ART & ADVOCACY

The Art Law Newsletter of *Herrick, Feinstein LLP*

SUMMER 2009 :: Volume 03

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The Curious Case of Kazimir Malevich

By Mari-Claudia Jiménez

Stories about the restitution of stolen or looted art have been making headlines lately. Museums, galleries, auction houses, and even foreign governments have been returning stolen or looted art to the heirs of the original owners. But not all restitution cases can be solved amicably or through diplomatic means. These types of cases are increasingly being brought to court. Because art restitution cases typically involve foreign museums, which are usually owned by foreign sovereigns, they often entail complicated issues of foreign immunity, immunity from seizure, and extraterritorial jurisdiction.

Consider this situation: A European government-owned museum loans a number of artworks to two American museums for temporary exhibition. The borrowing museums secure the necessary certifications from the U.S. Department of State to ensure that the artworks are immune from seizure by any U.S. court. Shortly before the exhibition closes and the artworks are returned to the lender, a lawsuit is commenced against the government-lender in a U.S. federal court by claimants asserting that the artworks were wrongfully expropriated from their family 50 years earlier. The claimants' assertion of jurisdiction over the government-lender is based, in part, on the presence of the artworks in the U.S., pursuant to the loan that had been immunized from judicial seizure. A court hearing such a case would have to consider the following:

- Does the artworks' immunity from judicial seizure protect them and protect the foreign sovereign lender of the artworks from being sued in the U.S.?
- Can a U.S. court obtain jurisdiction over a foreign sovereign on the basis of a museum loan?
- Can a foreign sovereign's activities in the U.S., no matter how small or indirect, subject it to U.S. jurisdiction?

This scenario, in fact, was presented to a court in early 2004, when the heirs of Kazimir Malevich (the "Heirs"), the world-renowned Russian artist, filed suit in the U.S. District Court in Washington, D.C., against the City of Amsterdam (the "City") to recover 14 artworks by their famed ancestor after the artworks had been in the United States on loan from the Stedelijk Museum, which is owned and operated by the City of Amsterdam, for exhibitions at the Solomon R. Guggenheim Museum in New York City and the Menil Collection in Houston, Texas. Herrick, Feinstein represented the Heirs.

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The Fate of Malevich's Artworks

In 1927, Russian artist Kazimir Malevich, the father of "Suprematism," considered the first systematic school of abstract painting in modern art, brought more than a hundred of his paintings, drawings, and other works to Berlin to be exhibited. When Malevich was unexpectedly called back to Leningrad, he entrusted his artworks to several acquaintances in Germany for safekeeping. Malevich never returned to Germany, and died an outcast in the Stalinist Soviet Union in 1935. A vast collection of the works left in trust by Malevich eventually came into the possession of the Stedelijk Museum.

Until the fall of the Iron Curtain, the majority of Malevich's Heirs resided in the Soviet Union or elsewhere in Communist Eastern Europe. Living in difficult conditions, the Heirs were unable to find and communicate with each other or take measures to discover and redress the expropriation of Malevich's property. It took several years after the fall of the Iron Curtain for all of Malevich's living Heirs to locate and contact each other and begin the difficult process of recovering the family's property, including the works at the Stedelijk Museum. Beginning in 1996, and for many years thereafter, the Heirs repeatedly asked the City of Amsterdam and the Stedelijk Museum to return Malevich's artworks. In September 2001, Amsterdam formally advised the Heirs that it would not return the artworks to them or continue to negotiate with them to try to achieve an amicable settlement.

In 2003, however, the Stedelijk made what turned out to be a crucial decision: It included 14 of the 84 Malevich artworks in its possession as part of a temporary exhibition at the Solomon R. Guggenheim Museum in New York City (from May 22, 2003, until September 7, 2003) and the Menil Collection in Houston, Texas (from October 2, 2003, until January 11, 2004).

