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Case 14 Artworks – Malewicz Heirs and City of Amsterdam

Kazimir Malewicz – Stedelijk Museum – City of Amsterdam – Netherlands/Pays-Bas – United States/Etats-Unis – Artwork/œuvre d'art – Spoils of war/butins de guerre – Ownership/propriété – State immunity/immunité des Etats – Anti-seizure legislation/garantie de restitution – Judicial claim/action en justice – Judicial decision/décision judiciaire – Negotiation/négociation – Settlement agreement/accord transactionnel – Conditional restitution/restitution sous condition

In 2003, 14 artworks by the Russian artist Kazimir Malewicz were exported to the United States by the Stedelijk Museum of Amsterdam to be part of a temporary exhibition at the Guggenheim Museum in New York and the Menil Collection in Houston. Shortly before the end of the loans, the heirs of Malewicz brought an action against the City of Amsterdam seeking to recover the value of the artworks or, in the alternative, the artworks themselves. They asserted that they were wrongfully expropriated from their family 50 years earlier. While the appeal was pending, the heirs and the City of Amsterdam reached a settlement. This settlement not only concerned the works that were the subject of the action, but also all Malewicz art objects in the collection of the Stedelijk Museum.

I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.

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I. Chronology

Spoils of war

- **1927**: The Russian artist **Kazimir Malewicz** brought more than 100 of his artworks to Berlin for exhibition at the *Berliner Kunstausstellung*. In June of the same year, Malewicz was called back to Leningrad (now Saint Petersburg). Since he expected to soon return to Germany, he entrusted his works of art to several friends in Germany.
- **September 1927**: The exhibition at the *Berliner Kunstausstellung* closed and the artworks were shipped to **Alexander Dorner**, one of Malewicz's friends. At that time it was not possible to return the works to Malewicz in the Soviet Union because Stalinist condemnation of abstract art would have led to their confiscation and destruction. Dorner exhibited some of the artworks at the *Landesmuseum* in Hannover, of which he was the director.
- **1935**: **Kazimir Malewicz passed away**.
- **1937**: The Nazis' attacks against "degenerate art" compelled Dorner to take steps to ensure that the artworks would be kept secure for the benefit of Malewicz's heirs. First, he concealed the works in the museum's basement. Then, he sent them to **Hugo Häring**, another of Malewicz's friends.
- **1956**: **Häring lent** the artworks to the **Stedelijk Museum of Amsterdam**. The loan agreement contained an option to purchase the collection. The City exercised this option in **1958**.[1]
- **1996**: A group of **35 heirs of Kazimir Malewicz** asked the City of Amsterdam to **return** the entire collection to them.[2] The City **refused**.
- **2003**: **14 artworks** in the **Malewicz collection** at the Stedelijk Museum (13 paintings and 1 drawing) were **exported to the United States** (U.S.) to be part of a temporary **exhibition** at the Solomon R. Guggenheim Museum in New York (from 22 May 2003 until 7 September 2003) and the Menil Collection in Houston (from 2 October 2003 until 11 January 2004).
- **January 2004**: Two days before the exhibit in Houston closed, the **Malewicz heirs filed suit** in the District Court for the District of Columbia against the City of Amsterdam to recover the value of the artworks or, in the alternative, the artworks themselves.[3]
- **30 April 2004**: The City filed a **motion to dismiss the complaint**.
- **30 March 2005**: The District Court **denied** the City's motion to dismiss.[4] Shortly afterwards, the City **renewed its motion to dismiss** by submitting additional evidence.
- **27 June 2007**: The District Court **denied** the City's **renewed motion**.[5] The City of Amsterdam then filed an **appeal** with the Court of Appeals for the District of Columbia.

