KING & SPALDING

Client Alert

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Congress Amends FSIA to Protect Art and Cultural Exchanges[1]

Introduction

On December 16, 2016, President Obama signed into law the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (FCEJICA). The bill, which extends sovereign immunity to foreign states that send works of art to the U.S. for temporary exhibit, passed with bipartisan support. The FCEJICA was first introduced in the House of Representatives in 2012, but failed to secure support in the Senate. However, the bill was reintroduced in the Senate in July 2016, was reported by the Judiciary Committee in September, and passed both the House and the Senate by voice vote in December.

The FCEJICA amends the U.S. Foreign Sovereign Immunities Act (FSIA), the legal regime that governs litigation against foreign sovereigns and state instrumentalities in American courts. The FSIA establishes a general presumption that foreign sovereigns are immune from suit, subject to certain exceptions.[2] One such exception, known as the "expropriation exception," abrogates the foreign sovereign immunity from U.S. judicial proceedings in cases involving the taking of property in violation of international law. The FCEJICA narrows the expropriation exception by excluding from its scope circumstances where the property at issue consists of works of art loaned by a foreign government for temporary display in the U.S. While this latest amendment to the FSIA was billed as a clarification, it may serve to create new uncertainties as to the exact circumstances in which cultural property may form the basis of a suit against a foreign sovereign in U.S. courts.

Background: FSIA and the Expropriation Exception

The FSIA was enacted in 1976 with the principal purpose of codifying American sovereign immunity law. The Act greatly limited the executive branch's involvement in determinations of foreign sovereign immunity, which had come to be viewed as potentially inconsistent and subject to political considerations, and instead gave this role to the judiciary. Section 1604 of the FSIA provides that foreign states are presumptively immune from the jurisdiction of U.S. state and federal courts. This immunity extends not only to the state itself, but also to any "agency or instrumentality" of the foreign state.[3] Consistent with the global trend favoring "restrictive" immunity, which seeks to preserve immunity for governmental acts while

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leaving sovereigns subject to suit for their non-governmental acts, the FSIA's grant of immunity is subject to a number of exceptions, set forth in Section 1605 of the Act. Where a case brought against a foreign state falls into one of the exceptions, the foreign state will not be immune, and a U.S. court will have subject matter jurisdiction to hear it.

One of the exceptions set forth in Section 1605(a) is the "expropriation exception," codified at Section 1605(a)(3). Under this exception, a foreign state (including its agencies and instrumentalities) is not immune in any case where "rights taken in violation of international law" are at issue, and where one of the following two sets of circumstances are present:

- The taken property, or any property exchanged for the taken property, is present in the United States *in connection with commercial activity* carried on in the U.S. by a foreign state; or
- The taken property, or any property exchanged for the taken property, is owned or operated by an agency or instrumentality of the foreign state, and that instrumentality *is engaged in a commercial activity* in the U.S.[4]

The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." The commercial character of an act is to be determined by reference to the *nature* of the act, rather than by reference to its purpose.[5]

Plaintiffs have availed themselves of this broad definition of commercial activity – and thus the expropriation exception itself – in order to bring claims against foreign sovereigns alleging unlawful seizure of works of art. Perhaps the most famous incidence of this phenomenon came in the litigation concerning Gustav Klimt's portraits of Adele Bloch-Bauer, which ultimately found its way to the Supreme Court.[6] This type of action has not been without controversy however, and certain other high profile cases have spurred calls to "clarify" the FSIA's expropriation exception so as to facilitate the international exchange of cultural property.

The *Malewicz* Case and the Impetus for FSIA Reform

In 2007, the U.S. District Court for the District of Columbia decided *Malewicz v. City of Amsterdam.*[7] That case involved paintings by Russian artist Kazimir Malewicz that had fallen into the possession of the City of Amsterdam's Stedelijk Museum in 1956. In 2003, the City loaned several of these paintings to various museums in the United States. Malewicz's descendants filed suit in federal court shortly thereafter, alleging that the City had unlawfully acquired the paintings in question. The City moved to dismiss the action, arguing that it was immune under the FSIA as a sovereign entity.[8]

In an opinion written by District Judge Rosemary M. Collyer, the district court denied the City's motion. Most notably, the court found that the City had engaged in "commercial activity" in the United States by virtue of (1) its loan agreement with several U.S. museums, (2) its receipt of € 25,000 as consideration for the loan agreement, and (3) the fact that various employees of the Stedelijk museum had supervised the transport and installation of the paintings in the U.S.[9] As such, the expropriation exception to the FSIA applied and the City was not immune from suit. This represented a broad reading of the "commercial activity" requirement, even when compared to other cases that had allowed suits to go forward against sovereign entities regarding allegations of stolen art.[10]

The *Malewicz* decision was also notable in that it allowed the suit to go forward even though the paintings at issue had been granted immunity by the State Department under the Immunity from Judicial Seizure Statute.[11] That law allows the State Department to declare a work of foreign art immune from judicial process upon the application of an importer. In *Malewicz*, the Guggenheim Foundation had in fact obtained such a grant of immunity,[12] but the court did not consider this relevant to its jurisdictional ruling.