The Immunity from Seizure Act

In 1965, Congress enacted the Immunity from Seizure Act to prevent judicial seizure of artworks loaned to museums and similar institutions located in the U.S. Pursuant to this law, 22 U.S.C. §2459, any non-profit museum or other exhibitor may apply to the U.S. Department of State for a determination that art to be loaned from abroad for exhibition is culturally significant and that the exhibition is in the national interest. If the application is approved, the art is automatically immune from judicial seizure. To obtain a determination that the loan of the artworks is in the national interest, the applicant must certify that it has undertaken professional inquiry, including independent, multi-source research into the provenance of the objects being loaned. The applicant also must certify that it does not know, or have reason to know, of any circumstances with respect to any of the objects that would indicate the potential for competing claims of ownership. For objects for which such circumstances exist, the applicant must describe those circumstances and the likelihood that any such claim would succeed. See U.S. Department of State Website, Statute Providing for Immunity from Judicial Seizure of Certain Cultural Objects (22 U.S.C. §2459), Checklist for Applicants, available at *http://www.state.gov/s/l/3196.htm.*

Amsterdam sought and obtained immunity under 22 U.S.C. §2459, despite the Heirs' objections. Thus, U.S. law prevented the Heirs from having a court "seize" the artworks pending a resolution of their claim. Nevertheless, based on the artworks' presence in the U.S., the Heirs brought suit against the City of Amsterdam for their return a few days before the works were to be returned to the Netherlands.

A Lawsuit Is Commenced Pursuant to the Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act (FSIA) provides that foreign states, agencies, and instrumentalities (which includes the City of Amsterdam) are immune from suit in U.S. courts unless certain exceptions apply. These exceptions include any case "in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state." 28 U.S.C. §1605(a)(3). The Heirs' lawsuit was brought pursuant to this provision, which is also known as the "expropriation exception."

The Heirs argued that: (i) the City of Amsterdam, through the Stedelijk Museum, took the Malevich artworks without compensation to them, the true owners, in violation of international law; (ii) at the time the lawsuit was commenced in January 2004, the Malevich works at issue were on exhibit at the Menil Museum in Houston, Texas, and therefore were "present in the United States," vesting jurisdiction over them in the United States pursuant to §1605(a)(3); and (iii) because the loan of the 14 artworks to the Guggenheim and the Menil Museums was a transaction that could be engaged in by a private party, it should be considered a "commercial activity" under the FSIA.

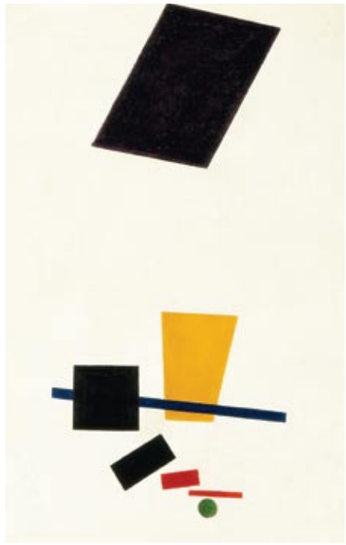
The City of Amsterdam moved to dismiss the Heirs' complaint, arguing, among other things, that: (i) the Heirs could not claim a violation of international law because they had not exhausted their remedies in a Netherlands court; (ii) the artworks were not "present in the United States" as a matter of law during the course of the exhibitions because Amsterdam had obtained for them federal immunity from seizure; and (iii) the loan of the Malevich artworks to the U.S. museums was not a "commercial activity carried on in the United States."

The First Decision by the District Court

In an opinion dated March 30, 2005, the U.S. District Court for the District of Columbia denied the City's motion to dismiss. First, the court found that the City's arguments concerning the Heirs' exhaustion of remedies in a Netherlands court were not a basis for dismissing the suit on jurisdictional grounds because the court could "not require Plaintiffs to take their case to a Dutch court unless the City of Amsterdam waiv[ed] its statute of limitations defense and the Dutch court accept[ed] that waiver." *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 308 (D.D.C. 2005).

