The Art Law Report

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Combining the Nazi Theft Exception in Senate Bill 2212 with Immunity from Seizure: Good Policy or Inconsistent Law?

By Nicholas O'Donnell on November 15th, 2012

Posted in Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Foreign Sovereign Immunities, Immunity from Seizure Act, Restitution, World War II

Opposition to Senate Bill 2212, the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (a bill the Art Law Report favors in its frequent commentaries) has been renewed recently. Senate Bill 2212 (already passed by the House of Representatives) would remove the mere display of a work of art in the United States as a satisfactory basis to satisfy the commercial activity requirement of the Foreign Sovereign Immunities Act necessary to sue a foreign sovereign here in the United States.

Nikki Georgopulos has posted part two of her thoughtful commentary on the bill at Plundered Art, focusing on the exception in the bill for artwork alleged to have been stolen or wrongfully acquired under the auspices of Nazi Germany. Specifically, the bill would exempt from the statute's application any case in which "the action filed is based upon a claim that the work was taken in Europe in violation of international law by the Nazi government of Germany or governments occupied, assisted, or allied by the Nazi government between January 30, 1933, and May 8, 1945."

The post is a reminder of the inherent tension between FSIA cases for art restitution, and the Immunity from Seizure Act, 22 U.S.C. § 2459 (which immunizes from seizure any object given immunity by the State Department as part of a loan or cultural exchange). The FSIA is a jurisdictional statute, which permits certain claims to be heard in U.S. federal court, but does not itself create the substantive basis for any claims. The Immunity from Seizure Act is a protection against a remedy (seizure) to satisfy a judgment or the expectation of one. If the Museum of Country A owes $10,000,000 and loses in court, the law says that the winner of that case cannot seize a painting that Country A's museum loans to an unrelated museum in the United States to sell to satisfy the judgment. It limits an otherwise valid creditor's rights in favor of cultural exchange.

On the other hand, Senate Bill 2212 is itself a reaction to the *Malevich v. City of Amsterdam* case, in which the very loan of a painting was itself held to satisfy the (commercial activity) jurisdictional requirements of the FSIA. Georgopulos correctly points out that Senate Bill 2212 does not make such plaintiffs' recovery any more likely as long as the object has immunity from seizure, and she argues that the unintended consequences of the bill do claimants no favors.

We agree, but ironically that is one of the reasons we believe that the bill is a good one despite its imperfections. The reason is simple: federal District Court litigation under the FSIA has been viewed with great promise for art restitution, particularly since the *Altmann v. Republic of Austria* case 2004. Yet time and again claimants have foundered short of relief. There is little point in opening the

courthouse doors to a claim over a painting whose return, by definition, cannot be compelled by court process. There are many ethical dilemmas associated with that reality, but the U.S. courts of limited jurisdiction have not shown themselves the place to resolve it. Sparing claimants the exercise is a positive outcome, in our view. Indeed, from that perspective the "Nazi exception" should be removed from the bill, if for no other reason than even with it, the *Malevich* plaintiffs could (1) still bring their claim, but (2) would not get the artwork back.

The Immunity from Seizure Act is an important one, without which international exhibition loans might literally cease. Questions about the State Department's qualifications to evaluate provenance or other issues are legitimate, but that speaks to how often a painting should be granted immunity, not whether the relief should exist at all (because the judgments being enforce by seizure will, overwhelmingly, have nothing to do with restitution in general or World War II in particular). The real question is whether it is better never to have objects of questionable provenance exhibited here because it will invite litigation in the U.S., or to allow those loans to proceed, knowing it may bring attention to the questions of ownership. It is merely an opinion, but the latter seems to give a claimant a better chance to negotiate its return or find out where the matter can be litigated.

This is among the most fraught issues in restitution litigation today, and proves the adage that hard cases make bad law. Rumors abound as to why the bill has been in committee for eight months, but it is hard to object to the calls for open hearings to move forward one way or another.

Tags: 22 U.S.C. § 2459, Altmann v. Republic of Austria, Art Law Report, Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Foreign Sovereign Immunities Act, Germany, Immunity from Seizure Act, Malevich v. City of Amsterdam, Nazi theft, Nikki Georgopulos, Plundered Art, Restitution, Senate Bill 2212, World War II

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