The decision alarmed members of the American art community, who feared that the court's broad reading of "commercial activity" would discourage foreign states and institutions from loaning artwork to the U.S. These fears were accentuated by the Russian government's decision to suspend all loans of artwork to U.S.-based institutions in the wake of another round of stolen-art litigation in 2010.[13]

The Association of Art Museum Directors has since become a vocal proponent of reform to U.S. sovereign immunity law.[14] The Association found support in Senator Orrin Hatch who, in sponsoring the FCEJICA, has specifically invoked the legacy of the *Malewicz* case as a factor necessitating passage of the bill.[15]

The FCEJICA's Reforms

The FCEJICA's primary effect is to restrict the scope of the expropriation exception by clarifying that transnational loans of artwork do not qualify as "commercial activity".[16] The bill thus directly abrogates the *Malewicz* decision. Specifically, the FCEJICA establishes a 3-part framework for establishing the immunity of foreign states with regard to art loans:

- First, a work must be imported into the U.S. from a foreign state in accordance with an agreement between that foreign state and one or more cultural or educational institutions within the U.S.
- Second, the President (or a designee thereof) must make a determination, in accordance with the Immunity from Judicial Seizure Statute (22 U.S.C. § 2459(a)), that the work in question is of cultural significance and the temporary exhibition of such work is in the national interest.
- Third, notice of the above presidential determination must be published in the Federal Register in accordance with 22 U.S.C. § 2459(c).

If the above requirements have been met, then any activity in the United States of the foreign state associated with the temporary exhibition or display of the artwork in question shall not be considered to be commercial activity for purposes of the expropriation exception.[17]

The FCEJICA does, however, provide for two exceptions to this rule. The "Nazi-era Claims" exception allows actions to go forward where they involve art that was allegedly taken by the Government of Germany (or governments affiliated with or controlled by Germany) between 1933 and 1945.[18]

A further exception permits actions "based upon a claim that [a work of art] was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group," provided that the taking occurred after 1900.[19]

Consequences and Implications

Despite the FCEJICA's seemingly narrow focus, its impact on the legal landscape concerning suits against foreign sovereigns could be quite consequential. While some have criticized the bill as a "solution in search of a problem," in that it was enacted in response to a single lower-court judicial decision,[20] others have focused on the ill-defined scope of the bill's two exceptions.[21]

The second exception in particular contains a variety of significant, yet undefined terms including "systematic campaign of coercive confiscation" and "vulnerable group." Moreover, this exception could potentially be read in conjunction with judicial precedent to *expand*, rather than contract the scope of the expropriation exception to the FSIA. For instance, the U.S. Court of Appeals for the D.C. Circuit recently decided in *Simon v. Republic of Hungary* that

confiscations of property can, in and of themselves, constitute genocide and thus violate international law.[22] Under this precedent, it is therefore possible that property may be "taken in violation of international law" even where a government is confiscating its own citizens' property.[23] This stands in contrast to the longstanding view that a government's seizure of its citizens' property – while potentially in contravention of domestic law – is not a violation of international law. The FCEJICA, while omitting the term "genocide," appears to support the *Simon* decision insofar as it leaves open the possibility of applying the expropriation exception where a "targeted and vulnerable group" is a government's own citizens.

Beyond the legal sphere, much of the criticism of the FCEJICA has centered on the fact that it immunizes purveyors of stolen art from legal action.[24] Ultimately, however, until courts are called upon to decide contentious issues arising under this new exception to the FSIA, its impact in both a legal and non-legal sense will remain uncertain.

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2 28 U.S.C. §§ 1604, 1605.

3 28 U.S.C. § 1603(a)-(b).

4 28 U.S.C. § 1605(a)(3).

5 28 U.S.C. § 1603(d).

6 *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

7 *See Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322 (D.D.C. 2007).

8 *Id*. at 326.

9 *Id*. at 332.

10 *See, e.g.*, *Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009) (finding commercial activity where state-controlled museum, in addition to exchanging artwork with U.S. museums, engaged in advertising and promotional activity and the purchase of goods and services).

11 22 U.S.C. § 2459.

12 *Malewicz*, 517 F. Supp. 2d at 330.

13 *Carol Vogel & Clifford J. Levy*, *Dispute Derails Art Loans from Russia*, N.Y. TIMES (Feb. 2, 2011), http://www.nytimes.com/2011/02/03/arts/design/03museum.html; *see also* Agudas Chasidei Chabad of U.S. v. Russian Federation, 729 F.Supp.2d 141 (D.D.C. 2010).

14 Doreen Carvajal, *Bill to Shield International Art Loans Gains in Senate*, N.Y. TIMES (Sept. 16, 2016), https://www.nytimes.com/2016/09/17/arts/design/bill-to-shield-international-art-loans-gains-in-senate.html.

15 Isaac Arnsdorf, *Russia Critics, Museums Square Off Over Senate Artwork Bill*, Politico (Sept. 15, 2016, 5:17 PM), http://www.politico.com/story/2016/09/senate-artworks-museums-russia-228239.

16 Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. No. 114-319, § 2(a) (2016) (to be codified at 28 U.S.C. § 1605(h)).

17 *Id*.

18 *Id*.

19 *Id*.

[20] *See* Nicholas O'Donnell, *Restitution Legislation: HEAR Act and Foreign Cultural Exchange Jurisdictional Clarification Act Move Forward*, Lexology (Sept. 18, 2016), http://www.lexology.com/library/detail.aspx?g=ddd1e86d-9cce-435d-9338-fb9a2e5ca1eb.

[21] *See, e.g.*, Ingrid Wuerth, *An Art Museum Amendment to the Foreign Sovereign Immunities Act*, LAWFARE (Jan. 2, 2017, 12:48 PM), https://www.lawfareblog.com/art-museum-amendment-foreign-sovereign-immunities-act.

[22] Simon v. Republic of Hungary, 812 F.3d 127 (D.C. Cir. 2016).

[23] *See* Wuerth, *supra* note 20.

[24] Laura Gilbert, *New Legislation to Protect Foreign Art Lenders from Lawsuits on U.S. Soil*, OBSERVER (Apr. 2, 2012, 5:08), http://observer.com/2012/04/new-legislation-to-protect-foreign-lenders-from-lawsuits-on-u-s-soil/.