Second, the court held that because the paintings were present in the U.S. at the time the suit was filed, they were present for purposes of FSIA jurisdiction. The artworks' immunization from seizure did not negate their presence in the U.S. for FSIA purposes.

Last, as to the claim that the exhibition loan was not a "commercial activity," the court based its analysis on the "rule of thumb" adopted by the courts in the District of Columbia: "If the activity is one in which a private person could engage, it is not entitled to immunity." Consequently, the court concluded that it was "clear that the City of Amsterdam engaged in 'commercial activities' when it loaned the 14 [Malevich] works to museums in the United States" because there is "nothing 'sovereign' about the act of lending art pieces, even though the pieces themselves might belong to a sovereign." The court explained that, even if the loan were made purely for educational and cultural purposes, as the City alleged, it still would be "commercial activity" under the FSIA. The court cited the language of the FSIA itself: "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. §1603(d).



{ Painterly Realism of a Football Player (1915), one of the works recovered by the Heirs *}*

The District Court left one issue open for a later decision. On the factual record before it, the court could not ascertain the substantiality of Amsterdam's contacts or activities with or in the U.S. in connection with the loan of the Malevich artworks as required by 28 U.S.C. §16036(d), which states in relevant part: "A commercial activity carried on in the United States by a foreign state means commercial activity carried on by such state and having substantial contact with the United States." The court requested further development of the factual record in order to make a final determination as to the substantiality of Amsterdam's contacts with the U.S. so that it could determine whether the City was immune from suit, and thus whether the court had jurisdiction to hear the case.

The City of Amsterdam appealed the March 30, 2005 decision, but the appeal was dismissed because it was not a final decision appealable as of right.

The Second Decision by the District Court

After taking additional evidence and supplemental briefs, in a June 27, 2007 opinion, the court found that the record contained "sufficient contacts to establish jurisdiction under the FSIA's expropriation exception." *Malewicz, et al. v. City of Amsterdam*, 2007 U.S. Dist. LEXIS 46312 (D.C. Cir. 2007). The court thus conclusively denied the City's motion to dismiss, paving the way for the case to go to trial. The City immediately appealed to the U.S. Court of Appeals for the District of Columbia Circuit.

It is interesting to note that the U.S. Government filed a Statement of Interest in the case, contending that §1605(a)(3) requires a sufficient nexus with the U.S. to provide fair notice to foreign states that they are submitting themselves to U.S. jurisdiction and abrogating their sovereign immunity, and that foreign states are unlikely to expect that this standard is satisfied by a non-profit loan of artwork granted immunity from seizure under 22 U.S.C. §2459. The court responded that, although "the opinions of the United States are entitled to 'great weight,'" the court "concludes that §2459 granting immunity and §1605(a)(3) establishing jurisdiction for certain claims against a foreign sovereign are both clear and not inconsistent," and therefore "the Court is bound to the plain meaning of these statutes." That is, these statutes are "unrelated except that a cultural exchange might provide the basis for contested property to be present in the United States and susceptible, in the right fact pattern, to an FSIA suit."

Five Painting Are Restored to the Heirs

Before the parties completed their submissions to the Court of Appeals, the Heirs and the City of Amsterdam reached a settlement. The City and the Stedelijk Museum agreed to transfer five important Malevich paintings to the Heirs in exchange for the dismissal of all litigation between them and an acknowledgment from the Heirs that the City has title to the works in the collection remaining with the City.

One of the Five Paintings Restituted to Malevich's Heirs

The Malevich case clearly illustrates that there is no automatic grant of sovereign immunity to a foreign government that is sued in the United States. The FSIA exceptions are numerous, varied, and broad enough to arguably encompass almost any type of connection to, or activity in, the United States. Though the FSIA protects foreign states from harassing litigation that could needlessly interfere with their essential governmental functions, it also protects private individuals who have a right to have their claims against foreign states adjudicated according to the law.

The June 2009 Prague Conference and Terezín Declaration: A New Begining?