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[1] *Malewicz v. City of Amsterdam*, 362 F.Supp.2d 298, at 302-304 (D.D.C. 2005).
[2] The City of Amsterdam was the owner of the Stedelijk Museum and of its collection.
[3] However, the artworks were allowed to return to Amsterdam as established in the loan agreement.
[4] *Malewicz v. City of Amsterdam*, 362 F.Supp.2d 298 (D.D.C. 2005).
[5] *Malewicz v. City of Amsterdam*, 517 F.Supp. 2d 322 (D.D.C. 2007).

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- **April 2008**: While the appeal was pending, the parties settled with an **agreement** that the City of Amsterdam would give five of the disputed paintings to the Malewicz heirs. In return, the heirs agreed to end the lawsuit.[6]

II. Dispute Resolution Process

Judicial claim – Judicial decision – Negotiation – Settlement agreement

- It took several years after the end of the Cold War and the fall of the Iron Curtain for all of Malewicz heirs to contact each other and begin the process of locating and recovering the family's property. In 1996, they found out that the artworks left in Germany by Kazimir Malewicz were at the Stedelijk Museum in Amsterdam and demanded restitution. This request was turned down by the City of Amsterdam in 2001 with a formal response.
- The City's authorities stated that the City had become the owner of the requested artworks in 1958, when it had bought them from Häring. Furthermore, they added that – even if the 1958 acquisition were found to be invalid – the City nevertheless had become the owner on 1 January 1993, through acquisitive prescription under Article 3:105 of the Dutch Civil Code.[7]
- The Malewicz heirs contested all these arguments. In particular, the heirs contended that the City purchased the collection in the face of its awareness that Häring had no authority to convey title.[8] They further alleged that the City and the Stedelijk Museum concealed the nature of the acquisition of the collection in its annual report for 1958, in catalogues, and through a lack of customary publicity for this kind of acquisition.[9]
- These seemingly irreconcilable positions – as well as the fact that litigation in the Netherlands could not be envisaged because of the norms on acquisitive prescription – explain why the heirs brought lawsuits in the U.S. to recover the value of the artworks or, in the alternative, the artworks themselves.
- By the same token, the amicable settlement of 2008 came as a complete surprise. This demonstrates that litigants and their counsels can negotiate at all times with a view to

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[6] Herrick, Feinstein LLP, Press release, "The City of Amsterdam and the Heirs of Kazimir Malevich Reach an Amicable Settlement regarding the Malevich Collection in Amsterdam," April 24, 2008, accessed November 15, 2013, http://www.herrick.com/sitecontent.cfm?pageID=26&itemID=8894. See also Martha Lufkin, "Stedelijk Returns Five Malevich Works to Artist's Heirs," *The Art Newspaper*, June 1, 2008, accessed October 30, 2013, http://www.theartnewspaper.com/articles/Stedelijk-returns-five-Malevich-works-to-artists-heirs-/8562.

[7] *Malewicz v. City of Amsterdam*, 362 F.Supp.2d, at 301-303.

[8] In 1956, Dr. Sandberg, the then-director of the Stedelijk Museum, convinced Häring to lend the collection to the Museum for restoration and exhibition. Häring had initially refused to do so by affirming that "he was only a custodian of the works, responsible for their safekeeping, and that he had no right to convey ownership of them to anyone". Sandberg prepared a proposal stating the terms of the loan. In his response, Häring suggested that he could even sell the collection. The City of Amsterdam entered into a loan contract with Häring. As stated, this contained an option to purchase the collection, which was exercised by the City in 1958. The heirs alleged that the documents on which the loan and the sale were based were frauds and were known by Sandberg to be frauds because of his prior correspondence with Häring. Moreover, the letter of June 1956, where Häring suggested for the first time that he could sell the collection, was signed "on behalf of" Häring, but not by him. *Ibid.*, at 301-304.

[9] *Ibid.*

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achieving a faster, cheaper, and mutually beneficial deal, regardless of the beginning of legal proceedings. In this respect, it can be argued that the City remained disposed to negotiate the dispute, first, because of the District Court's decisions of 2005 and 2007 and, second, because U.S. jurisprudence in matters of looted art supported the heirs' claim.

