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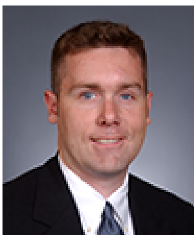
Foreign Affairs

Stolen Art

In the context of a stolen-art case, the author analyzes what it takes to compel a defiant foreign sovereign defendant to comply with a U.S. court order. Noting that a plaintiff in these cases can't expect too much help from the U.S. government and its diplomatic channels, he says that the order may be nothing more than an ''academic point.''

Chabad Library Case and Russian Art Loan Embargo Roil International Waters



BY NICHOLAS M. O'DONNELL

In a case that has tested the principles of how a defiant foreign sovereign defendant can be compelled to comply with a U.S. court order, the U.S. District Court for the District of Columbia made an emphatic statement on Jan. 16, 2013.

The Russian Federation, the Russian Ministry of Culture and Mass Communications, the Russian State Library, and the Russian State Military Archive will be fined $50,000 per day until they comply with a 2010 judgment that ordered the Russian defendants to return the library of the late Menachem Schneerson (the Library)—a library that has been in Russia for decades—to the plaintiffs, the current leadership of the worldwide Chabad Lubavitch movement in Brooklyn, New York. *Agudas Chasidei Chabad of the United States v. Russian Federation*, Case No. 1:05-cv-01548 RCL, 2013 BL 11643 (Jan. 16, 2013).

Particularly where the Foreign Sovereign Immunities Act (''FSIA''), 28 U.S.C. § 1602 et seq., was the basis for jurisdiction as it is in so many wartime art restitution cases, and the fact that the 2010 judgment led to a still-ongoing embargo of art and cultural artifact loans to the United States, the decision is a significant one for the realm of art law.

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Schneerson and the Library

The history of the case is complex. The Lubavitch movement—sometimes known as Chabad—is an international Jewish religious movement. Chabad was formed in the 1700s in Europe, and today there are over 2,500 Chabad-Lubavitch institutions in 65 countries. The movement has been led in each generation by a charismatic figure, the ''Rebbe,'' of which there have been seven (the most recent died in 1994).

The Library, of a variety of religious teachings and manuscripts, grew cumulatively under each Rebbe. By the early twentieth century, the Library included thousands of religious books, manuscripts, and other documents.

One portion of the Library was seized in 1917 by the emerging Bolshevik government from a warehouse in

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which the (then) Fifth Rebbe had placed it for safekeeping in the face of the advancing German army during the First World War as the Tsarist regime collapsed.

The Russian State Library (where those objects ended up after the dust settled) rejected the Fifth, and then the Sixth Rebbes' pleas for their return in the 1920s.

Over the next twenty years, the Sixth Rebbe moved from Russian/Soviet territory to Latvia, and then to Poland, from which he fled upon the invasion by Germany in 1939. The remaining portions of the Library still in his possession were left behind, collected by the German army, and ultimately captured by the Soviet Union at the end of the war. That portion is currently held by the Russian State Military Archive.

The Litigation

The Sixth Rebbe survived the war and settled in the United States, where he and his followers have been attempting to retrieve the Library ever since. They, and the then-Seventh Rebbe (who died in 1994 without an official successor), achieved initial success in 1991-92 as the Soviet Union collapsed, winning a Russian civil judgment that the movement, by then headquartered in Brooklyn, was the rightful owner of the Library.

Unfortunately for the movement and the current plaintiffs, political forces in the nascent Russian Federation apparently thwarted their early judicial victories by overruling the judgment, and the Library has remained firmly ensconced on Russian soil.

Since all the holders of the Library's various parts are Russian state organizations, this setback posed what seemed to be an insurmountable obstacle for Chabad to the extent it wished to look to another forum to litigate the dispute. In common law countries, at least, sovereign immunity means that the sovereign (i.e., the state and its instrumentality) cannot be sued without the sovereign's consent.

Hundreds of individual laws in the United States address when the state or federal governments can be sued, including the FSIA, which had never been applied retroactively since its passage in 1973.

In 2001, however, a woman named Maria Altmann filed suit in Los Angeles against the Republic of Austria for the return of several Gustav Klimt paintings that had belonged to her uncle. The legal question was whether Adele Bloch Bauer's (the subject of two of the painting) request that the paintings be given to the Republic of Austria was binding on Altmann's uncle Ferdinand Bauer, or whether Bauer's will to Altmann controlled.

Altmann argued that the FSIA gave the U.S. federal courts jurisdiction over her claims against Austria, the state sponsor of the Belvedere Museum where the paintings hung.

