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미국 외국주권면제법 관련 소송의 준거법 선택규정*

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〈국문초록〉

미국의 외국주권면제법 관련 소송에 적용될 실체법을 결정하는 '준거법 선택규정(choice-of-law rules)'에 대해, 미국의 일부 연방법원은 해당 법원의 소재지, 즉 법정지 주(州)의 준거법 선택규정을 적용하는 반면, 제9 연방항소법원 관할 연방법원들은 "법의 저촉(충돌)에 관한 리스테이트먼트(Restatement of Conflict of Laws)"를 준거법 선택규정에 관한 연방 보통법으로 간주하고, Restatement에 의해 준거법을 결정하여, 미국 연방법원 내에서 적용하는 '준거법 선택규정'이 서로 통일되지 아니하였다.

이에 2022년 4월 미국 연방대법원은 *Cassirer v. Thyssen-Bornemisza Collection Foundation ("TBC")* 판결에서, 외국주권면제법 관련 소송 중 연방법 사안이 아닌 재산권 소유권에 관한 분쟁사안에서 어떤 실체법을 준거법으로 적용할지 판단하기 위해서는 연방의 준거법 선택규정을 적용하지 않고, 법정지 주의 준거법 선택규정을 적용하여야 한다고 판결함으로써 연방법원 내에서의 상반된 접근방식을 통일하였다.

Cassirer 사건은 제2차 세계대전 중 나치에 의해 예술품이 약탈당했다고 주장하는 소유자가 현재 해당 예술품을 점유하고 있는 스페인 정부 산하 박물관을 상대로 약탈예술품 반환을 요구하는 외국주권면제법에서 기인된 소송이다. 캘리포니아 주에 소재한 연방법원은 Restatement를 연방의 준거법 선택규정으로 채택하고, 취득시효에 의한 점유를 인정하는 스페인의 민법을 준거법으로 적용함에 따라 결과적으로 스페인 박물관의 예술품에 대한 소유권을 인정하였다.

이와는 반대로, 미국 연방대법원은 외국 정부가 주권면제를 인정받지 못한 경우, 외국 정부는 사인(私人)으로 취급될 수 있다고 규정한 외국주권면제법의 제1606조를 근거로, *Cassirer* 사건의 스페인 박물관과 같은 외국정부에게도 사인에게 적용되는 책임과 실체법 관련 규정이 적용되어야 한다고 명시하였다. 따라서 연방대법원은 *Cassirer* 사건에 법정지인 캘리포니아 주의 준거법 선택규정을 적용하여야 하며, 만약 선의취득을 인정하지 않는 캘리포니아 주의 재산법이 준거법으로 적용되었다면, 스페인 박물관의 소유권이 부정될 수도 있다고 판결하였다. *Cassirer* 사건은 준거법 선택규정이 소송결과에 중대한 영향을 미칠 수 있음을 보여준 사례라 할 수 있다.

본 논문에서는 우리나라의 국제사법에 해당하는 미국의 법 저촉에 대한 규정,

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연방법원에서의 준거법 선택규정에 대해 살펴보고, 미국 제9 연방항소법원과 연방대법원의 *Cassirer* 판결에서 논의된 사항을 검토한다. 또한 대한민국 법원에서 우리 국제사법을 적용하여, 미국법을 준거법으로 확정한 사안의 경우 *Cassirer* 판시사항과 관련된 시사점으로 어떤 것이 있는지 살펴본다.

주제어 : 준거법 선택규정, 법의 저촉, 국제사법, 법정지법, 미국 외국주권면제법, 주권면제 적용배제

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Ⅰ. Introduction

The choice-of-law inquiry in U.S. courts follows two steps: first, courts have to decide which choice-of-law rules govern, and then by applying the chosen choice-of-law rules, courts need to determine which substantive laws shall be applied. The United States Supreme Court through its precedents set out certain choice-of-law rules how to determine the governing substantive laws in federal courts. Federal courts sitting in a state apply the forum state's substantive law.[1] Likewise, federal courts use the forum state's choice-of-law rules instead of federal choice-of-law rules to determine applicable substantive laws.[2] However, federal courts to review cases under the United States Foreign Sovereign Immunities Act ("FSIA")[3] have been split with regard to which conflict-of-law rules apply. Some federal courts apply the forum state's conflict-of-law rules while federal courts in the Ninth Circuit follow the Restatement of Conflict of Laws, by treating the Restatement as federal common law.[4]

In April, 2022, the Supreme Court settled a choice-of-law rule to decide

1) Erie Railroad v. Tompkins, 304 U.S. 64 (1938).
2) Klaxon v. Stentor Electric Manufacturing, 313 U.S. 487 (1941).
3) Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (2012).
4) 2 Litigation of International Disputes in U.S. Courts § 7A:19 n. 19, citing the Ninth Circuit Court's cases, stating, "Federal common law provides the choice of law rule applicable to deciding the merits of an action involving a foreign state."; "Applying Federal Common Law Choice-of-Law Rules Rather Than Forum State's Rules to Claims Under Foreign Sovereign Immunities Act," 10-18-2021 U.S. Sup. Ct. Actions 5.

the applicable law for claims under the FSIA. In *Cassirer v. Thyssen-Bornemisza Collection Foundation ("TBC")*,[5] to restitute the ownership of a painting expropriated by the Nazi during the World War II, the alleged owner of the painting brought an FSIA action against the TBC, Spanish government-controlled art foundation, possessing the painting at that time. The district court in California and the Ninth Circuit chose federal choice-of-law rules and led to applying Spain Civil Code which recognizes the TBC's ownership. Instead, if federal courts had chosen California's choice-of-law rules which applied California law on the ownership of property, the results might have been opposite. The plaintiff's ownership might have been recognized, not the TBC's. Contrary to federal courts in California, the U.S. Supreme Court in *Cassirer* ruled that federal courts should apply the forum state's choice-of-law rules instead of federal choice-of-law rules to decide which substantive laws should be applied to resolve non-federal claims under the FSIA.[6]

The *Cassirer* decision clarifies that the term, "American conflict of laws" does not direct only to the "federal conflict of law," but includes the forum state's conflict of laws, which set out choice-of-law rules. This paper overviews American conflict of laws, including the *Erie* doctrine and the *Klaxon* doctrine, as principles that federal courts follow. Then, the paper reviews how claims under the FSIA shall be treated in terms of choice-of-law rules, by analyzing the *Cassirer* cases of the Ninth Circuit and the U.S. Supreme Court. Also, the paper checks whether the *Cassirer* decision may make a reference to Korean courts to determine applicable substantive laws under Article 16(3) of its Private International Law[7] especially in case where controversies are related to U.S. citizens.

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5) Cassirer v. Thyssen-Bornemisza Collection Foundation, 142 S.Ct. 1502 (2022).
6) Cassirer, 142 S.Ct. at 1507.
7) Act on Private International Law of the Republic of Korea (wholly amended by Act No. 18670, Jan. 4, 2022), Article 16 (Law of Nationality).

Ⅱ. Choice-of-Law Rules in American Conflict Laws

This section briefly reviews American conflict laws, and choice-of-law rules especially in federal courts, including the *Erie* doctrine and the *Klaxon* doctrine.

1. American Conflict Laws and Choice-of-Law Rules

In the United States, the term of "conflict-of-laws"[8] are used to cover three subject matters, including (1) jurisdiction questioning where litigation can or should be initiated, (2) choice of law on how courts to determine applicable substantive laws among U.S. federal or states' laws or foreign countries' laws, and (3) recognition and enforcement of judgments rendered in other states or countries to answer where the final judgement be enforced.[9] It is noted that there is "no single American conflicts law."[10] Instead, there are many conflict laws in the United States including "50 states, the District of Columbia, and the United States itself as a separate sovereign with its own system of law."[11]

With respect to the issue of choice-of-law, a court has to deal with the choice-of-law question to resolve legal disputes filed by parties between residents of different states of the United States or foreign nationals. The

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8) Various terms are used to indicate conflict of laws in the U.S. reference books, such as "American Conflicts Law," "American Conflict Laws," or "Conflict of Laws."

