the law and in due consideration of the principles of transparency, legality and adequacy.¹² An enquiry by the Swiss Federal Office of Culture through the Contact Bureau on Looted Art¹³ and the Collection determined that Oskar Reinhart acquired valid title of ownership to the drawing “View of Les Saintes-Maries-de-la-Mer”. It was demonstrated that Oskar Reinhart purchased the drawing from Margarethe Mauthner as part of a longstanding business relationship at standard market conditions.¹⁴

⁶ 28 USC 1330, 1602-1611.

⁷ The principle of immunity entails that acts performed by a State in exercise of its sovereign authority attract sovereign immunity from the jurisdiction of foreign domestic courts and from enforcement proceedings. See Malcom N. Shaw, *International Law* (Cambridge: Cambridge University Press, 2008), 697.

⁸ 28 U.S.C. § 1605(a)(3).

⁹ *Andrew Orkin v. The Swiss Confederation, et al.*, 2011 U.S. Dist. Lexis 4357 (January 13, 2011), 2; *Andrew Orkin v. The Swiss Confederation, et al.*, 770 F. Supp. 2d 612, 2011 U.S. (S.D.N.Y., March 11, 2011), 6.

¹⁰ 28 USC § 1350.

¹¹ *Andrew Orkin v. The Swiss Confederation, et al.*, 770 F. Supp. 2d 612, 2011 U.S. (S.D.N.Y., March 11, 2011), 8.

¹² Federal Office of Cultural Affairs Press Release, “Van Gogh’s ‘View of Les Saintes-Maries-de-la-Mer’ Remains in the Oskar Reinhart Collection ‘Am Römerholz’ in Winterthur,” February 23, 2012, accessed May 22, 2012, <http://www.news.admin.ch/message/index.html?lang=en&msg-id=43525>.

¹³ The Contact Bureau on Looted Art is a center of expertise at the federal level to respond to all issues linked to looted art from the World War II era. See Federal Office of Culture FOC, “Looted Art,” available at: <http://www.bak.admin.ch/kulturerbe/04402/index.html?lang=en>.

¹⁴ Federal Office of Cultural Affairs Press Release, “Van Gogh’s ‘View of Les Saintes-Maries-de-la-Mer’ Remains in the Oskar Reinhart Collection ‘Am Römerholz’ in Winterthur”.

- The action was dismissed by the District Court for the Southern District of New York¹⁵ and subsequently by the Court of Appeals for the Second Circuit.¹⁶

III. Legal Issues

Jurisdiction – Ownership – Procedural issue – State immunity

- The issue of ownership is central to this case as the plaintiff filed the lawsuit in order to challenge the validity of Reinhart's purchase and, in turn, to obtain a judgment confirming that Margarethe Mauthner never lost the ownership title to the drawing. Therefore, it can be assumed that, had the case reached the merits, the court should have dealt with the question whether the van Gogh drawing "View of Les Saintes-Maries-de-la-Mer" had been taken illegally and whether Reinhart had acquired valid title of ownership to the drawing.
- However, as said, the merits of the case was not discussed because Orkin failed to demonstrate that the Court had subject matter jurisdiction under the "takings" exception of the FSIA. In particular, the District Court (and the Court of Appeals) affirmed that the "takings" exception did not apply to the case because the drawing was not "taken" by the defendants or by any other sovereign entity, but by Oskar Reinhart, a private individual, who subsequently bequeathed the drawing to the Swiss Confederation. In other words, the Court established that the term "taken" referred to acts of a sovereign, not of a private individual.¹⁷
- Likewise, Orkin failed to demonstrate that the Court had subject matter jurisdiction under the ATS. The Court refused to accept that the defendants were guilty of one of the "handful of heinous actions" that meets the definition of "violations of the law of nations".¹⁸ In fact, the defendants were alleged to have done nothing more than accept a donation of an artwork from a collector.¹⁹

IV. Adopted Solution

Request denied

- As the plaintiff failed to establish that the District Court had statutory or constitutional power to adjudicate his claim, the action was dismissed.²⁰ The Court of Appeals affirmed the judgment of the District Court.²¹

¹⁵ *Andrew Orkin v. The Swiss Confederation, et al.*, 770 F. Supp. 2d 612, 2011 U.S. (S.D.N.Y., March 11, 2011).

¹⁶ *Andrew Orkin v. The Swiss Confederation, et al.*, 2011 U.S. App. (October 12, 2011).

¹⁷ *Andrew Orkin v. The Swiss Confederation, et al.*, 770 F. Supp. 2d 612, 2011 U.S. (S.D.N.Y., March 11, 2011), 7. The District Court also found that the plaintiff's decision to sue the Foundation was naïve in that the Foundation never possessed the drawing at issue (*ibid.*, 4).

¹⁸ *Ibid.*, 9.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Andrew Orkin v. The Swiss Confederation, et al.*, 2011 U.S. App. (October 12, 2011).

