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Sherry Hutt
Editor

David Tarler
Assistant Editor

Walnut Creek, CA

Judicial Conversion of Culture

Attaching Embodiments of Ancient Culture to Judgments in Civil Proceedings

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Travis Sills

Introduction

In *Rubin v. The Islamic Republic of Iran*, several plaintiffs brought a personal injury suit against the Islamic Republic of Iran arising from a triple suicide bombing in a crowded Jerusalem market that killed four and injured dozens.[1] Iran is alleged to have provided material support to the Palestinian terrorist organization Hamas, which was responsible for carrying out the 1997 bombing at the Ben Yehuda market in Jerusalem, in which nine American citizens were injured.[2] On July 31, 2001, the plaintiffs sued Iran for their injuries basing jurisdiction on the Foreign Sovereign Immunities Act (FSIA). Iran did not respond to the suit and after consolidation of like cases arising from the same incident, default judgment was entered against Iran in 2003.[3] The court found that Iran supplied material support to Hamas for the "extrajudicial killing" and found Iran liable to the plaintiffs for personal injuries from the bombing in the amount of $423.5 million.[4]

The plaintiffs in this suit chose to seek reparation for their losses from Iran, knowing that, for lack of executable assets within the United States, it would be unlikely to obtain satisfaction from a judgment against Hamas.[5] Any assets of Iran within U.S. jurisdiction, though once "blocked" pursuant to Executive Order 12170 (issued during the 1979 Iran-hostage crisis), have since been rendered free of the designation. However, due to the foreign relations impact of the hostage crisis, and Executive Orders implementing the Algiers Accord

and freeing assets to be transferred back to Iran, virtually no liquid assets or properties remain within the United States. As such, the Campuzano plaintiffs (or Rubin plaintiffs after consolidation) sought items that were still in the United States and in which Iran holds an ownership interest. Thus, the Rubin plaintiffs looked to museums across the country that hold in their collections ancient Persian artifacts on loan from Iran.

In particular, the plaintiffs sought to attach items of Iranian cultural heritage that several museums across the country, including the Oriental Institute at the University of Chicago, the Field Museum of Natural History, Harvard University, and Boston's Museum of Fine Arts, are currently holding on loan for the sole purpose of philological and archaeological study.[6] The items held on loan at The Oriental Institute at the University of Chicago include "collections of ancient Persian seal impressions and cuneiform writings found on clay tablets and tablet fragments known as the Persepolis Fortification Texts and the Chogha Mish collection."[7] These artifacts were excavated from Persepolis, "at the foot of Kuh-i-Rahmat, or 'Mountain of Mercy,' in the plain of Marv Dasht about 400 miles South of present day Tehran," and from the site known as Chogha Mish in the Khuzistan Province of Iran in the 1930s and 1960s respectively.[8] Upon completion of the excavations, the collections were loaned to The Oriental Institute with the understanding that they were to be returned to Iran only upon completion of study by the Institute.

According to the Rubin plaintiffs, these physical embodiments of ancient Persian culture are attachable in execution of judgment just as any "lands, tenements, real estate, goods, and chattels" that are owned by any person against whom any judgment has been entered in any court for damages.[9] Ordinarily these collections would be protected under the Foreign Sovereign Immunities Act, discussed in detail below, but the plaintiffs sought to attach the collections through an exception to immunity known as the commercial activity exception.[10] A Citation to Discover Assets was then served upon the University of Chicago in an attempt to fit the collections into that exception.[11] However, as will be discussed below, objects of cultural heritage belonging to a foreign sovereign should not be subject to attachment like the categories of assets listed in state judgment execution statutes.

The social and educational characteristics inherent in objects of cultural heritage are distinguishable from the commercial characteristics of assets liable to enforcement. Recognizing that there currently exists an open and legal market for antiquities, a further distinction must be made between objects

of cultural heritage that serve an educational and cultural service and those objects of antiquity that are willingly placed into the stream of commerce through private sale and auction.[12] This is not to bifurcate cultural heritage into two classes, but merely to serve as a point of distinction between assets liable to enforcement, all of which by their nature have been designated as subject to commercial activity, and cultural heritage which never was intended to leave the realm of academia and collective social and cultural importance. The Persepolis Fortification Texts and the Chogha Mish collection, both subject to the current dispute, belong to the former; objects of cultural heritage that belong to the national patrimony of a sovereign country, placed on loan to museums for purposes of study, and for which there is no intention to strip away cultural value and meaning by placing on the antiquities market, must not be commoditized and attached by execution of judgment.

Attachment also presents a practical problem for borrowing institutions that have assumed a trust relationship with regard to loan material, and must therefore secure and protect objects on long-term loan in their collections. Attachment of such material would present the unique situation of forcing a museum to try to protect the cultural heritage on loan from wholesale judicial raiding every time a judgment against a lending sovereign needs to be satisfied. It follows that attachment through judgment executions of objects on long-term loan that pre-date the Immunity from Seizure Act[13] could strike a blow to borrowing institutions' collections, and academic pursuits thereof.