9) Peter Hay, Patrick J. Borchers, Symeon C. Symeonides and Christopher A. Whytock, Conflict of Laws, St. Paul: West Academic Publishing, 2018 at 3. "In civil-law systems, questions of jurisdiction and judgement-recognition form part of 'international procedural law' rather than of 'private international law.'" Id. American Conflict of Laws deals primarily with interstate conflicts. Luther L. McDougal III, et al., American Conflicts Law: Cases and Materials, Newark: LexisNexis, 2004 at 4. It is noted that outside of the United States, the term of "private international law" is used for "conflict of laws" as "conflict of laws became more and more inter-national law." Andreas F. Lowenfeld, Conflict of Laws, New York: Matthew Bender & Co., 1986 at 853.

10) Symeon C. Symeonides, American Choice-of-Law Revolution: Past, Present and Future, Boston: Martinus Nijhoff Publishers, 2006 at 2.

11) Symeonides, supra at 2-3.

court needs to decide which law should apply to the lawsuit based on common law doctrine, by questioning whether the forum court should apply its own law or that of another state or country.[12] Therefore, the choice-of-law problems "comprise much of the law of conflict of laws," as "courts normally apply the conflict-of-laws rules or system of their own state, not the rules or system of some other state."[13]

Under the federal supremacy clause of the United States Constitution,[14] federal laws are considered as 'supreme' and prevail as long as they are valid.[15] Thus, it appears to be no conflict of laws problem between state and federal law.[16] However, the Constitution creates "the conditions for the occurrence of horizontal and vertical choice of law."[17] Horizontal choice of law involves "decisions about which state's or nation's law is applicable among those having contacts with the parties to the action, the events giving rise to suit, or both,"[18] where "the sovereigns involved are all of coequal authority and power."[19] On the other hand, vertical choice of law concerns which law shall be applied by federal courts in diversity actions between residents of different states, or between residents of states and aliens.[20] In addition, vertical choice of law "concerns how state courts determine whether to apply their own law or federal law to suits within their jurisdiction."[21]

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12) McDougal, et al., supra at 2. The law of conflict of laws in the United States "largely involves the development of common law doctrine for choice of law in multi-state cases, whether they present issues of tort, or contract, or property or some other subject." Id.
13) Robert L. Felix and Ralph U. Whitten, American Conflicts Law, Durham: Carolina Academic Press, 2011 at 5.
14) U.S. Consti. art. VI, cl.2.
15) McDougal, supra at 2-3.
16) Id.
17) McDougal, supra at 3.
18) Id. at 545.
19) Id.
20) Id.
21) Id.

2. Choice-of-Law Rule in Federal Courts

In the United States, where "facts in a lawsuit relate to more than one state or nation," a court may face a choice-of-law problem to choose "between the relevant laws of the different states or countries."[22] The forum must decide which substantive or procedural law apply to the case in the forum. Especially, when a lawsuit is brought in federal courts, the choice-of-law questions are: (1) which choice-of-law rule federal courts may apply, federal choice-of-law rules or the forum state's choice-of-law rule; (2) since federal laws are regarded as supreme by the supremacy clause of the U.S. Constitution, and binding on federal and state courts, whether federal courts should apply federal laws.[23] In addition, where federal courts exercise diversity-of-citizenship jurisdiction[24] between a U.S. citizen and a foreign state, which substantive laws apply will be a crucial factor when laws of the forum state and those of the foreign state are different in providing remedies or imposing liabilities.

It is noted that the U.S. Constitution contains no provision to decide what law federal courts apply in cases within their subject-matter jurisdiction.[25] It is obvious that when federal courts exercise subject-matter jurisdiction over cases arising under the Constitution, laws, or treaties of the U.S., federal law shall be applied based on provisions of the

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22) Robert L. Felix and Ralph U. Whitten, American Conflicts Law, Durham: Carolina Academic Press, 2011 at 5.

23) Michael H. Hoffheimer, Conflict of Laws, Wolters Kluwer Law & Business, 2013 at 311.

24) 28 U.S.C. § 1332: "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between— (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4)a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States."

25) Felix, supra at 325. Section 1331 grants federal district courts with original subject matter jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. 1331.

Constitutions, federal statutes, or treaties.[26] However, if the subject-matter jurisdiction of federal courts is based on diversity-of-citizenship, which law shall apply, federal or state, is not clearly answered by the Constitution.[27]

(1) The *Erie* Doctrine

The *Erie* doctrine was drawn by the U.S. Supreme Court's *Erie Railroad Co. v. Tompkins*[28] in 1938. The *Erie* doctrine is still valid as the choice-of-law rule of federal courts under the diversity-of-citizenship jurisdiction. The Court in *Erie* ruled that "in federal courts, except in matters governed by Federal Constitution or by acts of Congress, law to be applied in any case is law of the state."[29] It is interpreted that federal courts sitting in a diversity case "operate simply as other courts of the state in which they are sitting," and the federal courts have to follow "the settled decisions of the highest state courts defining the content of state law on all matters."[30] The policy based on the *Erie* doctrine is understood that a similar suit filed by a non-resident in a federal court, not in a state court, "should not lead to a substantially different result,"[31] with the

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26) Felix, supra at 325. It is noted that state law may also govern in case of supplemental jurisdiction over claims governed by state law under 28 U.S.C. 1367. Id., n. 2.

27) Felix, supra at 325.

28) Erie Railroad v. Tompkins, 304 U.S. 64 (1938). In Erie, the plaintiff Tompkins, a citizen of Pennsylvania, brought an action in a New York federal court against the Erie Railroad Company, incorporated in New York. Tompkins sought to recover for personal injuries caused by the Erie Railroad's passing freight train operated in Pennsylvania when Tompkins was walking parallel to the train. Id. at 69.

29) Erie Railroad, 304 U.S. at 78; 28 U.S.C. § 1652 (State laws as rules of decision): "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." (June 25, 1948, ch. 646, 62 Stat. 944.); The Court in Erie continued: "And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." 304 U.S. at 78.

30) Felix, supra at 328.

31) 20 Fed. Prac. & Proc. Deskbook § 58 (2d ed.). The Court in Erie concerned the problems in Swift v. Tyson, 41 U.S. 1 (1842), which "led to unfair differences in the treatment

purpose of discouraging forum-shopping and avoiding the inequitable administration of the laws.[32]

In addition, the *Erie* decision can be read that "the obligation of the federal courts to follow state law extended only to substantive matters."[33] The *Erie* doctrine distinguished matters of substance and procedure. The doctrine meant that federal courts sitting in diversity follow the forum state's substantive law while the courts apply federal procedural law.[34] Thus, federal courts must determine whether the matter of the dispute is procedural or substantive.[35]

(2) The *Klaxon* doctrine

The *Erie* doctrine applies to conflict-of-law principles for federal courts sitting in diversity.[36] In *Klaxon v. Stentor Electric Manufacturing*,[37] the U.S. Supreme Court dealt with the issue: "Whether in diversity cases the federal courts must follow conflict of laws rules prevailing in the states in which they sit."[38] The *Klaxon* case was brought in a federal court in Delaware by a New York company for breach of contract executed in New York with a Delaware company.[39] The Court asserted that the rule of *Erie* "extends to the field of conflict of laws."[40] The Court continued that "the conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts."[41] The Court

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of similarly situated litigants, and it transgressed the state's primary authority by allowing the federal judiciary to invade rights which are reserved by the Constitution to the several states." Suzanna Sherry, "A Pox on Both Your Houses: Why the Court Can't Fix the Erie Doctrine," 10 J.L. Econ. & Pol'y 173, 174-175 (2013).