By Howard N. Spiegler [1]

The long-awaited international Holocaust Era Assets Conference was held June 26 – 30, 2009, in Prague, Czech Republic. Established as a means to assess the progress made since the 1998 Washington Conference with respect to the worldwide efforts to help Holocaust victims and their families recover property looted by the Nazis, the Prague Conference was comprised of a series of seminars and presentations by international experts in various fields and governmental and NGO representatives, who examined the accomplishments achieved since 1998 and the substantial amount of work that remains to be done. Although the subjects examined during the Conference were wide ranging, the major focus was on Nazi-looted art.

In the months that preceded the Prague Conference, many experts in the field, including Herrick attorneys, participated in and consulted with the Working Group on Looted Art that was formed in preparation for the Conference. Prior to the convening of the Prague Conference, the Group issued its "conclusions," which included "the urgent need to broaden, deepen, and sustain [the] efforts [since the Washington Conference] in order to ensure just and fair solutions regarding cultural property looted during the Holocaust era and its aftermath." Acknowledging that "the plundering of cultural property was an integral part of the genocide perpetrated against the Jewish people and of the persecution of others, and that it was a war crime and a crime against humanity," the Group made several recommendations to the nations participating in the Prague Conference, including: (a) providing adequate funding for provenance research and the ongoing internet publication of provenance information, including full details of looted objects and those of unclear provenance; (b) allowing unhindered access to public and private archives and documentation; (c) adopting restitution legislation to facilitate the identification and recovery of looted cultural assets; (d) establishing national claims procedures for fair and just solutions encompassing decisions based on the merits (and not based on technical defenses such as the passage of time), including: sharing evidence, the presumption of confiscation, relaxed standards of evidence for the original owner, the requirement that the present possessor have the burden of proving the rightfulness of his or her possession, and the elimination of the burdens of financial requirements for claimants; (e) declaring the inapplicability of export, citizenship, inheritance, and cultural heritage laws that bar the restitution of cultural property to claimants; (f) establishing public or private organizations to assist claimants with restitution; (g) forming an international association of provenance researchers to set standards and share information; and (h) encouraging institutions to provide provenance information in all exhibitions or other public presentations that include looted cultural property.

Meanwhile, governmental representatives began circulating drafts of what would eventually be adopted as the final declaration of the Prague Conference. Many observers believed, however, that these early drafts substantially diluted the recommendations of the Working Group on Looted Art. At several meetings organized to discuss the drafts, a number of experts requested that more specific and stronger proposals needed to be addressed in the final declaration. Herrick attorneys were active at these meetings, one of which took place in Krakow, Poland. At that meeting, the participants adopted a set of principles, called the "Krakow Declaration," and recommended that they be considered for the final declaration at the Prague Conference. The Krakow Declaration urged all nations to: (a) waive, or adopt exceptions to, statutes of limitations or prescription laws that prevent restitution of looted Holocaust property; (b) require governments to conduct systematic surveys of works of art and other cultural objects in their collections, produce inventories thereof, and make these inventories available to the general public; (c) adopt alternative dispute resolution mechanisms to resolve disputes, using qualified and independent experts; (d) open all public records and archives pertaining to the looting of cultural property and to provide incentives for the accessibility of private archives; (e) monitor restitution activity, make public annual reports on claims, and supply accurate information to the public about looted Holocaust property; and (f) create facilities that make available information on restitution procedures in other countries.

At the Prague Conference itself, two days of expert panels addressed these and other issues relating to looted art. Following that, the Conference was devoted to addresses by heads of various governmental and NGO delegations. As head of the United States delegation and as the keynote speaker opening the Prague Conference, Stuart Eizenstat, who spearheaded the Washington Conference when he served as an official in the Clinton Administration, focused on several important issues regarding looted art.

