UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No. [s]:08-5119-cv
BAKALAR v. VAVRA

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REPLY IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE IN SUPPORT OF APPELLANTS BY ISRAELITISCHE KULTUSGEMEINDE WIEN (JEWISH COMMUNITY VIENNA), AMERICAN JEWISH CONGRESS, LAWYERS' COMMITTEE FOR CULTURAL HERITAGE PRESERVATION, AMERICAN GATHERING OF JEWISH HOLOCAUST SURVIVORS AND THEIR DESCENDANTS, AND AMERICAN JEWISH COMMITTEE

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Dated: March 3, 2009

Pursuant to Fed. R. App. P. 27, Prospective Amici Curiae Israelitische Kultusgemeinde Wien (Jewish Community Vienna) ("IKG"), Lawyers' Committee For Cultural Heritage Preservation, American Jewish Congress, American Gathering of Jewish Holocaust Survivors and Their Descendants, and American Jewish Committee (collectively "IKG Amici") jointly state as follows in reply to Appellee David Bakalar's ("Bakalar") Opposition to the IKG Amici's Motion for Leave to Submit a Brief of Amicus Curiae pursuant to Fed. R. App. P. 29 ("Bakalar Opp." or "Opp.") in the above-captioned case.

I. PRELIMINARY STATEMENT

1. In their Motion for Leave to Appear as Amici, IKG Amici stated that the lower court based its decision in favor of Bakalar, in part, on a ruling that Swiss law governs the dispute over the drawing at issue ("Drawing"), setting out its interpretation of Swiss law and applying that understanding to the case. In their proposed brief, IKG Amici would offer what they submit to be a more thorough and accurate explanation and interpretation of Swiss law.

2. IKG Amici also explained that the nature of their interest grows directly from the work they do: protecting the interests of members of the Jewish community in their lost property, including art and cultural objects. IKG, for example, operates a Holocaust victims information service in Austria which, as Bakalar acknowledges, provided documents to Appellants Milos Vavra and Leon

Fischer ("Vavra and Fischer"). Opp. at 4. IKG Amici are, therefore, uniquely well-positioned to speak to issues of international law in the context of looted art, and to assist the Court in determining how that law should be interpreted. As a result, IKG Amici filed their Motion for Leave to Appear as *amici curiae*, requesting the opportunity to explain and interpret the provisions of Swiss law that apply to the *Bakalar* case.

3. In his Opposition, Bakalar argues that (1) this Court is bound by the record below concerning Swiss law (Opp. at 4), cannot independently research foreign law, and may pick and choose only among the interpretations of Swiss law offered below (*id.*), implying that the standard of review is whether "the District Court exercised poor discretion in its selected method of determining Swiss law" (*id.*); and (2) IKG Amici should not be allowed to appear because IKG and its undersigned counsel "materially participated below" and should have supplied the information set forth in IKG Amici's brief at that time. Opp. at 4-5.

4. Other than citation to Fed. R. Civ. P. 44.1, which governs proof of foreign law in United States district courts, Bakalar's Opposition is unburdened by citation to legal authority, controlling or otherwise, and reflects a misunderstanding of the role of foreign law in United States courts. By providing the rule of decision, rulings on foreign law have broad application and cannot be – and are no longer – treated as the private province of the parties and their dispute. For these

reasons, and as explained more fully below, IKG Amici submit that neither of Bakalar's arguments warrants denying IKG's Motion for Leave to Appear.

II. ARGUMENT

A. Bakalar Accepts That Swiss Law Is A Relevant Issue, And That IKG Amici Have Significant Interests In Presenting Information Concerning Swiss Law To The Court.

5. In their Motion for Leave, IKG Amici describe their interests in the matter and the relevance to this case of the issue addressed in their brief: Swiss law of good faith purchase. Pursuant to Fed. R. App. P. 29(b), these are the critical qualifications for participation as amici. IKG Amici submit that the district court erred in its ruling in favor of Bakalar in its interpretation and application of Swiss law. This error has significant ramifications for art restitution cases throughout the United States, cases of interest to prospective IKG Amici. Stolen artworks and other cultural objects have frequently changed hands in Switzerland on the way to these shores, so Swiss law frequently plays a role in art restitution cases.[1]

6. IKG Amici, who include organizations concerned with protecting art and cultural property, Holocaust survivors and the Jewish community generally, have an interest in seeing that survivors and heirs of victims are able to recover art

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[1] *See, e.g., Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd on other grounds*, 917 F.2d 278 (7th Cir. 1990) (mosaics passed through Switzerland on their way to U.S.); *Schoeps v. Museum of Modern Art*, 2009 U.S. Dist. LEXIS 5647 (S.D.N.Y. Jan. 27, 2009) (artwork passed through Switzerland; district court, *per* Rakoff, J., relies on lower court's interpretation of Swiss law in *Bakalar*).

works and other property stolen during the Holocaust, and in ensuring that stolen cultural property is returned to its proper owners. Consequently, their interests in appearing as amici in this case are evident and, indeed, uncontested.

7. Bakalar – remaining silent, as he does, with respect to the relevance of Swiss law and IKG Amici's interests in appearing – seems to accept that Swiss law is an issue of central importance in this appeal and that IKG Amici have significant interests in the proper interpretation and application of Swiss law in Holocaust art restitution cases. Therefore, he does not and cannot contend that IKG Amici fail to satisfy the basic standards set forth for amici in Fed. R. App. P. 29.