32) Joshua T. Carback, "Choice-of-Law for Federal Courts Sitting in Diversity in Pennsylvania," 40 Rev. Litig. 193, 236 (2021), citing from Hanna v. Plumer, 380 U.S. 460, 468 (1965).

33) Felix, supra at 330.

34) 20 Fed. Prac. & Proc. Deskbook § 58 (2d ed.).

35) 15A C.J.S. Conflict of Laws § 32 (Choice of law in federal court; diversity claims).

36) 3 Cyc. of Federal Proc. § 6:5 Applicability of Erie doctrine to conflict of laws; Tobias Barrington Wolff, "Choice of Law and Jurisdictional Policy in the Federal Courts," 165 U. Pa. L. Rev. 1847, 1848 (2017).

37) Klaxon v. Stentor Electric Manufacturing, 313 U.S. 487 (1941).

38) Klaxon, 313 U.S. at 494.

39) Id. at 494-495.

40) Id. at 496.

reasoned that "otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side."[42] Thus, as federal courts sitting in diversity apply the forum state's conflict of laws rules, the courts apply the forum state's choice-of-law rule to determine the applicable substantive law.[43]

3. Restatement of Conflict of Laws

Restatements of the Law, published by the American Law Institute (ALI),[44] compile existing case law and statutes from various jurisdictions and elaborate principles or rules for a specific area of law.[45] Since Restatements are secondary sources which have persuasive authority, they do not replace precedents and controlling statutes.[46] The ALI "leaves to the courts and legislatures to decide whether to follow the restatements or not."[47] Even if provisions of the Restatement may obtain mandatory authority when courts adopt the provisions, courts do "not follow them to the letter" unlike state statutes.[48]

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41) Id.

42) Klaxon, 313 U.S. 487, 496.

43) A federal court in its diversity jurisdiction was required "to apply the same choice-of-law rules that would have governed the case had it been brought in a court of the state in which it sits." Tobias Barrington Wolff, "Choice of Law and Jurisdictional Policy in the Federal Courts," 165 U. Pa. L. Rev. 1847, 1851 (2017). Whether Klaxon is "constitutionally required or necessarily to follow from Erie as a matter of policy" is questioned where Erie sought "uniformity of decision between state and federal courts sitting in the same state." Hay, et at., supra at 182.

44) ALI was established in 1923, with a group of judges, lawyers, and legal scholars to promote the clarification and simplification of United States common law. Norman L. Greene, "The American Law Institute: A Selective Perspective on the Restatement Process," 62 How. L.J. 511, 512 (2019).

45) Id. at 512-515.

46) Toni M. Fine, American Legal Systems: A Resource and Reference Guide, Newark: LexisNexis, 2008, at 9-11. "Secondary authority is not itself law, and is never mandatory authority. A court may, however, look towards sources of law for guidance as to how to resolve a particular issue." Id. at 2.

47) Greene, supra at 512-513; Fine supra at 11 (Restatements often being adopted as law of state).

The Restatement of Conflict of Laws has three series including the First Restatement adopted in 1934, the Second one published in 1971 and revised in 1989, and the new Third one is being developed.[49] The First Restatement is based on the territoriality approach and the "vested rights" theory, and is adopted by about 10 states in tort or contract cases.[50] The Second Restatement featured "the policies of Section 6, the concept of the 'most significant relationship,' and the list of particularized connecting factors."[51] However, it has been criticized that it provides "insufficient guidance to the courts" and is currently followed by about 20 states for tort or contracts cases.[52]

The Second Restatement is based on the "broad principle that rights and liabilities with respect to a particular issue are determined by the local law of the State which, as to that issue, has 'the most significant relationship' to the occurrence and the parties."[53] Section 2 of the Second Restatement describes conflict of laws as "part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state."[54] The Second Restatement includes subject matters of conflict of laws, such as judicial jurisdiction and competence, foreign judgments, and choice of law, within the scope of a state's Conflict of Laws rules.[55]

Section 6 of the Second Restatement is considered as the "cornerstone of

48) Joseph William Singer, "Choice of Law Rules," 50 Cumb. L. Rev. 347 (2019-2020).
49) 2 Litigation of International Disputes in U.S. Courts § 7A:21 (The current drafts of the Restatement (Third) of Conflict of Laws). Scholars show their concerns over the Third Restatement. See Singer, supra, at 347-348.
50) Carlos M. Vázquez, "Introduction to Symposium on the Third Restatement of Conflict of Laws," 110 AJILUNB 137 (2016), citing a survey reported in 2016, Symeon C. Symeonides, "Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey," 63 AM. J. COMP. L. 221, 292 (2016).
51) Hay, et al., supra at 58.
52) Carlos M. Vázquez, "Introduction to Symposium on the Third Restatement of Conflict of Laws," 110 AJILUNB 137 (2016); 7 Patry on Copyright § 25:8 (The Second Restatement of Conflict of Laws); Hay, et al., supra at 63-65.
53) Restatement (Second), Conflict of Laws Intro. (1971).
54) Restatement (Second), Conflict of Laws § 2.
55) Restatement (Second), Conflict of Laws § 2 comment a.

the entire Restatement."[56] It sets out "a list of general policy considerations"[57] as "factors" relevant to appraise the "most significant relationship," including: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied."[58] It is noted that "Section 6 is important in that it establishes the test that should guide the application of almost all other sections of the Restatement, most of which incorporate §6 by reference."[59]

It is wondering why the Restatement of Conflict of Laws is being treated as a federal common law which means common law developed by the federal courts. It is because "courts generally construe the federal common law of choice of law as consistent with the Restatement (Second) of Conflict of Laws,"[60] and federal common law looks to the Restatement by analyzing factors listed in Section 6 of the Second Restatement.[61] As below, the Ninth Circuit in *Cassirer* mentioned its precedent which treated the Restatement as a federal common law.

Ⅲ. Choice-of-Law Issues under Foreign Sovereign Immunities Act

Before the U.S. Supreme Court's decision in *Cassirer,*[62] which choice-of-law rules should be applied to FSIA cases has been split. Now, the

56) Hay, et al., supra at 58.
57) Id.
58) Restatement (Second), Conflict of Laws § 6(2).
59) Hay, et al., supra at 59-60.
60) 2 Litigation of International Disputes in U.S. Courts § 7A:15. Federal common law.
61) Id.
62) 142 S. Ct. 1502 (2022).

clarified Supreme Court's guideline in *Cassirer* may help to decide governing laws to claims under the FSIA.

1. FSIA as a jurisdictional statute

The United States Foreign Sovereign Immunities Act[63] was enacted in 1976 and implements sovereign immunity of a foreign state including its political divisions, agencies, and instrumentalities[64] from lawsuits in the U.S. federal or state courts under the FSIA.[65] The FSIA is treated as a jurisdictional statute to assert jurisdiction over foreign states in the United States if foreign states fail to establish their jurisdictional immunity.[66] The basis of sovereign immunity and exceptions to immunity is set out in Section 1604, stating that "subject to existing international agreements to which the United States is a party at the time of enactment of this 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 to 1607."[67]

While Section 1604 proclaims foreign states' immunity not to be sued in U.S. courts, the section also implies that foreign states are eligible to be sued if exceptions to immunity are recognized under Section 1605 and 1607. Section 1605 stipulates general exceptions to the jurisdictional immunity, providing that "a foreign state shall not be immune from the jurisdiction of

63) Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602~1611 (2016).

64) 28 U.S.C. § 1603: (a)A 'foreign state', except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b); (b) An "agency or instrumentality of a foreign state" means any entity－(1)which is a separate legal person, corporate or otherwise, and (2)which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3)which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

65) 28 U.S.C. § 1604.