In his keynote address, Ambassador Eizenstat highlighted steps that needed to be taken in several countries to fill the "[l]arge gaps [that] remain between the Washington Principles and the current reality," including establishing searchable centralized registers, permitting restitution from public museums, creating effective national claims processes, and redoubling the commitment to alternative dispute resolution mechanisms. In addition, he urged the United States to develop an expert advisory group to help claimants and museums resolve ownership disputes. Ambassador Eizenstat also addressed a critical issue of great interest to those who have worked in this area for many years:

> "I am also concerned by the tendency for holders of disputed art to seek refuge in technical defenses to avoid potentially meritorious claims, including statutes of limitation; adverse possession; de-accession laws; and export control laws which bar the export of looted art back to their rightful owner, even when its ownership has been established."

In his address as head of the United States delegation, Ambassador Eizenstat focused on the importance of access by victims and their families to archives that often constitute the key resource to ascertaining and supporting their claims for looted art. He called for "full and immediate access to all official and private archives," whether national, regional, or local, as well as "access to vital statistics, estate, and post-war compensation records, and immovable and cultural property records."

The Conference culminated in the adoption by 46 governments of what is now called the "Terezín Declaration," issued during the poignant concluding ceremony at the Terezín Memorial, site of the Theresienstadt concentration camp to which the Nazis transported more than 100,000 Jews, almost all of whom were murdered either there, in Auschwitz, or in other camps. The Terezín Declaration incorporated several of the changes to the original drafts urged by experts at the many preparatory meetings described above.

"I am also concerned by the tendency for holders of disputed art to seek refuge in technical defenses to avoid potentially meritorious claims, including statutes of limitation; adverse possession; de-accession laws; and export control laws which bar the export of looted art back to their rightful owner, even when its ownership has been established."

–Ambassador Eizenstat

Recognizing that "art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists and their collaborators through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and sales under duress, during the Holocaust era between 1933 – 45 and as an immediate consequence," the Terezín Declaration endorsed the following principles regarding Nazi-looted art:

1. We reaffirm our support of the Washington Conference Principles on Nazi-Confiscated Art and we encourage all parties including public and private institutions and individuals to apply them as well,
2. In particular, recognizing that restitution cannot be accomplished without knowledge of potentially looted art and cultural property, we stress the importance for all stakeholders to continue and support intensified systematic provenance research, with due regard to legislation, in both public and private archives, and where relevant to make the results of this research, including ongoing updates, available via the internet, with due regard to privacy rules and regulations. Where it has not already been done, we also recommend the establishment of mechanisms to assist claimants and others in their efforts,
3. Keeping in mind the Washington Conference Principles on Nazi-Confiscated Art, and considering the experience acquired since the Washington Conference, we urge all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.

With an eye to compliance with these principles, the Declaration also announced the creation of the European Shoah Legacy Institute in Terezín (to be known as the Terezín Institute). The Institute will be a voluntary forum to "note and promote developments" and to develop and share "best practices" in the areas addressed by the Conference and the Declaration. To this end, the Institute will publish regular reports and develop websites to facilitate information sharing with respect to art provenance.

We look forward to further developments around the world as nations and other interested parties now turn toward putting the principles of the Terezín Declaration into practice. As attorneys who have expended substantial efforts in recovering Nazi-looted art for our clients, we are particularly interested in the importance of resolving cases on the basis of merits rather than on the basis of technical defenses, such as statutes of limitations and other doctrines based on the passage of time. We experience regularly the acute need to open up public and private archives that contain critical documentation necessary to assess and support our clients' claims. We hope that the Terezín Declaration's words will be turned into action on these most significant issues. [2]

1 Herrick attorneys Howard N. Spiegler and Lawrence M. Kaye were invited to be observers at the Prague Conference and at meetings of the American delegation. Herrick attorney Charles Goldstein chaired a panel on looted art in his capacity as counsel to the Commission on Art Recovery.