Absent a binding decision or statutory amendment preventing the attachment of cultural heritage, another way to allow museums and other borrowing institutions to combat attachment is to allow the borrowing institution to assert the sovereign immunity defense, if applicable, by proxy for the lending sovereign. In such cases, the borrowing institution, holding a possessory interest in the objects sought to be attached, should have standing to assert the lending country's sovereign immunity defense on behalf of the cultural heritage res. The plaintiffs should not be relieved of their burden to prove that the property they seek to attach is not immune, solely on the basis that the foreign sovereign did not appear in the proceedings. In attachment proceedings, immunity should run with the property, not with the party against whom judgment was entered.

The propositions asserted by this paper will serve a vital twofold purpose: protect against commoditization of cultural heritage through judicial conversion, and protect the integrity of the borrowing institutions' collections and

goals for scholarly pursuit. The apparatus that both judgment creditor and respondent cultural institution rely upon to prevail in attachment proceedings is the Foreign Sovereign Immunities Act, which at the outset favors presumptive immunity for foreign sovereigns and their property.

Foreign Sovereign Immunities Act

In seeking to execute against the cultural property of Iran, the Rubin plaintiffs initially needed to overcome the presumption of immunity granted to foreign sovereigns by the Foreign Sovereign Immunities Act (FSIA). Under Section 1604 of the Act, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in Sections 1605–1607 of this chapter." In order to overcome this presumption of immunity, the plaintiffs relied on the so-called "terrorism exception" to sovereign immunity, codified under 28 U.S.C. 1605(a)(7). This exemption comes in the form of a 1996 amendment to the FSIA, adopted as the Antiterrorism and Effective Death Penalty Act, which acts to waive the sovereign immunity of state sponsors of terrorism. Section 1605(a)(7) states that

> [a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, *extrajudicial killing*, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in Section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state [emphasis added].

The magistrate judge hearing the Rubin case concluded that the Hamas bombing was indeed an extrajudicial killing and that Iran provided material support for the act, thus triggering the application of Section 1605's terrorism exception to foreign sovereign immunity.[14] The existence of an exception to Iran's sovereign immunity thus provided the court with subject matter jurisdiction over Iran pursuant to 28 U.S.C. 1330(a), which provides to district courts jurisdiction in civil actions where a sovereign is not entitled to immunity pursuant to Section 1605 exemptions.[15]

Iran failed to appear in defense against plaintiffs' claims and after consolidation of this and another case arising from the same incident, the United States District Court for the District of Columbia entered a default judgment against Iran.[16] The plaintiffs in the consolidated case then sought to execute

against that judgment through an attachment citation. In particular, the plaintiffs sought to attach items of Iranian cultural heritage that several museums, including the University of Chicago and the Field Museum of Natural History, are currently holding on loan for purpose of philological and archaeological study, or claim to own outright.[17] These items include the Persepolis Fortification Texts and the Chogha Mish collection.[18]

Restrictive Theory of Sovereign Immunity and Attachment

In order to attach these artifacts, the plaintiffs had to assert jurisdiction over the collections. In an effort to do so, they invoked the Terrorism Risk Insurance Act of 2002 (TRIA) and Section 1610 of the FSIA.[19] However, as with immunity from jurisdiction in the plenary case, the plaintiffs must overcome immunity of the sovereign's property in attachment proceedings. This is a relatively recent departure from sovereign immunity jurisprudence. For over a century and a half sovereigns enjoyed complete immunity subject to no limitations; this was an established practice in the form of judicial deference to requests for immunity to sovereigns by the Executive Branch. This was done as a matter of "grace and comity," not constitutional restriction.[20] As the Executive Branch agency in charge of requests to grant immunity from suit to foreign sovereigns, the State Department supplanted complete sovereign immunity with the "restrictive theory" of sovereign immunity in 1952.[21]

Under the restrictive theory, "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts."[22] However, this restriction on sovereign immunity applied only to jurisdictional immunity and "did nothing to modify the complete immunity enjoyed by foreign sovereigns from execution against their property."[23] After two decades of applying the restrictive theory on a case by case basis, and to ensure that an evenhanded judicial approach absent political influences would be applied to immunity cases, the theory was codified in 1976 as the Foreign Sovereign Immunities Act.[24]

The FSIA did not just codify the restrictive theory for jurisdictional immunity, but also "modified the rule barring execution against a foreign state's property by '*partially* lowering the barrier of immunity from execution, so as to make this immunity conform *more closely* with the provisions on jurisdictional immunity in the bill.' H.R. Rep. No. 94-1487, at 27 (emphasis added)."[25] Thus a foreign sovereign's commercial activity became the standard to defeat both immunity from jurisdiction and immunity from attachment. However,

"immunity from execution is nevertheless narrower than jurisdictional immunity."[26] In citing to *DeLetelier v. Republic of Chile*, the Connecticut Bank of Commerce court stated:

> The court concluded that Congress intended to lift immunity from execution only "in part," that it did not intend to reverse completely the historical and international antipathy to executing against a foreign state's property even in cases where a judgment could be had on the merits. *Id.* It attributed the differences in phrasing between the jurisdictional (§ 1605) and the execution (§ 1610) immunity sections in the FSIA to a deliberate choice to narrow the scope of immunity from execution.[27]