66) Arthur R. Miller, 14A Fed. Prac. & Proc. Juris, § 3662.3 (Actions Involving Foreign Nations - Exception to Foreign Sovereign Immunity)

67) 28 U.S.C. § 1604.

courts of the United States or of the States in any case" where certain exceptions listed in that section are recognized.[68] The listed exceptions are waiver exception,[69] commercial activity exception,[70] expropriation exceptio n,[71] and tort exception.[72] In addition, the FSIA later added a state-sponsored terrorism exception in 1996.[73] A foreign state can be sued in the United States if one of exceptions to immunity is affirmed by courts.

2. Choice-of-Law Rule under the FSIA

The FSIA does not contain a choice-of-law provision.[74] Thus, courts in the United States have to determine which law shall be applied in FSIA cases. Since an FSIA case between a U.S. citizen and a foreign state is subject to federal courts under the diversity-of-citizenship jurisdiction,[75] the FSIA case is treated as a diversity case, and the forum state's

68) 28 U.S.C. § 1605(a).
69) 28 U.S.C. § 1605(a)(1).
70) 28 U.S.C. § 1605(a)(2). "Most state-owned corporations are inherently commercial. However, it is insufficient for the purposes of establishing an exception simply to demonstrate that the foreign state has engaged in commercial activity. Rather, the plaintiff must demonstrate a nexus between the foreign state's commercial acts, the plaintiff's claim, and the United States." Riblett, 18 J. Transnat'l L. & Pol'y 1, 32.
71) 28 U.S.C. § 1605(a)(3).
72) 28 U.S.C. § 1605(a)(5). "The noncommercial tort exception provides jurisdiction over claims 'in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property,' but only where the relevant conduct 'occurred in the United States.'" Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 714 (2021).
73) 28 U.S.C. § 1605(a)(7). In 2008, this exception was amended into 28 U.S.C. 1605A (Terrorism exception to the jurisdictional immunity of a foreign state). Unlike other exceptions to immunity, the newly amended terrorism exception creates a cause of action for state-sponsored acts of terrorism. 28 U.S.C. 1605A.
74) 2 Litigation of International Disputes in U.S. Courts §7A:19, n. 4. (Foreign Sovereign Immunities Act). The author of this article indicated that the FSIA fails to address some of the technical problems arising during the trial of these suits, such as the rules for determining what substantive law shall apply to the merits of a case against a foreign state. Joel Mendal Overton, II, "Will the Real FSIA Choice-of-Law Rule Please Stand Up?" 49 Wash. & Lee L. Rev. 1591 (1992).
75) The diversity jurisdiction provision is codified at 28 U.S.C. § 1332, and grants federal court jurisdiction in all civil actions between a citizen of a state and a subject of a foreign state.

choice-of-law rule can apply to the FSIA case.

In addition, Section 1606 of the FSIA provides: "As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances."[76] The U.S. Supreme Court interpreted Section 1606: "Where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances."[77] Thus, the section is interpreted that the Congress intended that a state's causes of action would apply to FSIA cases after foreign states lose its jurisdictional immunity subject to U.S. courts which apply the forum state's choice-of-law rules, "only to the extent that no federal claims are involved."[78]

3. Nature of Claims in an FSIA Case

The FSIA was drafted to concern the increasing contact of American citizens with foreign states and to provide American citizens to have access to courts in the United States to resolve legal disputes with foreign state s.[79] As the FSIA adopted the theory of restrictive immunity, Section 1604 can be read that the immunity of a foreign state is restricted to suits

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76) 28 U.S.C. § 1606. The section continues: "... but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought." Id.

77) First National City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611, 622 n. 11 (1983).

78) 2 Litigation of International Disputes in U.S. Courts §7A:19, citing from Barkanic v. General Admin. of Civil Aviation of the People's Republic of China, 923 F.2d 957, 959 (2d. Cir. 1991)

79) George K. Chamberlin, "Exceptions to jurisdictional immunity of foreign states and their property under the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§ 1602 et seq.)," 59 A.L.R. Fed. 99 (Originally published in 1982), §2[a].

involving a foreign state's public acts, but such immunity does not extend to suits based on its commercial or private acts.[80] The immunity of a foreign state shall be taken away once an exception to the immunity including commercial activity exception, expropriation exception, tort exception is recognized. Subsequently, it is assumed that commercial activity, property expropriation and tortious act done by foreign states might create civil or commercial claims related to contracts, property law, and tort.[81] Section 1606 also supports this assumption as the section treats foreign states as 'private' parties[82] once the foreign states lost its immunity when they are sued based on their private acts.

As the Supreme Court phrased, without any "substantive federal component,"[83] civil or commercial claims under the FSIA are regarded as non-federal or state claims, which will be decided by state or foreign laws, rather than U.S. federal law.[84]

Ⅳ. Analysis of *Cassirer v. Thyssen-Bornemisza Collection Foundation*

This chapter briefly reviews procedural backgrounds and discussions of an FSIA case, *Cassirer v. Thyssen-Bornemisza Collection Foundation ("TBC"),*[85] in United States federal courts in California and the U.S. Supreme Court, by focusing on choice-of-law issues. Plaintiff Cassirers claimed that a painting, Camille Pissarro's *Rue Saint-Honoré in the Afternoon, Effect of Rain*(the "Painting"), once owned by their great-grandmother,[86] extorted by the Nazis during World War II when she was

80) Restatement (Third) of Foreign Relations Law of the United States § 451 (1987).
81) Cassirer v. Thyssen-Bornemisza Collection Foundation, 142 S.Ct. 1502, 1508 (2022).
82) 28 U.S.C. § 1606.
83) Cassirer, 142 S.Ct. at 1509.
84) It is noted that the forum state's choice-of-law rule apply to state law claims, and should not extend to federal claims. 2 Litigation of International Disputes in U.S. Courts §7A:19.
85) Cassirer, 142 S.Ct. 1502 (2022).

forced to sell it to the Nazi to obtain an exit visa out of Germany.[87] In 1988, a Swiss baron[88] and Spain made a loan agreement to establish the Thyssen - Bornemisza Collection Foundation,[89] "an entity created and controlled by the Kingdom of Spain."[90] Later Spain purchased the painting in 1993.[91] After the Cassirer family learned that the painting was possessed by the TBC, they filed a petition in Spain to recover the painting in 2001, but the petition was denied.[92] Thus, in 2005 Cassirers initiated an action against the TBC in the district court in California.[93]

The current issue of this U.S. Supreme Court case is involved in which choice-of-law rules applied to decide substantive law to resolve the matters, whether the TBC lawfully possessed the painting.[94] Federal courts in California had to decide which choice-of-law rules should apply, federal choice-of-law rule or state's one. In this case, federal courts in California chose federal choice-of-law rules, instead of California's choice-of-law rules.[95] Subsequently the federal courts applied Spain's substantive law, which recognized the TBC's ownership of the painting, instead of applying California's substantive law.[96]

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86) At the beginning of the lawsuit, Lilly Cassirer, who inherited the painting, was one of the plaintiffs, but she died at the time of petition to the Supreme Court. Cassirer, 142 S.Ct. at 1507.

87) She transferred the painting for 900 Reichsmarks (around $360 at 1939 exchange rates). Cassirer v. Thyssen-Bornemisza Collection Found., 153 F. Supp. 3d 1148, 1151 (C.D. Cal. 2015), rev'd and remanded, 862 F.3d 951 (9th Cir. 2017).

88) Baron Hans - Heinrich Thyssen - Bornemisza of Lugano, Switzerland bought the painting from a New York art dealer for $275,000 in 1976 and maintained it as part of the Thyssen - Bornemisza Collection in Switzerland. Cassirer, 153 F.Supp.3d at 1151.

89) Cassirer, 153 F.Supp.3d at 1151.

90) Cassirer, 142 S.Ct. at 1506.