2 Many of the proceedings and documents pertaining to the Prague Conference may be found at www.holocausteraassets.eu.

The Art of Perfection: Avoiding Pitfalls in Gallery Bankruptcies

By Edmund M. Emrich & Stephen B. Selbst [1]

With the current economic downturn pushing many art galleries to the brink of insolvency, there is no better time than now to assess the rights that collectors and artists have if a gallery with which they have consigned valuable artwork files for bankruptcy while in possession of their artwork. Should collectors in this situation fear that they may lose their artwork in a battle with the gallery's other creditors? Should artists have similar concerns? The answers to these questions may be quite different, and will depend upon the facts and circumstances of the particular case. However, both collectors and artists have cause for concern unless they have taken the necessary steps to protect themselves.

The bankruptcies of once-prominent galleries, such as the Andrew Crispo Gallery, Salander O'Reilly, and Berry-Hill, illustrate the competing interests of agency law, which serves largely to protect the principal's property rights while that property is in the possession of his agent, and bankruptcy law, which seeks to equitably distribute the debtor's property for the benefit of all creditors. The art world rarely observes the formalities that are part of the fabric of ordinary commercial dealings. The executive who ensures that his company perfects and protects its security interests in routine business transactions is usually less careful in his personal art dealings, even though he could face severe consequences for not perfecting or protecting his interests in his art. Applying business discipline to art dealings requires a change in the mindset of galleries, collectors, and artists alike; failure to do so could cause collectors and artists to lose their entire investment if the gallery with which they have consigned artwork files for bankruptcy. To protect themselves, collectors and artists need to be diligent in entering into tightly drawn contracts, perfecting their liens on their artwork, complying with applicable lien notification requirements, and keeping close tabs on the whereabouts and status of their artwork.

Treatment of Consignments Under the UCC and Bankruptcy Code

The starting place in assessing rights of consignors is the Uniform Commercial Code ("UCC"). A threshold question with respect to any particular consignment is whether it falls under the umbrella of Article 9 of the UCC, which governs most consignments. If Article 9 applies, the consignor with an unperfected interest in his artwork faces an uphill battle in prevailing against a gallery's bankruptcy estate because the UCC treats the consignee similar to an owner of the consigned property.

In order to take a consignment out of the ambit of Article 9 of the UCC, the consignor must establish the existence of one of the statutory exceptions, including that: (i) the consignee is "generally known by its creditors to be substantially engaged in selling the goods of others," or (ii) the goods are consumer goods immediately before delivery. In a gallery's bankruptcy case, a consignor with an unperfected interest in his artwork may be forced to litigate one or both of these issues before a bankruptcy court. UCC § 9-102(a)(20).

Under the "generally known" exception, the consignor has the burden of proving that most of the gallery's creditors were aware that the gallery was substantially in the business of selling artwork on consignment. This burden will be difficult for consignors to satisfy, particularly where the gallery obtains artwork under a variety of different arrangements. Under the "consumer goods" exception, the consignor has the burden of proving that the artwork was "used or bought for use primarily for personal, family or household purposes." Establishing the purpose of acquisition or use is not as easy as it sounds, however, because the answer to the question of whether the consignor bought or used the artwork principally for investment purposes or personal enjoyment is highly subjective. The analysis is further complicated by the fact that investment and personal enjoyment motives are not necessarily mutually exclusive. Given the lack of clearly defined case law in this area, the consignor cannot take comfort in how courts will rule on these issues. Moreover, regardless of whether the consignor ultimately prevails, the litigation likely will be hard fought, costly, and time consuming.

If Article 9 applies, the consignor may be found to have a lien on the consigned artwork. The UCC grants consignors an automatic purchase-money security interest in inventory. Thus, if the artwork qualifies as inventory, the consignor would have a lien. To perfect such a lien, the consignor must provide statutorily prescribed notice to holders of competing security interests who have filed a financing statement covering the same types of inventory before giving the consignee possession of the property. UCC § 9-324(b)&(c). This necessitates the performance of a lien search to ascertain the gallery's secured creditors prior to delivering the artwork. If the security interest is perfected, the consignor is entitled to first priority in the artwork and stands in front of all other creditors. If the security interest is unperfected, the consignor may face a much less favorable outcome.