In the *DeLetelier* case, the plaintiffs were able to obtain a judgment against Chile, avoiding the sovereign immunity bar, but were unable to execute against the property sought for attachment. The court phrased its understanding of this result in terms of Congress' purpose for the FSIA: "since it was not Congress' purpose to lift execution immunity wholly and completely, a right without a remedy does exist."[28] The *DeLetelier* court thus recognized that it is more difficult to overcome the immunity burden when attempting to attach foreign sovereign property than it is in obtaining jurisdiction in the plenary case against the sovereign. The Justice Department explained the rationale for the "very circumscribed nature of the lifting of the ordinary immunity of foreign sovereign property" in its second Statement of Interest.[29] According to the statement, "judicial incursion on a foreign sovereign's property is often likely to be far more problematic from a foreign relations point of view than simply requiring the sovereign to appear to defend a lawsuit on the merits."[30]

Standing under FSIA Section 1610 and Waiver

The Rubin plaintiffs sought to execute under FSIA Sections 1609 and 1610 (a)(7) and (f)(1). Section 1609 is the basis for an immunity from attachment and execution of property proceeding.[31] Section 1610 then goes on to discuss immunity waiver, "used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act."

The interpretation as to who has standing to assert the Section 1609 immunity from attachment defense is a hotly contested issue in the Rubin case. The plaintiffs claim that only the foreign sovereign may assert immunity from attachment of its property, while the Citation Respondent museums contend

that attachment immunity runs with the property itself. Essentially the plaintiffs claim that since Iran never appeared before the court to assert an attachment from immunity defense, that defense is waived. This argument is made based on affirmative defense jurisprudence, where plaintiffs assert that attachment immunity is an affirmative defense that must be pleaded, or else it is waived as per Rule 8 of the Federal Rules of Civil Procedure.

However, the Citation Respondent museums contend that attachment immunity is not an affirmative defense that needs to be asserted by the foreign sovereign, but should be considered by the court as a matter of course to effect subject matter jurisdiction. The argument put forth by the Citation Respondents is that the Rubin plaintiffs should not be relieved of their burden under FSIA Section 1610 to prove that the property is not immune solely because the sovereign nation against whom judgment was entered does not appear before the court. Immunity from attachment should run with the property itself in attachment proceedings, not with the party against whom the judgment is entered.

In a ruling on a partial summary judgment motion by the plaintiffs seeking to establish that no party other than Iran may assert the sovereign immunity defenses under Sections 1609 and 1610, the magistrate judge sided with the plaintiffs and held that immunity from attachment is an affirmative defense.[32] The judge based his ruling on Rule 8(c) of the Federal Rules of Civil Procedure, and stated that "various forms of immunity have been held by federal courts to be affirmative defenses under Rule 8(c)."[33] The Second Statement of Interest of the United States offers an instructive assessment and correction of the judge's erroneous application of Rule 8(c) to attachment immunity.[34] Further, the judge relies on a House Report which stated that foreign sovereign immunity was enacted by Congress to be "an affirmative defense which must be specially pleaded."[35]

However, the judge's reliance on the legislative history in this respect may be misguided as "the statement in the legislative history that sovereign immunity is an affirmative defense which must be pleaded and proven by the party asserting it, H.R. Rep. No. 1487 at 17, 1976 U.S. Code Cong. & Ad. News at 6616, is *not entirely accurate* (emphasis added)."[36] The Supreme Court in *Verlinden B.V. v. Central Bank of Nigeria*, reviewing the same report, had a different and more reasoned interpretation of the defense under FSIA than that of the magistrate judge. The *Verlinden* court understood the legislative history to refer to immunity from *suit* as an affirmative defense, with no mention made of immunity from *attachment*. The court also recognized that "subject-matter jurisdiction turns on the existence of an exception to foreign sovereign immunity.

. . . Accordingly, even if the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act."[37] Thus *Verlinden* established that the court has an independent obligation to assess its own jurisdiction in sovereign immunity cases.

Similarly, the court in *Walker Int'l Holdings Ltd. v. Republic of Congo* held that it was not the sole right of the foreign sovereign to urge the court to consider available immunity for sovereign property. The court in Walker was "unable to find any authority for the proposition that it is the sovereign's *exclusive* right to raise the issue of sovereign immunity under the FSIA. In fact, the very language of the FSIA makes clear that the [foreign state's] presence is irrelevant."[38] Addressing the relevance of the sovereign state's presence and waiver, the court held that "[n]either 28 U.S.C. §1610(a) nor (b) requires the presence of the foreign sovereign or gives the sovereign exclusive standing to raise the waiver element."[39]

The law of forfeiture may prove helpful in determining who has standing to contest judicial seizure of property. As in attachment proceedings, forfeiture proceedings may involve one party who holds an interest in property and seeks to contest the seizure thereof. According to *United States v. Sixty Thousand Dollars ($60,000.00) in United States Currency*, "to have standing to contest a forfeiture, one must be a claimant."[40] A claimant "is one who claims to own the article or merchandise or to have an interest therein."[41] "It is not necessary therefore that a claimant under the forfeiture statute allege ownership. A lesser property interest such as possession creates standing."[42]

Since "the baseline presumption that Congress adopted under Section 1609 was that foreign sovereign property was to be treated as immune,"[43] the Rubin court, being authorized to take up the issue *sua sponte* by the decision in *Verlinden*, should then make the conclusion that Iran is a foreign sovereign, and as such, the Persian collections enjoy a presumption of immunity.