91) The purchase price of the collection was $338 million entirely funded by Spain. Cassirer, 153 F.Supp.3d at 1152. The estimated value of the collection at that time between $1 billion and $2 billion. Cassirer v. Thyssen-Bornemisza Collection Foundation, 862 F.3d 951, 957 (9th Cir. 2017).

92) Cassirer, 862 F.3d at 957.

93) Cassirer v. Kingdom of Spain, 461 F.Supp.2d 1157 (C.D. Cal. 2006) (holding that the painting was taken by Spain, within meaning of FSIA's expropriation exception).

94) Cassirer, 142 S.Ct. 1502 (2022).

95) Cassirer, 862 F.3d 951 at 960-963.

96) Id. at 963-965.

Thus, Cassirers filed a petition for certiorari to the U.S. Supreme Court, seeking to review that federal courts in California should apply California's choice-of-law rule, not a federal one.[97] The Supreme Court ruled in favor of Cassirers.[98]

This section will be focused on issues of choice-of-law rules related to this FSIA case. Conclusively, choosing the choice-of-law rule is very important since the choice-of-law rule decides which substantive law shall be applied, especially where applicable substantive laws contain different legal standards, and depending on applicable substantive laws, the result of the liabilities of the concerned parties might be totally different in the end.

Here, in case of ownership of property, laws in Spain and California are different in terms of whether a subsequent purchaser has a good title to the property. Under California's substantive law on property, developed through its common law, thieves cannot pass good title to anyone, including a good-faith purchaser.[99] Thus, purchasers or all subsequent purchasers from a thief, and even a good-faith purchaser acquire no title in the property.[100] On the other hand, under Spanish law, a consensual transfer of ownership requires title and transfer of possession.[101] Once a previous owner had a good title to the property, the subsequent purchaser becomes the lawful owner by adverse possession.[102]

1. Procedural Backgrounds

In a previous separate lawsuit against the Kingdom of Spain and TBC, TBC raised sovereign immunity under the FSIA, not to be sued in U.S. courts.[103] However, the Ninth Circuit denied TBC's sovereign immunity

97) Cassirer, 142 S.Ct. at 1507.
98) Id. at 1510.
99) Cassirer, 862 F.3d 951 at 960.
100) Id. at 960-961.
101) Id. at 974.
102) Cassirer, 862 F.3d at 974.
103) Cassirer v. Kingdom of Spain and the TBC, 616 F.3d 1019 (9th Cir. 2010) certiorari denied by Kingdom of Spain v. Estate of Cassirer, 564 U.S. 1037 (2011).

defense and recognized jurisdiction of the federal district court in California, by holding that the expropriation exception to immunity under the FSIA was applicable even though neither Spain nor TBC took the painting from its alleged owner.[104] The circuit court also saw that TBC engaged in sufficient commercial activity in the United States, which falls into the commercial activity exception to immunity.[105] Thus, the court concluded that the district court has jurisdiction over TBC pursuant to the FSIA.[106]

The new lawsuit had started to decide whether TBC is the owner of the painting.[107] In sum, *Cassirers'* federal courts in California, the U.S. District Court[108] and the Court of Appeals for the Ninth Circuit,[109] chose the Restatement (Second) of Conflict of Laws as a choice-of-law rule, rather than California state's choice-of-law rule, and finally applied Spanish law as a governing law for the claim of the ownership of property, rather than California law.[110]

The U.S. District Court in California held that under a federal choice-of-law rule, Spain's law governed the TBC's claim, stating that TBC had acquired painting by adverse possession.[111] Under Spain's law of adverse possession, TBC was the owner of painting.[112] Thus, the District Court entered summary judgment for TBC,[113] and Cassirer appealed. On appeal, the Court of Appeals for the Ninth Circuit acknowledged the

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104) Cassirer, 616 F.3d at 1037.

105) Id. at 1033-1034. To prove the TBC's commercial activity exception to immunity, the district court listed various commercial activities in the U.S. done by TBC, including activities for art exhibitions, buying or selling books, posters, and post cards of works of art, or "permitting a program to be filmed at the museum that included the Pissarro painting and was shown on Iberia Airlines flights between Spain and the United States." Cassirer, 616 F.3d at 1032, citing from Cassirer, 461 F.Supp.2d 1157, 1173 - 75.

106) Cassirer, 616 F.3d 1019, 1038; Cassirer, 862 F.3d 951, 958.

107) Cassirer v. Thyssen-Bornemisza Collection Found., 153 F. Supp. 3d 1148 (C.D. Cal. 2015), rev'd and remanded, 862 F.3d 951 (9th Cir. 2017).

108) Cassirer, 153 F. Supp. 3d 1148.

109) Cassirer, 862 F.3d 951.

110) Id. at 963-965.

111) Cassirer, 153 F. Supp. 3d 1148, 1160-1168.

112) Id. at 1160-1167.

113) Cassirer, 153 F. Supp. 3d 1148, 1168.

District Court's decision.[114] The Court of Appeals confirmed that TBC acquired the ownership of the painting through adverse possession by applying the Spain Civil Code.[115] Applying Spain's law was led by federal choice-of-law rules, rather than California's choice-of-law rules.[116]

However, the District Court's decision was reversed and remanded by the Court of Appeals, on the ground that the District Court interpreted Spain Civil Code's Article 1956, "actual knowledge," too narrowly.[117] On remand, following a bench trial, the District Court entered judgment in favor of TBC in 2019.[118] Cassirers appealed.[119] In 2020, the Court of Appeals for the Ninth Circuit affirmed the District Court's judgment, by rejecting Cassirers' argument that "the district court applied the incorrect test for actual knowledge under Article 1956"[120] whether TBC or the former possessor right before the TBC knew that the painting was stolen.[121] The Ninth Circuit concluded that even if the district court applied the incorrect test, any error was harmless or clearly erroneous.[122] Cassirers' petition for certiorari to the U.S. Supreme Court was granted in 2021.[123]

2. Arguments on Choice-of-Law Rules in the Ninth Circuit

In 2020, the Court of Appeals for the Ninth Circuit confirmed the decision of the district court, by holding that the Restatement (Second) of the Conflict of Laws to determine which substantive law applies in deciding the merits of the *Cassirer* case.[124] The Court chose the Restatement which

114) Cassirer, 862 F.3d 951, 981.
115) Id. at 980-981.
116) Id. at 981.
117) Id.
118) Cassirer v. Thyssen-Bornemisza Collection Foundation, 2019 WL 13240413 (C.D.Cal. 2019).
119) Cassirer, 824 Fed.Appx. 452 (9th Cir. 2020).
120) Cassirer, 824 Fed.Appx. at 456.
121) Id. at 456-457.
122) Id.
123) Cassirer, 142 S.Ct. 55 (2021).
124) Cassirer, 862 F.3d 951, 957.

directed Spain's substantive law.[125] Thus, Spain's Civil Code was applied to determine whether the painting had passed to TBC via acquisitive prescription. The Court finally approved the ownership of TBC through adverse possession.[126]

The Ninth Circuit explained why federal choice-of-law rules applied instead of California's choice-of-law rules, and why the Court did not apply California's substantive law, which has been developed through its common law that purchasers or all subsequent purchasers from a thief, including a good-faith purchaser, acquire no title in the property.[127]

The Court initially reviewed the Holocaust Expropriated Art Recovery Act of 2016 ("HEAR"),[128] and its precedents. The Court noted that the cause of action of this Cassirer case is based on the HEAR.[129] Thus, it argued that federal courts could apply the "HEAR's six-year statute of limitations for claims involving art expropriated during the Holocaust,"[130] but the "HEAR does not specify which state's substantive law will govern the merits of such claims."[131]

Since the HEAR does not direct a governing law in this case, the Court first need to decide which choice-of-law rules should be applied to find a governing substantive law. The Court considered that "when jurisdiction is based on the FSIA, federal common law applies to the choice-of-law rule determination,"[132] by citing its precedent, *Schoenberg v. Exportadora de Sal, S.A. de C.V.*[133] In *Schoenberg*, the Court held that "with no choice-