If the consignor's security interest is unperfected, then, "for purposes of determining the rights of creditors of . . . a consignee, while the goods are in the possession of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had or had power to transfer." UCC § 9-319. Consistent with the UCC's policy of guarding against hidden liens, the consignee is treated as owner of the property unless the consignor has perfected its security interest. [2] If the consignor's security interest is unperfected, the gallery's other creditors may share in the value of the consigned artwork. In other words, the consignor may be stripped of all ownership rights and relegated to the position of a general unsecured creditor.

Since Section 541(a)(1) of the Bankruptcy Code deems "all legal or equitable interests of the debtor in property as of the commencement of the [bankruptcy] case" to be part of the bankruptcy estate, and since a gallery's bankruptcy estate is entitled to set aside any unperfected liens under the "strong arm" provisions of Section 544(a) of the Bankruptcy Code, the bankruptcy estate will be able to sell the artwork free and clear of liens, claims, and encumbrances and treat the consignor who has an unperfected interest as a general unsecured creditor. 11 U.S.C. § 363(b), (f). The consignor who owned the artwork is left without meaningful recourse, a result that may seem counterintuitive and unfair. This potentially harsh consequence shows why it is critical for consignors to perfect their security interests.

Even if Article 9 does not apply, the inquiry does not necessarily end. The consignee's creditors may also attempt to defeat the consignor by contending that the transaction is governed by Article 2 of the UCC. [3] Section 2-326 differentiates between "sale on approval" goods (i.e., goods delivered primarily for use) and "sale or return" goods (i.e., goods delivered primarily for resale). Goods found to be "sale or return" goods are deemed to be subject to the claims of the buyer's creditors as long as such goods are in the buyer's possession. Thus, as the bankruptcy court held in *In re Morgansen's, Ltd.,* if artwork is consigned to a merchant on a "sale or return" basis, the merchant's other creditors will be able to look to the artwork to satisfy their claims. [4] Therefore, the manner in which the contract is structured is important.

Special Protection for Artists

Most states have enacted legislation to protect artists who consign their artwork to galleries from the claims of the galleries' creditors. For example, New York has enacted a statute that deems the gallery to be holding fine art as trust property for the benefit of the consignor-artist. [5] The statute makes clear that the trust property cannot be made "subject or subordinate to any claims, liens or security interest of any kind or nature whatsoever." Thus, under the New York statute and similar laws in other states, artists who consign their artwork to galleries are better protected than collectors who do so. The protective statutes, however, do not always afford full protection to artists. Unless the legislation expressly repeals the various UCC provisions, as the New York statute arguably does, those provisions can still be deemed to control.

When Consigned Property Is Moved

With many galleries operating in the international arena, it is common for artwork to be moved to countries other than the one in which they were originally consigned. If a consigned artwork in which a security interest has been properly perfected is moved by a New York gallery to its London branch, for example, and the London branch files for bankruptcy protection, the artwork may not be shielded from claims of the London branch's creditors. Thus, consignors would be well advised to build into their consignment contracts restrictive covenants that prohibit the consignee from moving the artwork without permission, along with notice requirements, to minimize this risk.

Conclusion

The best way to safeguard a consignor's interest in artwork is by: (i) entering into a tightly drawn contract that structures the transaction properly and imposes restrictions on the movement of the artwork, and (ii) perfecting the consignor's lien by complying with UCC notification requirements and filing UCC-1 financing statements. While similar measures are routinely effectuated in the business world, they are much less commonly taken in the art world. Given the high stakes involved and the unkind treatment of unperfected consignment liens in bankruptcy cases, prudence requires that they be taken.

1 Chantelle Aris, a summer associate, contributed to the preparation of this article.

2 The concern about hidden liens appears to be less valid in the art world, where consignments are a common occurrence. See Note, "A Picture Imperfect: The Rights of Art Consignor-Collectors When Their Art Dealer Files for Bankruptcy," 58 Duke L.J. 1859, 1863 (2009).

