

Boosting Legal Protection For Foreign Art Lenders

Law360, New York (July 30, 2012, 1:50 PM ET) -- This year, visitors to the Metropolitan Museum of Art were able to view Rembrandt's "Portrait of the Artist" (ca. 1665), on loan from the Kenwood House in North London and in the United States for the very first time. Also this year, visitors to the Philadelphia Museum of Art experienced Van Gogh Up Close, an exhibition featuring some of the artist's most innovative paintings, on loan from private collectors and museums worldwide, including the Van Gogh Museum in Amsterdam, the Centraal Museum in Utrecht, and the Hague. And, on the West Coast from July 3 to Sept. 23, 2012, visitors to the J. Paul Getty Museum will have the opportunity to see Gustav Klimt: The Magic of Line, the first retrospective fully dedicated to the drawings of the popular modern artist, on loan mostly from the Albertina in Vienna.

International loans such as these allow Americans to witness the world's most precious art close to home. Enabling this intercultural exchange is the Immunity from Seizure Act ("IFSA"), 22 U.S.C. § 2459, the United States' guarantee to foreign art lenders that their art is immune from judicial seizure while in this country. But despite the legislative protection of the IFSA, foreign lenders have grown increasingly hesitant to make loans to U.S. museums in recent years, in large part because of the 2005 decision of the District Court for the District of Columbia in *Malewicz v. City of Amsterdam*.

Applying the Foreign Sovereign Immunities Act ("FSIA"), the court in *Malewicz* held that 14 Kazimir Malevich paintings, on loan to the Solomon R. Guggenheim Museum from the Stedelijk Museum in Amsterdam, were subject to an ownership claim despite the works' immunity under the IFSA. The FSIA, which generally immunizes foreign governments from suit in U.S. courts, includes an exception for lawsuits involving property taken in violation of international law and that has a connection to a commercial activity conducted by the foreign state.

The *Malewicz* court found that the practice of lending and borrowing art constitutes "commercial activity" for purposes of the FSIA. In doing so, the court created an inconsistency under federal law, which undermined the IFSA's immunity and, according to many American museum directors, potentially impairs or even halts borrowing of loaned artwork by U.S. museums.

The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act ("FCEJICA") (S. 2212), currently pending in the Senate, seeks to restore the protections Congress meant to provide through the IFSA. The FCEJICA would amend the FSIA to bar all ownership claims over foreign art on loan in the United States, except those brought by families whose art was expropriated by the Nazis during World War II. The FCEJICA would thus overturn *Malewicz* by explicitly providing that the lending and borrowing of cultural objects among sovereign states is not "commercial activity" for purposes of the FSIA.

Supporters of the FCEJICA, most prominently the Association of Art Museum Directors, recognize that, absent increased legal protection for foreign art lenders, many Americans might never have the opportunity to view some of the world's great artistic treasures. Just last year, for example, Russia banned art loans to the United States in response to a 2010 ruling by the D.C. district court that a historic collection of rabbinic books and manuscripts seized during the Bolshevik Revolution belongs not to Russia, but to the U.S.-based Hasidic group, Chabad-Lubavitch, and must be returned to it.

Although American diplomats have tried to assure Russian officials that federal law protects foreign art through, for example, court filings that promise Russia that 38 works that were set to go on loan to the Los Angeles County Museum of Art in May 2011 would be protected from seizure, the Russian government remains steadfast, demanding more legal assurances before the loans resume. Arguably, then, the increased protection provided by the FCEJICA would promote the international exchange of cultural objects, which is in the nation's interest.

Opponents, however, find the legislation deficient in many respects. For starters, the bill is said to go too far in protecting lenders at the expense of owners trying to reclaim stolen art. Moreover, by immunizing foreign art lenders from suit in U.S. courts, the FCEJICA could effectively permit U.S. museums to exhibit art that they know was stolen (assuming, *arguendo*, museum policies would permit such a consequence).

The most pointed criticism takes aim at the bill's special treatment of art looted by the Nazis during World War II, because, critics say, the bill creates a hierarchy of atrocities by elevating the Holocaust above all others. Supporters, though, see this as consistent with obligations museums have long recognized to address and resolve issues concerning Nazi-era looted works.

Absent passage of the FCEJICA, it appears that procuring loans from foreign museums and collections will be increasingly difficult in light of recent U.S. court decisions in these art-related cases. Foreign lenders need clear notice from the United States that artworks on loan for public display will not be caught up in expensive court proceedings simply because the works are being exhibited on our soil.

Unfortunately, the art world may have to wait for a final decision on the FCEJICA's fate, as nonpartisan support for the bill has slowed in the Senate amid increasing public opposition over the legislation's perceived shortcomings and, of course, the political realities of diminishing momentum for legislation in an election year.

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