Overcoming the Presumption of Attachment Immunity for Sovereign Property

If the court does recognize the presumption of immunity accorded to the Persian collections as detailed above, then according to Section 1610(a)(7), that baseline presumption of immunity may be defeated with a showing that the sovereign property is subject to commercial activity within U.S. jurisdiction. If this showing can be made, then Section 1610(a)(7) will permit attachment of the sovereign property. The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act."[44] Importantly, "Congress deliberately left the meaning open and . . . put [its] faith in the

U.S. Courts to work out progressively, on a case-by-case basis . . . the distinction between commercial and governmental."[45] A recent case that illuminates the commercial activity exception to immunity from attachment is *Republic of Austria v. Altmann.*

Commercial Activity In *Republic of Austria v. Altmann*, Austria was sued for wrongful possession of several paintings by Gustav Klimt under the FSIA. The plaintiff Altmann sued the Belvedere Gallery, which is part of the Austrian National Gallery, for restitution of the paintings. In seeking to defeat the baseline immunity that the Belvedere Gallery enjoys as part of the Austrian National Gallery, the plaintiff offered evidence that the paintings were subject to commercial activity and thus may be brought under the ambit of the FSIA expropriation exception. In Altmann, the commercial activity in which the gallery engaged in the United States was the "authoring, editing, and publishing of a book entitled *Klimt's Women*, as well as an English-language guidebook, containing photographs of the looted paintings."[46] Also, the fact that the publication and marketing of the books was conducted in conjunction with an exhibition featuring the expropriated Klimt paintings, led the court to conclude that these activities did fall within the definition of "commercial activity" under Section 1603(d).

Commercial versus Sovereign The facts in *Malewicz v. City of Amsterdam*, another case that delves into the commercial activity exception, are closer to that of the Rubin litigation. The Malewicz heirs as plaintiffs brought an expropriation suit, with jurisdiction arising under the FSIA, against the City of Amsterdam after the city loaned 14 pieces of the Malewicz collection to the Solomon R. Guggenheim Museum in New York and the Menil Collection in Houston. The court interpreted commercial activity as defined in Sections 1610(a) and 1603(e) to mean "[i]f the activity is one in which a private person could engage, it is not entitled to immunity."[47] While this qualification would seem to create a hole through which some transactions may avoid being deemed commercial if not connected with trade and traffic or commerce (such as an Iranian loan of artifacts which are never displayed and only subject to scholarly research), the *Malewicz* court found a loan of artwork which would be displayed to be not sovereign, thus commercial.[48]

Substantial Contacts As mentioned above, the court did not reach the second element of the full definition of commercial activity ("substantial contacts") provided by Section 1603(e) since the court was able to deny the City of Amsterdam's motion to dismiss based on the satisfaction of the first element

under that section ("commercial activity"). The court did mention, however, that contacts involved in an international museum loan need to be explored to determine if they are "substantial" within the meaning of Section 1603(e). The court acknowledged that the City of Amsterdam's contacts with the American museum could have been "insubstantial and insufficient to expose it to FSIA jurisdiction," and that "the possibility that such a minimal level of contact will necessarily suffice to provide jurisdiction threatens to chill the entire international exchange program." Thus, despite its unforgiving take on the "commercial activity" element of Section 1603(e), the *Malewicz* decision leaves open the potential for museums to avoid Section 1610's commercial activity exception if the sovereign's contacts are not deemed "substantial" within the meaning of Section 1603(e) and the court's interpretation of that section.

At the other end of the spectrum, the court in *Stena Rederi AB v. Comision de Contratos* held that "a single contract or course of dealing executed within this nation's boundaries typically will constitute commercial activity carried on in the United States."[49] However, the actual loan transaction in the Rubin litigation, for which there is no record, and may have been comprised of little more than a handshake, occurred in Iran at the time of the excavation of the collections 30 and 60 years ago. It then remains to be decided whether the mere presence of ancient Persian artifacts at an American museum will constitute substantial contacts to establish commercial activity.

Commercial Activity and Rubin The Rubin plaintiffs claim that the Persepolis Fortification texts and the Chogha Mish collections have been subject to commercial activity in the United States by means of publications based on research of the collections. However, as attested to by affidavits of Curator Raymond Tindel and Professor Matthew Stolper of the Oriental Institute at the University of Chicago, the published works regarding the Persian collections were purely scholarly in nature and purpose, and could not be construed as a commercial endeavor.[50] Further, the Institute does not charge an admission fee, and the collections themselves are not displayed nor made the subject of any commercial use or activity.[51]

Similarly, the Rubin plaintiffs should not be able to meet the substantial contacts requirement under the commercial activity exception. The only contacts that have been made between Iran and the Citation Respondent museums include the original expeditions to Persepolis and Chogha Mish in the 1930s and 1960s respectively to recover the artifacts, and a 2004 letter confirming the return of 300 pieces of the collection and other future transfers

back to Iran upon completion of study. In no way can these contacts be considered "substantial" within the meaning of Section 1603(e) and ultimately the commercial activity exception under Section 1610.