B. An Appellate Court May Consider Information About Foreign Law That Was Not Before The District Court.

8. In his Opposition, Bakalar primarily contends that the Court should not consider "new evidence" concerning Swiss law (Opp. ¶ 1) or "expand the record for the first time on appeal" (*id.* ¶ 12). As is well-established in this Court and elsewhere, ever since Fed. R. Civ. P. 44.1 was added in 1966, arguments like these have had no bearing on determinations of foreign law in United States courts. *Curley v. AMR Corp.*, 153 F.3d 5, 12-13 (2d Cir. 1998) (Second Circuit found submissions on foreign law to be inadequate to allow proper choice of law analysis or application of foreign law, and requested additional briefing).[2]

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[2] *See also Twohy v. First Nat'l Bank*, 758 F.2d 1185, 1192 (7th Cir. 1985) ("If we were to apply pre-1966 law, where questions of foreign law were viewed as

9. A district court's determination of foreign law is no longer regarded as a factual matter between the parties, but as a question of law of broad impact and, therefore, subject to *de novo* review on appeal. *Curley*, 153 F.3d at 11 ("[P]ursuant to Fed. R. Civ. P. 44.1, a court's determination of foreign law is treated as a question of law, which is subject to *de novo* review."); *see also United States v. Schultz*, 333 F.3d 393, 401 (2d Cir. 2003) (same, citing parallel Fed. R. Crim. P. 26.1).

10. The rules governing determination of foreign law changed significantly with the addition of Fed. R. Civ. P. 44.1, which permits the trial court to consider "any relevant material or source, including testimony, whether or not submitted by a party or admissible." The rule replaced the old approach to determining foreign law, under which trial courts would look to state-specific rules of evidence. The commentary to Rule 44.1 explains that the prior approach was overly narrow, often prohibiting courts from using the best sources to find foreign law. Now, the district court "may engage in its own research and consider any relevant material thus found." Fed. R. Civ. P. 44.1 Comm. Note. *See also id.* ("The court may have at its disposal better foreign law materials than counsel have

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issues of fact, with the party relying on foreign law carrying the burden of proof. . . the lower court's dismissal could be affirmed solely because of plaintiff's failure to carry his burden of proof. The adoption of Fed. R. Civ. P. 44.1 in 1966, however, substantially changed the manner in which federal courts are to treat questions of foreign law.") (internal citations omitted).

presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail."). This approach applies on appeal, as well, where the Court may request supplemental presentations from the parties and conduct its own research. *Curley*, 153 F.3d at 12 ("[A]ppellate courts, as well as trial courts, may find and apply foreign laws."); *see also Twohy*, 758 F.2d at 1193 ("both trial and appellate courts are urged to research and analyze foreign law independently"). *Curley*, not discussed by Bakalar in his Opposition, is controlling authority from this Court.

11. Moreover, Courts of Appeal have an obligation to verify independently that the trial judge correctly determined and applied foreign law. *Trans Container Services (BASEL) A.G. v Security Forwarders, Inc.*, 752 F.2d 483, 486 (9th Cir. 1985). Accordingly, Courts of Appeal owe no special deference to a district court's determination of foreign law and may consider information not available to or considered by the court below. *Mobile Marine Sales, Ltd. v M/V Prodromos*, 776 F.2d 85, 89 (3d Cir. 1985).

12. As a result of Rule 44.1 and the independent role this Court plays in finding and applying foreign law, the IKG Amici brief setting forth a proper explanation and interpretation of Swiss law should be considered. Although Bakalar's Opposition implies that the discourse here should be limited to interpretations presented by the parties below (Opp. at 4), the committee

commentary to Fed. R. App. P. 29(b) urges the opposite approach, encouraging parties amicus to present new information:

> An *amicus curiae* brief which brings relevant information to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus curiae* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.

Fed. R. App. P. 29(b) Comm. Note, *quoting* Sup. Ct. R. 37.1. *See also* Fed. R. App. P. 29(d) Comm. Note (amicus brief "should treat only matter not adequately addressed by a party").

13. In sum, IKG Amici's brief discussing Swiss law serves an important function for this Court: it speaks to Swiss law of good faith acquisition in the context of looted art, and how that law should be correctly interpreted and applied. Commentary to Fed. R. Civ. P. 44.1 anticipates that federal courts at the trial and appellate levels will consider a wide range of sources in determining foreign law, and prospective IKG Amici ask that their brief be one of those sources. Because Bakalar challenges neither the central relevance of the determination of Swiss law nor IKG Amici's interests in addressing it, IKG Amici submit that their Motion for Leave to Appear should be granted.

C. IKG Was Not A Party Below And Did Not Have Standing To Submit Evidence Or Testimony Regarding Swiss Law.

14. Bakalar correctly states that IKG provided research documents from Austria to Vavra and Fischer, that IKG's Executive Director Erika Jakubovits

testified at deposition and trial below, and that undersigned counsel represented IKG at those proceedings.

15. IKG's involvement, however, was solely as a third party. It filed no papers in the court below, nor was it served with any. It did not have occasion to present information regarding the correct interpretation and application of Swiss law or to address any other issues in the case.

16. IKG should be able to participate as amicus here on the same basis as the remaining four IKG Amici who had *no* involvement in the case below.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, IKG Amici respectfully request that they be granted leave to appear in the above-captioned case.

Date: March 3, 2009

Respectfully submitted:

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