III. Legal Issues

Ownership – State immunity – Anti-seizure legislation

- The *Malewicz* case raised interesting questions that revolved around two U.S. pieces of legislation, the Immunity From Seizure Act and the Foreign Sovereign Immunity Act.
- The Immunity From Seizure Act (IFSA)[10] was enacted in 1965 to ensure the protection from judicial seizure of artworks loaned from abroad to museums and similar institutions located in the U.S. Pursuant to this statute, any not-for profit museum or other exhibitor could apply to the Department of State for a determination that art objects to be loaned from abroad for exhibition were culturally significant and that the exhibition was in the national interest. If application was granted, the art was immunized from judicial seizure by the federal government.[11]
- The Foreign Sovereign Immunity Act (FSIA)[12] was enacted in 1976 to codify the passage to the theory of restrictive State immunity.[13] The FSIA provided that a foreign State and its agencies and instrumentalities were immune from jurisdiction in U.S. courts unless certain exceptions apply.
  These exceptions included any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States" (28 U.S.C.

[10] 22 U.S.C. §2459.

[11] In order to obtain a determination that the loan is in the national interest, the applicant must certify that he has undertaken professional inquiry, including independent, multi-source research into the provenance of the objects being loaned. The applicant must also certify that he 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, or, for objects for which such circumstances do exist, the applicant must describe those circumstances as well as the likelihood as to whether any such claim would succeed. See U.S. Department of State, Immunity from Judicial Seizure – Cultural Objects, Checklist for Applicants, http://www.state.gov/s/l/c3432.htm, accessed October 31, 2013.

[12] 28 U.S.C. §1602. FSIA is the "sole basis for obtaining jurisdiction over a foreign state in our courts". *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 2253, 159 L.Ed.2d 1 (2004).

[13] Traditionally, the U.S. followed the "absolute theory" of sovereign immunity, which embodied the principle that a foreign State could not be subjected to process in a court of law without its consent. Thus, U.S. law granted complete immunity from suit to foreign sovereigns. In 1952, the U.S. Department of State switched to the "restrictive theory" of State immunity. Under this theory, a State is immune from the jurisdiction of foreign courts in respect of claims arising out of governmental activities (*acta jure imperii*); it is not immune, however, in respect of claims arising out of activities of a kind carried on by private persons (*acta jure gestionis*). *Malewicz v. City of Amsterdam*, 362 F.Supp.2d, at 309-310.

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§1605(a)(2)); and 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)).

- Prior to the exhibition of the Malewicz collection, the Department of State had made the necessary certifications pursuant to the IFSA. Therefore, the "artworks were immune from seizure and other forms of judicial process that might have had the purpose or effect of depriving the Guggenheim or the Menil Collection (or any carrier) of custody or control of the artworks while in this country".[14] However, the major question in the case did not concern the IFSA, but whether the heirs of Malewicz could sue the City of Amsterdam – an instrumentality of the Kingdom of the Netherlands – under one of the exceptions to the FSIA.
- The Malewicz heirs' suit was brought under the FSIA's "taking" exception (§1605(a)(3)).[15] They argued that: (i) the City of Amsterdam, through the Stedelijk Museum, took the Malewicz artworks "in violation of international law", that is, without paying compensation to their true owners, none of whom was then or thereafter a citizen of the Netherlands;[16] (ii) at the time when the action was commenced in January 2004, the 14 artworks at issue were on exhibit at the Menil Museum in Houston, and were therefore "present in the United States"; and (iii) because the loan of the 14 artworks to U.S. museums was an act that could be engaged in by a private party, it constituted a "commercial activity" under the FSIA.[17]
- The City of Amsterdam moved to dismiss the Malewicz heirs' complaint by arguing that: (i) they had not exhausted the judicial remedies available in the Netherlands; (ii) the works of art were not "present in the United States" as a matter of law during the course of the exhibitions because they had been immunized from seizure pursuant to the IFSA; and (iii) the loan of the Malewicz artworks to the Guggenheim and Menil museums was not a "commercial activity carried on in the United States" as required by the FSIA.[18]
- On 30 March 2005, the District Court for the District of Columbia denied the City's motion to dismiss.
  First, the District Court found that the City's arguments concerning exhaustion of domestic remedies were not a basis for dismissing the suit 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. […] [I]f the statute of