Attachment of Regulated Property: Section 1610(f)(1)

Even if the loan of the Chogha Mish and the Persepolis Fortification tablets from Iran to the University of Chicago and other cultural institutions could be construed as commercial in nature, the commercial activity exception does not authorize the attachment of regulated property.[52] Congress prescribed for this category of property the coverage of Section 1610(f)(1). The Chogha Mish collection, by virtue of its committal to the purview of the Iran-U.S. Claims Tribunal in The Hague, and the Persepolis collection, through license requirements established by the Office of Foreign Assets Control,[53] are subject to government regulations which take them beyond the scope of the commercial activity exception. If Section 1610(a)(7), the commercial activity exception, were permitted to deal with regulated property, then 1610(f)(1) would be "superfluous."

In *Flatow v. Islamic Republic of Iran*, the court ruled on the applicability of the commercial activity exception to blocked accounts. The court held that the commercial activity exception did not apply to a bank account containing diplomatic funds because the account was licensed by OFAC and thus regulated under IEEPA.[54] According to the court, because the account was regulated by OFAC, "if the President had not exercised his authority to waive its requirements, the plain terms of Section 1610(f)(1)(A) appear to cover this account."[55] The court went on to conclude that "if this Court were to construe Section 1610(a)(7) to permit the attachment of blocked Iranian accounts, this interpretation would render Section 1610(f)(1)(A) superfluous."[56]

It thus becomes clear that the two sections were meant for the attachment of two distinct categories of property. Property that seemingly fits within the commercial activity exception will rather be couched within 1610(f)(1) if regulated under the IEEPA. The Persian collections, subject to export licenses from OFAC for transfer back to Iran, fits within the latter. It may be important to note that while the property at issue in *Flatow* was "blocked," according to the court's reasoning and plain terms of Section 1610(f)(1), any regulation, including license requirements under OFAC, would fall under the purview of that section. Attachment of property that is currently subject to Iran-U.S. claims tribunal actions would represent the negative foreign policy implications that the Presidential waiver seeks to prevent.[57]

Terrorism Risk Insurance Act

Another method by which to attach assets under the FSIA is the Terrorism Risk Insurance Act, or TRIA, Pub. L. No. 107-297, 116 Stat. 2322 (Nov. 26, 2002). Codified as a note to Section 1610 of the FSIA, TRIA was enacted to "deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties."[58] Section 201 of the Act discusses the means by which victims of terrorism may execute against such assets.

Section 201 and the Attachment of "Blocked Assets"

The legislative history of the Act suggests that "the purpose of Section 201 was to provide justice to terrorist victims, to hold terrorist states accountable for their crimes and to deter them from perpetrating acts of terrorism against American citizens in the future."[59] TRIA operates in conjunction with actions brought under the FSIA. Specifically, Section 201 of TRIA "addresses the attachment of foreign property in connection with judgments obtained under Section 1605(a)(7) of the FSIA against terrorists, terrorist organizations, and State sponsors of terrorism."[60]

A "blocked asset" under TRIA is defined as "any asset *seized* or *frozen* by the United States under Section 5(b) of the Trading with the Enemy Act or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701;1702) (emphasis added)."[61] As will be discussed below, the Persian collections held by the Citation Respondent museums are not "blocked assets" as defined by TRIA. In order for the collections to fit under the definition provided by the Act, they would need to be seized or frozen by the United States.

Crisis and Resolution: The Effect on Iran's Assets and the Rubin Plaintiffs' Opportunities to Attach the Collections

In response to the 1979 seizure of the U.S. embassy in Iran and the ensuing hostage crisis, and under the authority of the International Emergency Economic Powers Act (IEEPA), the President of the United States imposed sanctions against Iran through a series of Executive Orders.[62] Under one such order, Executive Order 12170, President Carter ordered "blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities" within the jurisdiction of the United States, or "which are or come within the possession or control of persons subject to the jurisdiction of the United States."[63]

The property mentioned would have included some of the collections sought for attachment by the Rubin plaintiffs, since these collections were claimed to be on loan from Iran, and within the jurisdiction of the United States.

To facilitate the sanctions programs, the Office of Foreign Assets Control created the Iranian Assets Control Regulations (IACR).[64] The IACR prohibited the transfer, payment, export, withdrawal, or other dealing with Iranian property except as authorized.[65] With the end of the hostage crisis, and the signing of the Algiers Accords, the United States agreed to "'restore the financial position of Iran, insofar as possible, to that which existed prior to November 14, 1979' and further agreed 'to commit itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction.'"[66] Under this agreement, the United States committed to arrange for the transfer back to Iran of all Iranian assets located within U.S. jurisdiction. An Iran-U.S. Claims Tribunal was established in The Hague to facilitate this purpose, and further Executive Orders consistent with the terms of the Algiers Accord were issued. These Executive Orders governed the process by which the United States would transfer to escrow accounts previously "blocked assets" pursuant to claims settlement procedure under the Accord.[67] The Executive Order most applicable to the Rubin plaintiffs and the Citation Respondent museums is Executive Order 12281, Direction to Transfer Certain Iranian Government Assets.