125) Cassirer, 862 F.3d at 960.
126) Id.
127) Cassirer, 862 F.3d at 960-961.
128) Holocaust Expropriated Art Recovery Act of 2016, Public Law No: 114-308 (2016).
129) Cassirer, 862 F.3d at 959-960.
130) Id. at 960.
131) Id.
132) Cassirer, 862 F.3d at 961.
133) Schoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777, 782 (9th Cir. 1991). The Court in Schoenberg stated: "The choice of law inquiry has two levels. First, we must determine whose choice of law rules govern. Second, applying those rules, we determine whose law applies. On the first level, either California or federal common law choice of law rules control. On the second level, Exportadora claims that Mexican law, which limits damages, should apply, while plaintiffs argue for the

of-law provision expressed in the FSIA," the Court should use the "choice-of-law principles of the federal common law"[134] and that "federal common law follows the approach of the Restatement (Second) of Conflict of Laws."[135] Later *Schoenberg* has been cited in another FSIA case, *Sachs v. Republic of Austria*.[136] The court in *Sachs* reiterated the *Schoenberg* approach by considering the Second Restatement factors for the "more significant relationship" test.[137]

The Court in *Cassirer* implied that *Sachs* did "not clearly overrule the *Schoenberg* precedent."[138] Thus, the Court concluded that "since *Sachs* did not expressly overrule *Schoenberg"* and the Supreme Court has "not overruled or effectively overruled *Schoenberg,"* the Court must apply *Schoenberg's* approach to determine which state's substantive law applies.[139] Accordingly, the Court decided to apply *Schoenberg* and the Second Restatement as a feral common law.[140]

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application of California law, which does not limit recovery." Id. The Court continued: "Although the general rule is 'that a federal court sitting in diversity applies the conflict-of-law rules of the state in which it sits,'... jurisdiction in this case is based on FSIA, not diversity. ... Therefore, federal common law applies to the choice of law rule determination." Id.

134) Schoenberg, 930 F.2d at 782.

135) Id.

136) Sachs v. Republic of Austria, 737 F.3d 584, 600 n.14 (9th Cir. 2013) (en banc), reversed on other grounds by OBB Personenverkehr AG v. Sachs, 577 U.S. 27, 136 S.Ct. 390 (2015). Sach, a California resident, purchased a rail pass in California from a travel agent in United States, and had injury by falling through a gap in a train platform in Austria while attempting to board moving train. She brought a negligence claim against OBB, Austrian government-owned railway carrier in federal courts in California, which recognized commercial activity exception to OBB's immunity. However, the U.S. Supreme Court in OBB denied commercial activity exception since "conduct constituting gravamen of passenger's suit occurred in Austria, not in the U.S." OBB Personenverkehr AG v. Sachs, 136 S.Ct. 390 (2015).

137) Restatement (Second) of Conflicts § 6(2) (1971). The Court in Sachs implied that California law would apply to Sachs's claims since California has a strong interest in providing compensation to its residents because the ticket purchase occurred in California although Sachs was injured in Austria. Sachs, 737 F.3d 584, 600 n.14 (9th Cir. 2013).

138) Cassirer, 862 F.3d at 961.

139) Cassirer, 862 F.3d at 961. The Court distinguished Sachs from Cassirer. The court noted that Sachs did not apply the Restatement because the plaintiff purchased the ticket in California. Id.

Then, the Court reviewed factors in Section 6 and other sections related to real and personal property in the Second Restatement to decide which state has the most significant relationship to the case.[141] The Court took into account that TBC purchased the painting in Spain and claimed to have acquired prescriptive title by possessing the painting in Spain. The Court selected Spain as "the state which, with respect to the particular issue, has the most significant relationship to the thing and the parties under the principles stated in Section 6"[142] of the Second Restatement. Finally, the Court chose Spanish law to decide whether TBC has the title to the painting.

3. Discussions in the U.S. Supreme Court

The main question in the U.S. Supreme Court is "whether a court in an FSIA case raising non-federal claims (relating to property, torts, contracts, and so forth) should apply the forum State's choice-of-law rule, or instead use a federal one."[143] The Supreme Court indicated that the Ninth Circuit applies federal choice-of-law rules while other Circuits apply the forum state's choice-of-law rules for non-federal claims brought under the FSI A.[144] The petitioner Cassirer also argued that "the Ninth Circuit violated the proscription against federal courts applying federal common law except where necessary to protect uniquely federal interests."[145]

The Supreme Court's analysis took somewhat different steps from the Ninth Circuit's approach to decide which choice-of-law rule shall be applied. The Supreme Court focused on: (1) Whether foreign states under the FSIA can be treated as private parties, by analyzing Section 1606 of the FSIA;[146] and (2) Whether federal common lawmaking is necessary for

140) Cassirer, 862 F.3d at 961-962.
141) Id. at 962-964.
142) Id. at 963.
143) Cassirer v. Thyssen-Bornemisza Collection Foundation("TBC"), 142 S.Ct. 1502, 1507 (2022).
144) Cassirer, 142 S.Ct. at 1507; "Applying Federal Common Law Choice-of-Law Rules Rather Than Forum State's Rules to Claims Under Foreign Sovereign Immunities Act," 10-18-2021 U.S. Sup. Ct. Actions 5.
145) Cassirer, 142 S.Ct. at 1510.

non-federal claims seeking the ownership of expropriated property, by considering the nature of claims under the FSIA.[147]

The Supreme Court initiated its discussion, by pointing out that the FSIA sets out the principle of foreign sovereign immunity from "civil" actions,[148] such claims related to property, contract, or tort. Also, the Court noticed that the FSIA has no choice-of-law provision to "affect the substantive law determining the liability" of a foreign state.[149] However, the Court found a way how to handle claims under the FSIA. The Court noted that Section 1606 of the FSIA provides: "... a foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances"[150] when the foreign state is not immune under the FSIA.[151] Therefore, the Court concluded that a foreign state can be treated as a private party, and consequently, the same rules of liability and the same substantive law applied to a private party should be used to a foreign state.[152]

The Court regarded that "Section 1606 also dictates the selection of a choice-of-law rule."[153] The Court set up a hypothetical example to compare two suits claiming the ownership of a painting, one suit against a "foreign-state-controlled" museum and the other against a private museu m.[154] The Court concerned: "If the choice-of-law rules in the two suits differed, so might the substantive law in fact chosen. And if the substantive law differed, so might the suits' outcomes"[155] where in one case, the plaintiff would obtain the title of the painting while the other might not. The Court's reasoning is: "Only the same choice-of-law rule can guarantee use of the same substantive law—and thus guarantee the

146) Id. at 1508-1509.
147) Id. at 1509-1510.
148) Id. at 1508.
149) Id.
150) 28 U.S.C. § 1606.
151) Cassirer, 142 S.Ct. at 1508.
152) Id.
153) Id.
154) Id.
155) Id.

same liability."[156]

The next question the Court raised is which choice-of-law rules the Ninth Circuit should have applied in the *Cassirer* case. The Supreme Court chose California's choice-of-law rule, by indicating that Section 1606 requires the use of the forum state's choice-of-law rule as "the rule a court would use in comparable private litigation"[157] The Court saw that if a private suit is filed in a state court, California's choice-of-law rule would be applied.[158] Likewise, if such a private suit claiming diversity jurisdiction in a California federal court, California's choice-of-law rule also govern under the *Klaxon* principle which requires federal courts to apply the forum state's choice-of-law rule.[159] The Court concluded that applying the same choice-of-law rules to a foreign state like a private party ensures a foreign state's liability in the same manner and to the same extent as a private party.[160]

Finally, the Court questioned whether a new federal common lawmaking might be needed to apply a federal choice-of-law rule in FSIA suits raising non-federal claims[161] involving legal issues of property, contract or tort. The Court addressed that "judicial creation of federal common law to displace state-created rules must be necessary to protect uniquely federal interests."[162] The Court pointed out that even the foreign government does not demand the necessity to apply a federal choice-of-law rule in suits like *Cassirer*.[163] The Court disapproved that federal law would displace or supplant state's choice-of-law rule when foreign states are subject to U.S. federal jurisdiction and property-or contract-related claims.[164] The Court also disagreed that applying the forum state's choice-of-law rule would create foreign relations concerns.[165]

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156) Id.
157) Cassirer, 142 S.Ct. at 1508-1509.
158) Id. at 1509.
159) Id.
160) Id.
161) Id.
162) Id.
163) Id.
164) Cassirer, 142 S.Ct. at 1509-1510.
165) Id.