[14] *Ibid.*, at 303. Notably, the State Department granted immunity to the artworks in spite of an objection filed by the heirs. *Ibid*.
[15] To recap, four elements must be present in order for the FSIA's "taking" exception to apply: (1) "rights in property" are at issue; (2) the property was "taken in violation of international law"; (3) the "property is present in the United States"; and (4) the property is present in the United States "in connection with a commercial activity carried on in the United States by the foreign state". *Malewicz v. City of Amsterdam*, 517 F.Supp. 2d 322, 328-329 (D.D.C. 2007).
[16] Pursuant to the "act of State doctrine", domestic courts consider the expropriation of property ordered by a foreign government against its own citizens and located within its own territory as immune from judicial scrutiny. While States remain internationally responsible for injuries involving property belonging to foreigners, the decisions regarding their own nationals' property remain essentially internal affairs. See *Malewicz v. City of Amsterdam*, 517 F.Supp. 2d 322, 336-340. For the relevant jurisprudence on the "act of State doctrine" see Joseph P. Fishman, "Locating the International Interest in Intranational Cultural Property Disputes," *Yale Journal of International Law* (2010): 347–404.
[17] *Malewicz v. City of Amsterdam*, 362 F.Supp.2d, at 306.
[18] *Ibid*., 306-311. The City maintained that the loan of artwork is an educational and cultural activity.

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limitations in the Netherlands would preclude this suit, the Court must not require the Malewicz Heirs to file there".[19]
Second, the Court held that "plaintiffs' filing of the complaint while the artworks were physically present in this country was sufficient to meet the 'present in the United States' factor of FSIA",[20] even if the objects actually left the U.S. before the City was served with the complaint. According to the District Court, the U.S. Congress enacted the FSIA in order to override the requirement that "a plaintiff obtain *in rem* jurisdiction over property before suit could be filed against a foreign sovereign".[21] Moreover, although the IFSA precluded the seizure of objects, it did not prevent the foreign lender from being sued. Indeed, the heirs did not seek judicial seizure of the artworks.
Third, as to the nature of the loan, the District Court noted that it was "clear that the City of Amsterdam engaged in 'commercial activities' when it loaned the 14 Malewicz 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".[22] By citing the language of the FSIA, the Court also stated: "[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".[23] Nevertheless, in the end the Court "declined to decide whether the City had carried on commercial activity in the United States in connection with the loan of the artwork because the record was insufficient to determine whether the City's contact with the United States was substantial".[24] On this point, the District Court adopted a different decision in 2007: despite the additional evidence submitted by the City in support to the position that it was immune from suit under the FSIA, the Court held that "the record contains sufficient contacts to establish jurisdiction under the FSIA's expropriation exception".[25]

IV. Adopted Solution

Conditional restitution

- Pursuant to the settlement of April 2008, the Malewicz heirs received five paintings from the collection of the City of Amsterdam.[26] In exchange, the heirs dropped claims to the other artworks and ended the legal action against the City.