This Executive Order effectively removed the "blocked" status from Iranian assets within U.S. jurisdiction, including the Persepolis Fortification texts and the Chogha Mish collections. Such assets could now "be transferred at any time upon the request of the Government of Iran."[68] Pursuant to such requests and through the claims settlement process at The Hague, parts of the collections were returned to Iran in 2004. Since the collections are no longer "blocked assets" according to Section 201 of TRIA, they are no longer attachable by judgment creditors, including the Rubin plaintiffs.

Regulation of Transactions Does Not "Block" Assets

The focus of the Rubin plaintiffs' attempts to attach the collections as "blocked assets" under TRIA may then shift to Executive Order 13059, and others implemented as part of a trade embargo that have the effect of prohibiting "commercial and financial transactions with Iran, including for example, the exportation of goods to Iran."[69] However, these orders do not have the effect of prohibiting the transfer of the collections as "blocked assets" or otherwise. They are simply "an exercise of the President's power under IEEPA to regulate

transactions with foreign countries."[70] The Rubin plaintiffs may place emphasis on the fact that in 2004, the Citation Respondents needed to procure a license from OFAC to export the collections back to Iran. The plaintiffs may believe that the need for a license evidences the fact that the collections are blocked assets. However, as the Statement of Interest of the United States explains, "[a]lthough OFAC issued a license . . . authorizing this transfer to take place . . . the license evidences only that certain transactions, such as the exportation of goods to Iran, require authorization."[71] This is not to say that the artifacts are blocked under the Iranian Assets Control Regulations.

UN Convention on Attachment Immunity

Section 1610 of the FSIA and the TRIA were intended to compensate victims of terrorism with attachment of assets of the terrorist party. However, the assets that Congress likely had in mind are frozen bank accounts and real property subject to seizure, not objects of cultural heritage. Interestingly, though, international law has attempted to speak to this issue through the adoption of a multilateral treaty. Adopted in 2004, the UN Convention on the Jurisdictional Immunities of States and Their Property opened for signature on January 17, 2005, and, under Article 28, will remain open until January 17, 2007. Seventeen states have signed the Convention, with only one ratification; the United States is not a signatory. In order to come into force, however, thirty states need to ratify the Convention.

In its general statement on immunity, Article 5 of the Convention makes it clear that "a State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention."[72] This statement is very similar to FSIA Sections 1604 (immunity from jurisdiction) and 1609 (immunity from attachment). Also like the FSIA, commercial activity is an exception to general attachment immunity. However, there is a significant departure from the FSIA in the Convention. Article 21(1)(d) provides for a specific carve-out that is essential to the protection of cultural heritage. That article states:

> Property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19(c).

Under this Article, a distinction is made between objects of cultural heritage that are intentionally placed into the stream of commerce and pieces of

cultural heritage that were never intended to be removed from academia and collective social and cultural importance.

Perhaps the United States may take heed of the wisdom garnered by the Convention in creating attachment immunity for cultural heritage, especially in light of the present litigation and the implication thereto that cultural heritage could be judicially converted and privatized.

Conclusion

The Oriental Institute at the University of Chicago and other cultural institutions should be granted standing to assert the immunity defenses on behalf of the cultural heritage res. In attachment proceedings, immunity should run with the property, allowing any interested party to bring available defenses to the attention of the court. The University of Chicago, maintaining a possessory interest in the Persian collections, should be deemed an interested party and allowed to assert such defenses. Then based on the foregoing analysis of the FSIA and TRIA, the Rubin plaintiffs should not be able to defeat the immunity provided to the sovereign property under the FSIA.

Even if judgment creditors could evade immunity from attachment, cultural property should not be considered assets attachable in execution of judgment. Reason and even the old canon of *ejusdem generis* stand firmly against holding otherwise. Execution of judgment in federal court is implemented according to the laws of the state in which the district court sits.[73] The attachment proceedings brought against the University of Chicago maintained jurisdiction in the Northern District of Illinois. Thus, the laws applicable to judgment executions in the instant case are that of the state of Illinois.[74] Judgment execution is therefore guided by 735 ILCS 5/12-112, "What liable to enforcement." Pursuant to Section 12-112, "[a]ll the lands, tenements, real estate, goods and chattels . . . of every person against whom any judgment has been or shall be hereafter entered in any court . . . shall be liable to be sold upon . . . judgment."[75]

Cultural heritage should not be included among this list of attachable assets. Cultural heritage is distinct from objects of art and antiquity that have been willfully placed into the stream of commerce. To the latter belongs art as embraced in the traditional sense by consumerism: paintings, prints, modern sculpture, and even privately held antiquities placed on the open market. The readily commercialized nature of such objects may place them squarely within the ambit of assets liable to enforcement. However, a distinction should be

made for objects of cultural heritage, as was done in the UN Convention. Such objects should not be viewed as "goods and chattels" freely subject to attachment as are those assets liable to enforcement. Like the Persepolis Fortification texts and the Chogha Mish collection, cultural heritage is the physical embodiment of culture, the byproduct of a people, not an individual, and thus must not be attachable at the request of one private individual or party.