To satisfy the requirements of the FSIA, Altmann made what was a novel argument at the time: that because her uncle's paintings were taken in violation of international law, and because Austria was engaged in commercial activity in the United States, the law should be applied retroactively to wartime claims.

In 2004, the U.S. Supreme Court agreed, and sent the case back to Los Angeles for litigation. *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). The parties agreed to arbitrate in Austria, where Altman won and the paintings were delivered to her.

The case was a revelation in that it seemed to offer the FSIA as a path to claimants unhappy with the process they were receiving in other countries, particularly in Eastern Europe. The major impetus, for example, behind Altmann's strategy was that in Austria she would have been required to post a bond calculated as a percentage of her claims, which amounted to millions of dollars she could not afford. The Altmann case opened the floodgates to this new theory of jurisdiction.

So, in 2005, Agudas Chasidei Chabad sued the defendants in U.S. district court in Washington, D.C., seeking the return of the Library. They argued that the FSIA abrogated any claims by the Russian defendants to immunity because the Library was taken in violation of international law; both by the revolving Tsarist/German/Soviet/Nazi armies that overran it, and with respect to the denial of due process after the initial Russian court victory in the 1990s.

The district court denied the defendants' motion to dismiss in reliance on the FSIA, and the U.S. Court of Appeals for the D.C. Circuit affirmed that the Russian defendants are not immune from suit because the Library was taken in violation of international law (particularly with respect to the initial victory in Russian court in 1991 that was overruled by executive action), and because Russia is engaged in commercial activity in the United States. *See* Agudas Chasidei Chabad v. Russian Federation, et al., 528 F.3d 934 (D.C. Cir. 2008).

Russia's Response and the Art Embargo

Thereafter, things got interesting. A loss in the court of appeals like that simply means that the case will proceed (as happened in Altmann), not that the plaintiffs had prevailed or even proven a part of their case, only that the U.S. court could hear the dispute. Rather than defend the case back in the trial court, however, the Russian defendants filed a ''Statement with Respect to Further Participation,'' informing the court that they simply would not participate further in proceedings in a court that they claimed had no jurisdiction over them.

The district court thereafter entered a default judgment against them, ordering the immediate return of the Library to the plaintiffs on July 30, 2010. Having simply terminated their participation, however, the Russian defendants neither did so, nor even responded to the judgment.

For the remainder of that year, the plaintiffs provided the district court with various updates, mostly relating to their efforts to serve the default judgment on the Russian defendants in compliance with applicable international procedure. The Russian defendants sent a letter directly to the court in January 2011 (in Russian), reiterating that they did not consider themselves bound by the judgment.

It was at this point that the case began to take on a public dimension.

In February 2011, the Pushkin Museum and the State Hermitage Museum announced that they would no longer extend any loans of Russian cultural artifacts to the United States, for fear of their seizure to enforce the Agudas Chasidei Chabad judgment.

Exhibition loans are a delicate, little-publicized process that rely on extraordinary trust between participating institutions and nations. Apart from the questions of logistics and insurance, which can be negotiated but which ultimately are fairly straightforward matters of

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contract, the willingness to make the loan, the light that the exhibition will cast on a museum's object, and the potential future need for loans in return are all difficult-to-quantify matters that require a very nuanced discussion.

Exhibitions at the Metropolitan Museum of Art, the National Gallery of Art, the Houston Museum of Natural Science, and the Museum of Russian Icons were all reportedly affected, and the embargo continues to this day.

Russia's move was all the more curious when considered in the context of another aspect of foreign immunity: the Immunity from Seizure Act (''IFSA''), 22 U.S.C. § 2459. IFSA creates a program under which exhibition organizers or any other recipient of a loaned object from abroad can apply to the federal government for a prospective declaration that the culturally significant object is immune from seizure. Any loaned objects given an IFSA grant of immunity may not be seized while in the United States to enforce an unrelated judgment.

Although it was enacted in 1965, IFSA gained greater currency after the long saga over Egon Schiele's Dead City and Portrait of Wally paintings that were loaned from Austria without IFSA immunity. Portrait of Wally alone spent 12 years in a New York warehouse after the Manhattan District Attorney seized the two paintings in 1998 on suspicions about the Leopold Foundation's acquisition of them following the Second World War.

Largely as a result of the Schiele fiasco (which was resolved in 2010 by settlement), museums had come to apply for IFSA immunity for international loans as a matter of course, and any loans from Russia granted such immunity would have been safe from any interference arising out of the *Agudas Chasidei Chabad* case. Nonetheless, Russian officials were apparently unpersuaded by diplomatic efforts to convince them of IFSA's protections.