Ultimately, the Court concluded that the standard choice-of-law rule is the forum state's choice-of-law rule to apply the *Cassirer* case which is a property-law dispute.[166] The decision of the Ninth Circuit was vacated and remanded if the circuit court had applied California's choice-of-law rule, the rule would lead to the application of California's property law, and the TBC's ownership might have not been recognized under the California law.[167]

V. Implications

The *Cassirer* decision provides lessons and expectations related to potential lawsuits under the FSIA. First, the *Cassirer* case can be an exemplary guideline to similarly-situated lawsuits to recover the forcefully expropriated property against a foreign state. It is a considerable event to witness how federal courts in California will re-analyze the merits of *Cassirer* by applying the forum state's choice-of-law rule after the U.S. Supreme Court vacated and remanded the previous decision of the Ninth Circuit. If the alleged owner wins, the *Cassirer* case becomes a landmark case which impact other unresolved expropriated property case under the FSIA.

The Supreme Court in *Cassirer* reaffirmed that even if such a lawsuit against a foreign state is filed in U.S. federal courts under the rule of diversity, U.S. federal laws are not the only governing jurisprudence. Before the *Cassirer* decision, litigants might have some misunderstanding that only federal choice-of-law rule or the Restatement of Conflict of Laws as federal common law shall apply to determine substantive law. However, if such a lawsuit contains no federal claims, the case is decided by the forum state's choice-of-law rules, instead of federal choice-of-law rule. Thus, the *Cassirer* case through its litigation process provides guidelines how to deal

166) 142 S.Ct. at 1510.

167) Id. at 1509-1510. Petitioners argued that (1) proper application of California choice of law rules would lead to application of California substantive law; (2) proper application of the Ninth Circuit's federal common law test required application of California substantive law. Brief for Petitioners, 2021 WL 5404788 (U.S.) (Appellate Brief) at 13.

with the jurisdictional immunity defense of a foreign state defendant, and how to decide a forum which applies the forum state's choice-of-law rules that might lead to more favorable substantive law for the plaintiff, among several forums with significant relationship.

Also, the Supreme Court in *Cassirer* clearly advised that whether a foreign state may exercise jurisdictional immunity is a federal question under the FSIA while whether the foreign state is liable under property law is a 'civil' claim or matter. Likewise, once stepping across the threshold of jurisdictional immunity for the foreign state based on expropriation exception, commercial activity exception, or tort exception, the FSIA lawsuit may continue for the merits since the foreign state is treated as a private party under the "law of a state" such as property law, contract or tort, not the law of the U.S. or federal law.

Second, unrelated to a question under the FSIA, the *Cassirer* case advised how to understand rules of American conflict laws to deal with a U.S. citizen or corporation as a party of a lawsuit in Korean courts to determine applicable substantive laws under the Korea's Private International Law. For example, Article 16 of the Korean conflict law states: "(3) Where a party has nationality of a country which has varying laws depending on the territorial unit, the law designated under the optional provisions of the law of the country shall govern and, in the absence of such provisions, the law of a territorial unit most closely related to the party shall govern."[168]

For example, in case where a California resident is a party in a lawsuit in Korean courts, how to decide the law of nationality of the California resident under Article 16(3) will be questionable. Here, the phrase, "a country which has varying laws," includes a country like the United States, and the term "the territorial unit" may refer to individual states in the United States. In addition, if the phrase, "the law designated under the optional provisions of the law of the country" under the Korean law, might

168) Act on Private International Law of the Republic of Korea (wholly amended by Act No. 18670, Jan. 4, 2022), Article 16, Paragraph 3.https://elaw.klri.re.kr/kor_service/lawView.do?hseq=60196&lang=ENG(last visited on December 20, 2022).

imply a conflict-of-law representing the United State, which may refer to a federal conflict-of-law, Korean courts might regard the Restatement of Conflict of Laws as a federal choice-of-law rule in deciding the law of nationality of Californian citizen.[169] Since a federal conflict-of-law representing the United States exists, California's conflict-of-law as "the law of a territorial unit most closely related to the party" as phrased in the Korean law might not be considered in advance.

Similarly, whenever, broadly speaking, the "law of the United States" is chosen to resolve any civil or commercial matters under the Korean Private International Law, Korean courts have to deal with which law in the U.S. shall govern, federal law or relevant state law, including federal choice-of-law rules or state's choice-of-law rules. Even if Korean courts may apply a federal choice-of-law first, it is adequately done by obeying the rule of Korean conflict-of-law. On the contrary, now, the *Cassirer* decision by the U.S. Supreme Court provides a guideline how U.S. courts deal with civil or commercial cases to decide governing laws, by applying a state's choice-of-law first. If so, it can be presumed that similar lawsuits in Korean courts and U.S. courts might have different results by applying different choice-of-law rules of the U.S.

Above all, when the Korean Private International Law finally chooses "the law of the United States" as a governing law, how Korean courts decide which "the law of the United States" apply is always eventful. Since the Korean Private International Law deals with civil or commercial matters, such as contract, tort, property law, "the law of the United States" is meant to be "the law of a state" on contract, tort, or property, rather than federal laws. Interestingly, American conflict laws does not adopt the concept of "the law of nationality" or citizen, but "the law of domicile."[170] Korean courts often employ "the law of residence" where a U.S. citizen or

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169) Korean Supreme Court adopted a rule of "hidden *renvoi,*" which applied the Restatement (Second) of Conflict of Laws in its case on domestic relations, 2005*meu*884 decided on May 26, 2005. Kim Yeon, et at. Private International Law, Beommoonsa, 2022 at 222-223.

170) Hay, et al., supra 277-278.

a state's resident resides as "the law of nationality."[171] Thus, Korean courts apply a state's substantive law to deal with subsequent matters including domestic relationship, succession, or testament.

It is arguable: Should Korean courts may review the relevant state's choice-of-law rule in the U.S. first, instead of the Restatement of Conflict of Laws unless the state officially adopts the Restatement as the conflict-of-law of the state? Cautiously, in case a country like the U.S., how about implementing Article 16(3) of Korean conflict law as follows: "Where a party has nationality of a country which has varying laws depending on the territorial unit, the law of a territorial unit most closely related to the party shall govern first."

In conclusion, at least, Koreans being sued in U.S. courts should not presume that federal choice-of-law rules shall always precede state's choice-of-law rules.

Ⅵ. Conclusion

The *Cassirer* decision is meaningful since the U.S. Supreme Court clarifies the selecting process of governing laws including conflict-of-law rules in an FSIA case when a foreign state defendant was not entitled to jurisdictional immunity under the FSIA. This guideline helps foreign state defendants to prepare their lawsuits in U.S. federal courts, especially in case where the outcome of litigation might be quite different or opposite depending on which substantive law has applied to their cases because of the different legal standards of potentially applicable governing laws in terms of liabilities or remedies.