Update

Since completion of this article, U.S. District Judge Blanche Manning ruled on June 22, 2006, that the University of Chicago could not assert the sovereign immunity defense for Iran, holding that only Iran as sovereign could assert such a defense.[76] Relying on Magistrate Judge Martin Ashman's interpretation of *Powers v. Ohio* (499 U.S. 400 (1991)), the case on point allowing for third parties to assert the rights of an absent party, Judge Manning held that the University of Chicago did not meet the two-part test allowing for a proxy defense.[77] After this unfavorable ruling for protection of the Persepolis fragments and Chogha Mish collection, Iran decided to enter an appearance in the case to assert its immunity defense. In light of Iran's appearance, the artifacts should be secure from attachment.

However, other similarly held cultural artifacts around the country could be subject to similar attachment proceedings, potentially leading to further litigation over attachment of cultural heritage to civil judgments. Judge Manning's decision makes such litigation potentially more favorable for plaintiffs seeking to privatize cultural heritage through attachment proceedings when the sovereign state does not appear to assert its immunity defense.

Notes

1. *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 260 (D.D.C. 2003).
2. *Id.*
3. *Rubin v. The Islamic Republic of Iran*, 349 F. Supp. 2d 1108, 1110 (N.D. Ill. 2004).
4. *Id.*
5. Were Hamas to have any assets located within U.S. jurisdiction, they would likely be classified as "blocked" under the Terrorism Risk Insurance Act of 2002. Any such "blocked assets" within the U.S. belonging to a terrorist organization would likely be available for attachment pursuant to TRIA, as will be briefly discussed below.
6. *Rubin*, 349 F. Supp. 2d at 1110.

7. *Rubin v. Islamic Republic of Iran*, 408 F.Supp. 2d 549 (N.D. Ill. 2005), *adopted and objection overruled*, 2006 U.S. Dist LEXIS 45284 (N.D, Ill. June 22, 2006).
8. The Oriental Institute, The University of Chicago, http://oi.uchicago.edu/OI/MUS/PA/IRAN/PAAI/PAAI.html, http://oi.uchicago.edu/OI/PROJ/CHO/Chogha_Mish.html.
9. 735 Ill. Comp. Stat. 5/12–112 (2005).
10. *Rubin*, 349 F. Supp. 2d at 1110, 1111.
11. *Id.* at 1111.
12. To clarify, antiquities that are willingly placed into the stream of commerce would include those objects that have always been subject to private ownership, or collection pieces such as multiples or other expendable objects that museums may wish to de-accession through auction or other means of private sale.
13. The Immunity from Seizure Act, enacted in 1965, is a procedural safeguard offered to foreign museums and lenders that provides for immunity from seizure to collections to be exhibited in the United States. However, this Act does not have retroactive application, so any objects within the United States on long-term loan that pre-date the effective date of the Act, such as the Persian collections in the Rubin action, will not qualify for protection.
14. Findings of Fact and Conclusions of Law, entered in *Campuzano v. Islamic Republic of Iran*, Civil Action No. 00-2328 (RMU), at 20, citing *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 18 (D.D.C. 1998).
15. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).
16. *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 279 (D.D.C. 2003).
17. *Rubin v. Islamic Republic of Iran*, 349 F. Supp. 2d 1108, 1110 (N.D. Ill. 2004).
18. *Rubin v. Islamic Republic of Iran*, 2005 U.S. Dist. LEXIS 33675.
19. Statement of Interest of the United States of America, at 4, entered in *Rubin v. Islamic Republic of Iran, 349 F. Supp. 2d 1108 (N.D. Ill. 2004).*
20. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).
21. *Id.* at 486-487.
22. *Id.* at 487.
23. Second Statement of Interest of the United States of America at 6, entered in *Rubin v. Islamic Republic of Iran*, 349 F. Supp. 2d 1108 (N.D. Ill. 2004)
24. *Verlinden B.V.*, 461 U.S. at 488.
25. *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 252 (5th Cir. 2002).
26. *Id.*
27. *Id.*
28. *DeLetelier v. Republic of Chile*, 748 F.2d 790, 799 (2nd Cir. 1984).
29. Second Statement of Interest of the United States of America, at 7, entered in *Rubin v. Islamic Republic of Iran*, 349 F. Supp. 2d 1108 (N.D. Ill. 2004).