- The District Court rejected the plaintiff's contention that the "takings" exception applied on the grounds that the term "taken", as used in the FSIA, referred to acts of a sovereign, not of a private individual. In other words, the District Court established that a court of the United States can affirm jurisdiction only where an object was taken from the plaintiff – or the plaintiff's predecessor – by a sovereign or by some person or entity acting on a sovereign's behalf. In the case under review, the drawing passed from Mauthner to Reinhart, who did not act in any capacity other than as a private individual.²²

V. Comment

- The dispute over the Vincent van Gogh drawing "View of Les Saintes-Maries-de-la-Mer" is interesting for at least two reasons.
- First, it demonstrates that the families which lost artworks during the Nazi era do attempt to rely on the "takings" exception of the FSIA – as interpreted by US courts in their decisions²³ – in order to sue foreign sovereigns in the United States and retrieve such property, even if the plaintiff or the requested art object have no connection with the United States. This is evidenced by the fact that in the present case the plaintiff, Andrew Orkin, was a Canadian citizen and that the disputed property was not in the United States.²⁴
- Second, the settlement of this case is interesting because the courts of New York narrowed the scope of application of the FSIA, thereby limiting the power of individuals to bring restitution claims against foreign sovereigns in the United States. As said, Orkin invoked the FSIA against Switzerland arguing that the sale of the drawing by Mauthner to Reinhart was a taking in violation of international law. This argument certainly found support in the London Declaration of 1943.²⁵ Moreover, the Washington Principles²⁶ of 1998 established the presumption that any transaction involving Holocaust victims should be viewed with suspicion. The District Court and the Court of Appeals disagreed and affirmed that the FSIA's exception to State immunity required that the initial taking was done by a foreign State.
- Clearly, this decision represents a further incentive for claimants to resort to means of dispute settlement alternative to litigation. With respect to Holocaust-looted art, the advantages of non-confrontational means are demonstrated, for instance, by the out-of-court settlements in

²² *Andrew Orkin v. The Swiss Confederation, et al.*, 770 F. Supp. 2d 612, 2011 U.S. (S.D.N.Y., March 11, 2011), 7-8.

²³ See, e.g., *Maria Altmann v. Republic of Austria*, 142 F.Supp. 2d 1187 (C.D.Cal. 1999), *aff'd*, 317 F.3d 954 (9th Cir. 2002), as amended, 327 F.3d 1246 (9th Cir. 2003), 541 US 677 (2004); *Malewicz v. City of Amsterdam*, 362 F.Supp. 2d 298 (D.D.C. 2005). On the *Altmann* case see Caroline Renold, Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, "Case Six Klimt Paintings – Maria Altmann and Austria," Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

²⁴ In *Malewicz* (*ibid.*), a foreign sovereign was denied immunity even though the claimed property was not located (for most of the time) on United States soil.

²⁵ *Declaration of the Allied Nations against Acts of Dispossession Committed in Territories under Enemy Occupation or Control*, 5 January 1943 (8, Department of State Bulletin 21).

²⁶ Released in connection with the Conference on Holocaust Era Assets, which took place in Washington, DC, in December 1998, on the initiative of the United States. The principles are available at: <http://www.lootedartcommission.com/Washington-principles>.

the cases involving the paintings “Portrait of Wally”,²⁷ “Madonna and Child in a Landscape”²⁸ and “Landscape with Smokestacks”.²⁹

VI. Sources

a. Bibliography

- Shaw, Malcom N. *International Law*. Cambridge: Cambridge University Press, 2008.

b. Court decisions

- *Andrew Orkin v. The Swiss Confederation, et al.*, Case No. 09 Civ. 10013 (LAK), 2011 U.S. Dist. Lexis 4357 (January 13, 2011).
- *Andrew Orkin v. The Swiss Confederation, et al.*, 770 F. Supp. 2d 612, 2011 U.S. Lexis 24507 (S.D.N.Y., March 11, 2011).
- *Andrew Orkin v. The Swiss Confederation, et al.*, 2011 U.S. App. Lexis 20639 (October 12, 2011).
- *Malewicz v. City of Amsterdam*, 362 F.Supp. 2d 298 (D.D.C. 2005).
- *Maria Altmann v. Republic of Austria*, 142 F.Supp. 2d 1187 (C.D.Cal. 1999), *aff'd*, 317 F.3d 954 (9th Cir. 2002), as amended, 327 F.3d 1246 (9th Cir. 2003), 541 US 677 (2004).

c. Legislation

- Foreign Sovereign Immunity Act, 28 USC 1330, 1602-1611.
- Alien Tort Statute, 28 U.S.C. § 1350.

d. Documents

- Washington Conference Principles on Nazi-Confiscated Art, released in connection with The Washington Conference on Holocaust Era Assets, Washington, DC, December 3, 1998. Available on the Website of the Commission for Looted Art Europe. Accessed July 15, 2011, <http://www.lootedartcommission.com/Washington-principles>.
- *Declaration of the Allied Nations against Acts of Dispossession Committed in Territories under Enemy Occupation or Control*, 5 January 1943 (8, Department of State Bulletin 21).

²⁷ See Raphael Contel, Giulia Soldan, Alessandro Chechi, “Case Portrait of Wally – United States and Estate of Lea Bondi and Leopold Museum,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

²⁸ See Alessandro Chechi, Raphael Contel, Marc-André Renold, “Case Madonna and Child in a Landscape – Philipp von Gomperz Heirs and North Carolina Museum of Art,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

²⁹ See Anne Laure Bandle, Alessandro Chechi, Marc-André Renold, “Case Landscape with Smokestacks – Friedrich Gutmann Heirs and Daniel Searle,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre - University of Geneva.

e. Media

- Cossy, Catherine. “Le musée ‘Am Römerholz’ peut garder son dessin de van Gogh.” *Le Temps*, February 23, 2012. Accessed May 22, 2012, http://www.letemps.ch/Page/Uuid/201a0626-5e44-11e1-9d26-32e99746e1f6/Le_mus%C3%A9e_Am_R%C3%B6merholz_peut_garder_son_dessin_de_Van_Gogh.
- Federal Office of Cultural Affairs Press Release. “Van Gogh’s ‘View of Les Saintes-Maries-de-la-Mer’ Remains in the Oskar Reinhart Collection ‘Am Römerholz’ in Winterthur.” February 23, 2012. Accessed May 22, 2012, <http://www.news.admin.ch/message/index.html?lang=en&msg-id=43525>.