More FSIA lawsuits in U.S. courts against the Korean government and its agencies can be expected although this paper fail to present even rough statistics of lawsuits.[172] As shown below in previous FSIA cases against

171) Hay, et al., supra 278. Korean Supreme Court, 2005*meu*884, decided on May 26, 2005; Seoul Family Court, 2013*deudan*91378, decided on June 27, 2014.

172) More FSIA lawsuits are expecting as the number of foreign state-owned corporations

Korean parties, some courts asserted Korean defendants' jurisdictional immunity while other cases denied such immunity, and thus, continued their lawsuits in U.S. courts. For example, in 2018, a U.S. defense contractor brought an action in a district court in Maryland against Korean government and its Defense Acquisition Program Administration where the Fifth Circuit addressed that Korean defendants implicitly waived its sovereign immunity.[173] On the other hand, a lawsuit of shareholders' derivative action against the Korea Management Corporation ("KAMCO"), the Second Circuit ruled that KAMCO qualifies as an organ of Korea for purposes of FSIA immunity.[174] Even in similar labor disputes brought by former employees of the Korea Trade Center ("Kotra") in 2009 and 2014, New York courts decided differently with respect to immunity of Kotra. The 2009 lawsuit in a N.Y state court recognized the commercial activity exception by rejecting Kotra's immunity defense.[175] However, in a similar lawsuit in 2014 under the Age Discrimination in Employment Act and N.Y. human rights law, a New York federal court recognized the jurisdictional immunity of Kotra, rejecting the commercial activity exception.[176]

As observed, lawsuits under the FSIA are initiated to find out whether foreign states are entitled to jurisdictional immunity. However, once exception to immunity is admitted, foreign states need to deal with federal or non-federal claims. Thus, if Korean parties in U.S. courts carefully examine U.S. courts' decisions under the FSIA, especially how courts employ the forum state's choice-of-law rule to select governing law, it might be helpful to find more favorable substantive law for them.

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located or engaged in business in the United States increases. Andrew Loewenstein, "The Foreign Sovereign Immunities Act and Corporate Subsidies of Agencies or Instrumentalities of Foreign States," 19 Berkeley J. Int'l L. 350, 351-352 (2001).

173) BAE Systems Technology Solution & Services, Inc. v. Republic of Korea's Defense Acquisition Program Administration, 884 F.3d 463 (4 Cir. 2018), where the plaintiff sought declaratory judgment that it had not breached any contractual obligation to Korea and permanent injunction barring Korea from prosecuting its suit against it in Korean courts. Id.

174) Murphy v. Korea Asset Management Corp., 190 Fed. Appx. 43 (2 Cir. 2006).

175) Cha v. Kotra, 2009 WL 3516910 (N.Y.Sup. 2009) where Cha sued for gender and pregnancy discrimination in violation of N.Y. human rights law.

176) Kim v. Kotra, 51 F.Supp.3d 279 (S.D.N.Y. 2014).

[참고문헌]

FELIX, Robert L. and WHITTEN, Ralph U., *American Conflicts Law,* Durham: Carolina Academic Press, 2011.

HAY, Peter, BORCHERS, Patrick J., SYMEONIDES, Symeon C., and WHYTOCK, Christopher A., *Conflict of Laws,* St. Paul: West Academic Publishing, 2018.

HOFFHEIMER, Michael H., *Conflict of Lws,* Wolters Kluwer Law & Business, 2013.

LOWENFELD, Andreas F., *Conflict of Laws,* New York: Matthew Bender & Co., 1986.

MCDOUGAL, Luther L., III, FELIX, Robert L., WHITTEN, Ralph U., *American Conflicts Law:* Cases and Materials, Newark: LexisNexis, 2004.

SYMEONIDES, Symeon C., *American Choice-of-Law Revolution: Past, Present and Future,* Boston: Martinus Nijhoff Publishers, 2006.

CARBACK, Joshua T., "Choice-of-Law For Federal Courts Sitting in Diversity in Pennsylvania," 40 *Review of Litigation* 193 (2021).

FOSTER, George K., "When Commercial Meets Sovereign: A New Paradigm for Applying the Foreign Sovereign Immunities Act in Crossover Cases," 52 *Houston Law Review* 361 (2014).

GARNETT, Richard, "Precarious Employment? Varying Approaches to Foreign Sovereign Immunity in Labor Disputes," 51 *International Lawyer* 25 (2018).

GREENE, Norman L., "The American Law Institute: A Selective Perspective on the Restatement Process," 62 *Howard Law Journal* 511 (2019).

LOEWENSTEIN, Andrew, "The Foreign Sovereign Immunities Act and Corporate Subsidies of Agencies or Instrumentalities of Foreign States," 19 *Berkeley Journal of International Law* 350 (2001).

OVERTON, Joel Mendal, II, "Will the Real FSIA Choice-of-Law Rule Please Stand Up?" 49 *Washington and Lee Law Review* 1591 (1992).

SHERRY, Suzanna, "A Pox on Both Your Houses: Why the Court Can't Fix the Erie Doctrine," 10 *Journal of Law, Economics & Policy* 173

(2013).

SINGER, Joseph William, “Choice of Law Rules,” 50 *Cumberland Law Review* 347 (2019-2020).

TIDMARSH, Jay and MURRAY, Brian J., “A Theory of Federal Common Law,” 100 *Northwestern University Law Review* 585 (2006).

VAZQUEZ, Carlos M., “Introduction to Symposium on the Third Restatement of Conflict of Laws,” 110 *AJIL Unbound* 137 (2016).

WOLFF, Tobias Barrington, “Choice of Law and Jurisdictional Policy in the Federal Courts,” 165 *University of Pennsylvania Law Review,* 1847 (2017).

[Abstract]

The Recently-Settled Choice-of-Law Rule to Claims under the United States Foreign Sovereign Immunities Act

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Federal courts in the United States have been split with regard to which choice-of-law rules apply in reviewing claims under the United States Foreign Sovereign Immunities Act ("FSIA"). Some federal courts apply the forum state's choice-of-law while federal courts in the Ninth Circuit use federal common law, that is, the Restatement of Conflict of Laws.

In April, 2022, the U.S. Supreme Court in *Cassirer v. Thyssen-Bornemisza Collection Foundation ("TBC")* unified different approaches, by ruling that federal courts should apply the forum state's choice-of-law rules instead of federal choice-of-law rules to decide which substantive laws govern to resolve non-federal claims under the FSIA.

Cassirer is a dispute on the ownership of property, initiated as an FSIA case which was brought by the alleged owner of a painting expropriated by the Nazi during the World War II to recover the ownership of the painting from TBC, Spanish government-controlled art foundation and the current possessor of the painting. Federal courts in California chose the Restatement of Conflict of Law as federal choice-of-law rules, applied Spain Civil Code which honored adverse possession, and finally recognized the TBC's ownership.

On the contrary, the U.S. Supreme Court employed Section 1606 of the FSIA, stating that a foreign state can be treated as a private party once it is not entitled to sovereign immunity, and that the same rules of liability and the same substantive law applied to a private party should be used to a foreign state.

Thus, the Supreme Court concluded that federal courts should apply the forum state's choice-of-law rules to *Cassirer*, and that the ownership of

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TBC might have been denied if the forum state's choice-of-law rule might have been applied and led to California's substantive law which rejected the ownership of even good-faith purchasers. The Cassirer case showed that depending on which choice-of-law rule is applied, the outcome of the lawsuit can be significantly affected.

This paper briefly overviews American conflict of laws, and looks over principles of choice-of-law rules in federal courts. The paper analyzes the *Cassirer* cases of the Ninth Circuit as well as the U.S. Supreme Court. In addition, the paper checks how the *Cassirer* decision may affect to Korean courts to determine applicable substantive law under the Korean Private International Law.

Keywords : Choice of Law, Conflict of Law, Restatement of Conflict of Laws, Foreign Sovereign Immunities Act, Sovereign Immunity