30. *Id.*
31. 28 U.S.C. §1609.
32. Memorandum Opinion and Order of Magistrate Judge Martin C. Ashman, entered in *Rubin v. Islamic Republic of Iran*, 408 FSupp. 2d 549 (N.D. Ill. 2005), *adopted and objection overruled*, 2006 U.S. Dist LEXIS 45284 (N.D, Ill. June 22, 2006).
33. *Id.*
34. The Department of Justice offers a more accurate assessment of the applicability of Rule 8 to immunity jurisprudence: "The Magistrate Judge's decision turns principally on his determination that attachment immunity constitutes an affirmative defense under Fed. R. Civ. P. 8(c). Rule 8, however, applies to 'pleadings' and Rule 8(c) requires an assertion of affirmative defenses '[i]n pleading to a preceding pleading.' Rule 7 gives a restrictive definition of 'pleadings.' 'Pleadings' include only complaints, and third-party answers. 'No other pleading shall be allowed.' Fed. R. Civ. P. 7(a). Any other application to a court for an order 'shall be by motion.' *Id.* 7(b). Thus, an application for attachment in aid of execution (under the FSIA or any other statute) does not fall within the restrictive technical definition of 'pleading. . . .' Unlike the substantive immunity from suit, however, which, at least potentially would be pled in answer to a complaint, a motion for attachment is a motion under Rule 7(b), and requires no 'pleading' in response. Rule 8(c) relating to affirmative defenses thus has no application to attachment proceedings. For this reason, it was error for the Magistrate Judge to rely on 'affirmative defense' jurisprudence in considering whether third parties may raise attachment immunity." Second Statement of Interest of the United States of America, at 8, note 6, entered in *Rubin v. Islamic Republic of Iran* (No. 03-cv-9370).
35. H.R. Rep. No. 94-1487, 9th Cong. 2nd Sess., at 17 (1976).
36. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373(7th Cir. 1985).
37. *Verlinden*, 461 U.S. at 492, note 20.
38. *Walker Int'l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229, 233 (5th Cir. 2004).
39. *Id.*
40. *United States v. $60,000.00 in U.S. Currency*, 460 F.3d 53 (D.C. Cir. 2006).
41. *Id.*
42. *Id.*
43. Second Statement of Interest of the United States of America at 7, entered in *Rubin v. Islamic Republic of Iran* (No. 03-cv-9370).
44. 28 U.S.C. 1603(d).
45. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308–09 (2d Cir. 1981).
46. *Republic of Austria v. Altmann*, 317 F.3d. 954, 969 (9th Cir., 2002).
47. *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 314 (D.D.C.2005).

48. The court reasoned against the argument that lending art could be a sovereign act: "[l]oans between and among museums (both public and private) occur around the world regularly. The City resists this conclusion, asserting that the exchange of artworks between not-for-profit organizations in different countries does not constitute 'trade and traffic or commerce.' Def. Mem. at 6. There is force to the argument and the Court has considered it with great care. Ultimately, because the international loan of artworks between museums can and does occur with potential sales of the works contemplated by the parties (which is undoubtedly 'commerce' in the traditional sense), and because it is the type of activity—not its purpose—that must guide the analysis, the Court finds the City's argument unpersuasive." *Id.*
49. *Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380 (5th Cir. 1991).
50. Affidavit of Raymond Tindel, entered in *Rubin v. Islamic Republic of Iran* (No. 03-cv-9370); Affidavit of Matthew W. Stolper, entered in *Rubin v. Islamic Republic of Iran* (No. 03-cv-9370).
51. *Id.*
52. *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 24 (D.D.C. 1999).
53. Statement of Interest of the United States of America at 8, entered in *Rubin v. Islamic Republic of Iran* (No. 03-cv-9370).
54. *Flatow*, 76 F. Supp. 2d at 24.
55. *Id.*
56. *Id.*
57. Pres. Det. No. 01–03 of October 28, 2000, 65 Fed. Reg. 66483.
58. 148 Cong. Rec. H8728 (Nov. 13, 2002).
59. *Hill v. Republic of Iraq*, No. Civ. A. 1:98CV03346TP,2003 U.S. Dist. LEXIS 3725, *8 (D.D.C. Mar. 11, 2003), citing 148 Cong. Rec. S11527 (Nov. 19, 2002) (remarks of Senator Harkin); 148 Cong. Rec. S5310 (June 13, 2002) (remarks of Senate Allen); 148 Cong. Rec. H6134 (Sept. 10, 2002) (remarks of Congressman Fosella and Congressman Cannon).
60. Statement of Interest of the United States of America, *Id.* at 6.
61. Terrorism Risk Insurance Act, Pub. L. No. 107–297, 116 Stat. 2322 (Nov. 26, 2002), Section 201 (d)(2)(A).
62. Statement of Interest of the United States of America, *Id.* at 7.
63. Executive Order 12170, 44 Fed. Reg. 65729 (Nov. 14, 1979).
64. *Id.* at 7–8.
65. 31 C.F.R. 535.201.
66. Statement of Interest of the United States of America at 8, entered in *Rubin v. Islamic Republic of Iran* (No. 03-cv-9370), citing Declaration of the Government of the Democratic and Popular Republic of Algeria (www.iusct.org).
67. *Id.*

68. *Id.*
69. *Id.*
70. *Id.* at 10.
71. *Id.*, note 7.
72. GA Res. 38, U.N.G.A., 59th Sess., U.N. Doc. GA 10309 (Dec. 2, 2004).
73. Fed. R. Civ. P. 69.
74. The presumed basis for attachment of cultural property (goods and chattels) in judgment execution in the state of Illinois would be treated substantially similarly in every state.
75. 735 Ill. Comp. Stat. 5/12–112 (2005).
76. *Rubin v. Islamic Republic of Iran,* 436 F. Supp. 2d 938, 939 (N.D. Ill. 2006).
77. Agreeing with Magistrate Judge Ashman, Judge Manning held that the University of Chicago would not suffer an "injury in fact" were the artifacts to be attached to the plaintiffs' judgment, and that prudential considerations do not favor permitting the University of Chicago to raise Iran's sovereign immunity defense; these considerations included the lack of strong ties to Iran and the absence of a hindrance preventing Iran from asserting its immunity defense on its own behalf. *Id.* at 944.