Since the judgment entered, the Chabad plaintiffs repeatedly asked the court to sanction the defendants, and made clear that they did not seek seizure of any unrelated cultural artifacts (an assurance that was understandable in their efforts to persuade Russia to cooperate, but legally redundant given the provisions of IFSA).

On the eve of a hearing on that request last summer, the court invited the views of the United States, which asked the court not to sanction the defendants, claiming it could hurt diplomatic relations and upset efforts at a diplomatic resolution. Those efforts had been, charitably, difficult to perceive, particularly with respect to the loan embargo.

After a number of procedural rounds, the district court had finally had enough. On Jan. 16, 2013, the court allowed the motion for sanctions, and commenced to fine the defendants $50,000 per day until the judgment was obeyed.

Russia's response was anything but meek. A quote attributed to the Russian Foreign Ministry in response to the order stated, ''It is outrageous that a Washington court has taken this unprecedented step fraught with most serious consequences as the imposition of a fine on a sovereign state. . . . The Schneerson Library has never belonged to the Chabad; it never left Russia, and was nationalized because there were no legal heirs in the Schneerson family. . . . The 'return' of these books to the US is therefore not an issue in principle.'' The Russian Foreign Ministry even tweeted about it, threatening to ''respond in kind,'' and saying, ''The decision to fine Russia for its refusal to transfer the Schneerson collection to the Hasidic community is illegitimate and inflammatory,'' and ''The Schneerson collection belongs to the #RussianFederation. It has legal immunity and is the property of the Russian people.''

The latter of those is at least a defense, one they might have asserted in the lawsuit and on which they very well might have won more than six years ago—but chose not to participate.

Given this direct affront to the independence of the U.S. courts—ironically, in view of the fact that the court ignored the Department of Justice's request that the court not sanction the defendants—it is somewhat surprising that the U.S. government has let these remarks go more or less unchallenged. Its diplomatic efforts to date have produced no results whatsoever, yet it seems intent on remaining silent so that it can continue to make its case to Russia—and be ignored.

Although the latest statements shift weekly, President Vladimir Putin inserted himself in the debate recently by announcing that the Library would be moved to the Jewish Museum in Moscow, as though that simply solved everything.

Where the dispute goes from here is . . . far from clear. Even despite the severity of the fine, it is a mechanism with no teeth for the moment.

In another context concerning restitution cases—the bulk of which invoke the FSIA—U.S. State Department Special Envoy for Holocaust Issues, Bureau of European and Eurasian Affairs Douglas Davidson (who was the messenger in November for the news that the U.S. had no plans to initiate a special commission on the topic under the 2009 Terezin Declaration, as some had hoped), gave a speech on March 25, 2012 in which he addressed the restitution dynamic. He remarked:

> In general, [ ] our Holocaust policy favors dialogue and negotiation—mediation, if you will—over litigation. It is this long-standing policy, I believe, that underlies the encouragement in the Washington Principles of national processes for alternate dispute resolution mechanisms.
>
> . . . there is perhaps an opportunity here for museums to seek to maintain their integrity so as to warrant public confidence by voluntarily engaging in mediation or some other manner of resolving disputes over ownership of Nazi-looted art that avoids the need to do so in a court of law. . . .
>
> There is an expectation, which we ourselves may have created, that the Department of State will create a national alternate dispute resolution process similar to those one finds in a number of European countries today. It is also widely observed that we have not yet fulfilled this expectation. But there is no reason why this should impede the efforts of others to do the same.

It is thus difficult to put much faith that U.S. diplomats will play an important—or even any—role in a resolution to the Chabad case, if it views the onus for restitution disputes to be on the participants, particularly museums that are at the very least good faith takers in due course. And while the United States shouldn't be faulted for declining to match the aggressive rheto-

ric of the Russian Foreign Ministry, this approach also seems to pass the buck in a way that is unlikely to be productive.

Where the dispute goes from here is also far from clear. Even despite the severity of the fine, it is a mechanism with no teeth for the moment.

Unless and until the court authorizes the plaintiffs or the U.S. Marshals to seize property to satisfy the fine (property that could not include cultural objects for the reasons discussed above), the fine will be an academic point. And it is far from certain that the court would ever do so; in levying the fine the court went to great lengths to say (and to criticize the U.S. for confusing the issue) that it was not ordering enforcement of the fine. The case law on that question is far more weighted against enforcing the fines through execution. *See, e.g.*, *FG Hemisphere Associates LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377-78 (D.C. Cir. 2011). In the meantime, cultural exchange continues to suffer.

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