[19] *Ibid*., at 308.
[20] *Ibid*., at 310.
[21] *Ibid*., at 309.
[22] *Ibid*., at 313-314.
[23] 28 U.S.C. §1603(d).
[24] *Malewicz v. City of Amsterdam*, 517 F.Supp. 2d 322, 328-329.
[25] *Ibid*., 340. With the 2007 decision, the District Court also dismissed the City's other arguments that the complaint of the plaintiffs had to be dismissed based on the statute of limitations defense, the "act of state" doctrine, and the *forum non conveniens* argument. *Ibid*., 340.
[26] These five paintings were: *Desk and Room* (1913); *Suprematism (Painterly Realism of a Football Player)* (1915); *Suprematism, 18th Construction* (1915); *Suprematist Composition (Blue Rectangle over Purple Beam)* (1916); and

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- In other words, the City acknowledged that the heirs had ownership title to the five paintings being transferred to them, while the heirs acknowledged that the City had title to all other Malewicz art objects in the City's collection.
- In reaching this settlement, the City and the heirs "strived for a resolution that honors the selection by Malewicz himself of the artworks, preserves the collection as his remaining legacy, acknowledges the historical developments and circumstances that prevented Malewicz from returning to Berlin and to his artworks … and respects and acknowledges the legacy of the heirs".[27] The mayor of Amsterdam, Job Cohen, said of the settlement: "The Museum works remaining with the City will continue to be open to the general public and available for research as an ensemble through its presence in the Stedelijk Museum Amsterdam. The role of Malewicz as a pioneer of modern and contemporary art is optimally visible in the context of the collection of modern art of the Stedelijk Museum Amsterdam. Therefore, as of December 2009, the artworks of Malewicz will be given a place of honour in the reopened Stedelijk Museum Amsterdam".[28]

V. Comment

- The *Malewicz* case raised interesting questions on how to reconcile the conflict between the FSIA and the IFSA. More importantly, this case unveiled the complex problems concerning the loan of artworks when it is claimed that these objects were stolen in the distant past. As it is often the case,[29] the parties resolved the ownership question by resorting to negotiation, the most common mechanism of dispute settlement alternative to litigation.
- In order to resolve the above issues, in March 2012 Senate Bill 2212 ("Foreign Cultural Exchange Jurisdictional Immunity Clarification Act") was passed in the House of the U.S. Congress (with a parallel bill in the Senate) to amend the FSIA, so that the presence of artworks in the U.S. with immunity from seizure would not constitute "commercial activity" under the FSIA. Thus, if enacted as law, this amendment would have overturned the judicial result in *Malewicz*.[30] Yet, although it had attracted no publicly-known opposition, the bill never received consideration from the Judiciary Committee of the U.S. Senate, let alone a vote, before expiring at the end of the last Congressional term. Therefore, the FSIA remains unaltered for now. This means that the very act of lending a work of art to the U.S. – even if

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Mystic Suprematism (Black Cross on Red Oval) (1920-1922). *Suprematist Composition* was sold by the heirs in November 2008 at Sotheby's in New York for US$ 60 million. Souren Melikian, "Connoisseurs Take Back Control of Art Market," *The New York Times*, January 9, 2009, accessed November 15, 2013, http://www.nytimes.com/2009/01/10/arts/10iht-melik10.1.19217720.html?pagewanted=all&_r=0.

[27] Herrick, Feinstein LLP, Press release, "The City of Amsterdam and the Heirs of Kazimir Malevich Reach an Amicable Settlement regarding the Malevich Collection in Amsterdam".

[28] *Ibid*.

[29] See, e.g.: Raphael Contel, Giulia Soldan, Alessandro Chechi, "Case Portrait of Wally – United States and Estate of Lea Bondi and Leopold Museum," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva; and Anne Laure Bandle, Alessandro Chechi, Marc-André Renold, "Case Landscape with Smokestacks – Friedrich Gutmann Heirs and Daniel Searle," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

[30] Patty Gerstenblith, *Art, Cultural Heritage, and the Law*, 3rd edition, Durham, North Carolina: Carolina Academic Press (2012), 753.

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that work is immune from seizure – can provide the "commercial activity nexus" sufficient to satisfy the FSIA and the basis for suing a foreign government. According to some commentators, this situation may discourage international loans or encourage litigation, or both.[31]

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