3 Although the 2001 amendments to the UCC removed true consignments from Article 2, and caused them to be treated under Article 9, courts continue to review transactions under Article 2 if they fit the "sale on approval" or "sale or return" criteria. If neither Article 9 nor Article 2 applies, the court will look to the common law on bailments.

4 302 B.R. 784 (Bankr. E.D.N.Y. 2003).

5 N.Y. Arts & Cult. Aff. Law § 12.01(a).

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Art Law Events

Upcoming Events Involving Herrick's Art Law Department

September 22, 2009

Frank Lord will be a panelist at the New York City Bar Association's Committee on Career Advancement and Management event entitled "How Another Degree in Addition to a JD Can Enhance One's Career."

September 29, 2009

Lawrence Kaye will deliver the keynote address at the Basel Institute on Governance's conference on "Governance of Cultural Property: Preservation and Recovery" in Switzerland. For more information, visit www.herrick.com/GovernanceConference.

October 7, 2009

The Goudstikker exhibition will open at the The Marion Koogler McNay Art Museum in San Antonio, Texas. The exhibition will remain at the museum through January 20, 2010. For more information, visit www.mcnayart.org.

October 20, 2009

Herrick will sponsor an event for Tufts Hillel entitled "Rewriting History at Long Last: The Saga of the Goudstikker Art Collection From Nazi Looting to Restitution." Featured speakers include Jeffrey Summit, Neubauer Executive Director, from Tufts Hillel, and Lawrence Kaye, Howard Spiegler and Steven Feldman from Herrick.

Recent Events Involving Herrick's Art Law Department

July 30 – August 1, 2009

Mari-Claudia Jiménez participated on the "Recovering Cuba's Looted Artworks" panel at the Association for the Study of the Cuban Economy conference entitled "Cuba in a World of Uncertainty." For more information, visit www.herrick.com/RecoveringCubasLootedArtworks.

July 23 – 24, 2009

The Jewish Museum conducted private tours of the Goudstikker exhibit for various Herrick clients and a group from the Young Professional Leadership "Strength Through Diversity" Program. Frank Lord provided details on Herrick's involvement with the Goudstikker case for the latter tour. For more information, visit www.herrick.com/Goudstikker.

June 26–30, 2009

Lawrence Kaye and Howard Spiegler attended the Holocaust Era Assets Conference in Prague, Czech Republic. Charles Goldstein, as counsel to the Commission on Art Recovery, chaired a key panel discussion on the legal issues of looted art. The conference hosted representatives from 49 nations, as well as the leading experts in the field, to discuss the future of Nazi-looted art claims and evaluated the progress made since the Washington Conference in 1998.

June 2009

Mari-Claudia Jiménez became a member of the editorial board of a forthcoming journal entitled "Property Rights in Transition," which will focus on Cuban restitution issues. The first issue will feature an article authored by Mari-Claudia regarding Cuban art restitution.

Spring 2009

Howard Spiegler and Mari-Claudia Jiménez authored the article "Surviving War and Peace: The Long Road to Recovering the Malevich Paintings" for the *Journal of Art Crimes'* first issue. The article describes the Malevich heirs' successful struggles to recover their artworks from the City of Amsterdam. Howard serves as a member on the editorial board of the *Journal*, which is comprised of art experts from several disciplines and countries. To read the article, visit www.herrick.com/SurvivingWarAndPeace.

For questions about upcoming events and other Art Law matters, please contact:

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Additional information on Herrick's Art Law Group, including biographical information, news, and articles, can be found at www.herrick.com/artlaw.

If you would like to receive this and other materials from Herrick's Art Law Group, please visit www.herrick.com/subscribe and add your contact information.

Herrick's "Resolved Stolen Art Claims" list, updated regularly, is available online at www.herrick.com/resolvedstolenartclaims