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Case Six Klimt Paintings – Maria Altmann and Austria

Ferdinand and Adele Bloch-Bauer – Maria Altmann – Austria/Autriche – Austrian National Gallery/Galerie nationale autrichienne – Artwork/œuvre d'art – Nazi-looted art/spoliations nazies – Institutional facilitator/facilitateur institutionnel – Conciliation – Judicial claim/action en justice – Judicial decision/décision judiciaire – State immunity/immunité des Etats – Ownership/propriété – Arbitration/arbitrage – Arbitral award/décision arbitrale – Unconditional restitution/restitution sans condition

Maria Altmann brought suit in the United States against the Republic of Austria and the Austrian National Gallery to recover six paintings by Gustav Klimt that the Nazis took during the Second World War from her Jewish relatives, Ferdinand and Adele Bloch-Bauer. Although the Supreme Court of the United States lifted Austria's jurisdictional immunity, the disputants reached an agreement to end the litigation and submit the dispute to arbitration in Austria. The arbitration panel ruled that Austria was obliged to return five of the Klimt's masterpieces to Maria Altmann.

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

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I. Chronology

Nazi looted art

- Ferdinand and Adele Bloch-Bauer owned the following paintings by Gustav Klimt: *Buchenwald* (1903), *Adele Bloch-Bauer I* (1907), *Schloss Kammer am Attersee III* (1910), *Adele Bloch-Bauer II* (1912), *Apfelbaum I* (1912), *Häuser in Unterach am Attersee* (1916), *Amalie Zuckerkandl* (1917-1918).
- **1925: Adele Bloch-Bauer died.** She left a will “kindly” requesting Ferdinand Bloch-Bauer to consider donating the Klimt paintings to the Austrian National Gallery. Ferdinand Bloch-Bauer acknowledged that he would have fulfilled Adele’s wish. However, he was not legally bound by it as he also owned the paintings.
- **1936:** Ferdinand Bloch-Bauer donated *Schloss Kammer am Attersee III* to the Austrian National Gallery.
- **1938:** Following the annexation of Austria to Nazi Germany, **Ferdinand Bloch-Bauer fled Austria.** Under the pretext of initiating tax evasion proceedings, the authorities of the German Reich **confiscated** his estate, his sugar factory and his personal property which included the paintings.
- **1939: Dr. Führer** – temporary administrator of the estate – gave the paintings *Adele Bloch-Bauer I* and *Apfelbaum I* to the Austrian National Gallery in return for *Schloss Kammer am Attersee III*. He sold the latter to Gustav Ucicky, a son of Gustav Klimt.
- **1942:** Dr. Führer sold *Buchenwald* to the City of Vienna Collection.
- **1943:** Dr. Führer sold *Adele Bloch-Bauer II* to the Austrian National Gallery and kept *Häuser in Unterach am Attersee* for himself. The painting *Amalie Zuckerkandl*, which was given by Ferdinand Bloch-Bauer to the Zuckerkandl family, was sold by Hermine Müller-Hofmann (the daughter of Amalie Zuckerkandl) to Viktoria Künstler (director of the “Neue Galerie”) for 1,600 Mark. Viktoria Künstler bequeathed this painting to the Austrian National Gallery in March 1988.
- **November 1945: Ferdinand Bloch-Bauer died.** In his will, he did not mention the paintings, which, to his knowledge, had been confiscated by the Austrian State through Nazi laws. However, he included a clause according to which his wealth should be handed over to his nephew Robert and his nieces Louise and Maria.
- **1946:** The Austrian Government passed the **Annulment Act**.¹ This act was designed to annul all transactions motivated by the discriminatory Nazis ideology that occurred from 1938 to 1945.
- **1948-1949:** The Bloch-Bauer heirs – through their lawyer **Dr. Rinesh** – obtained the **restitution of most of the collection and export permits** for the United States, where they lived. Under the Annulment Act, the Jews that wanted to leave Austria were required to “donate” valuable artworks – in favour of Austrian public museum and in the name of preserving national heritage – as a condition of receiving export permits for other valuable items. Dr. Rinesh agreed to donate the paintings *Häuser in Unterach am Attersee*, *Adele*

¹ Federal Law on the annulment of contracts and other legal acts that occurred during the German occupation of Austria of 15 May 1946, Federal Law Gazette 1946/106.

Bloch-Bauer I, Adele Bloch-Bauer II, Apfelbaum I, which were already in the State's possession. In addition, Dr. Rinesh relinquished the paintings *Buchenwald* and *Schloss Kammer am Attersee III*.

- **1998:** The painting *Portrait of Wally*, by Schiele, was confiscated in New York while on loan from the Austrian National Gallery.² As a result, allegations emerged that the Gallery possessed looted art. In response to such allegations the Austrian Government opened up its archives to permit research on the provenance of the national collection. An Austrian journalist uncovered documents proving that Ferdinand Bloch-Bauer never freely donated the Klimt paintings. He also discovered documents revealing that the Gallery knew that it possessed looted art.³
- **September-December 1998:** In response to these revelations, the Austrian Government passed the **Restitution Act**.⁴ This law allows the restitution of works of art that owners had been forced to donate in exchange for export permits pursuant to the Annulment Act of 1946. It also set up an advisory body (the "Restitution Committee") tasked with the responsibility to respond to restitution requests.
- **Maria Altmann** – one of the two nieces of Ferdinand Bloch-Bauer – settled in California in 1938 and became a United States citizen in 1945. She formally requested the restitution of the Klimt paintings under the Restitution Act. Specifically, Maria Altmann requested the restitution of *Adele Bloch-Bauer I, Adele Bloch-Bauer II, Apfelbaum I, Buchenwald, Häuser in Unterach am Attersee* and *Amalie Zuckermandl*. The request was rejected in **1999** by the Restitution Committee. As a result, Maria Altmann challenged the decision before Austrian courts. However, she withdrew the claim because of the costly legal fees required by Austrian law (1,2% of the litigated value, i.e. around \$ 1.6 million). She thus sued the Republic of Austria and the Austrian National Gallery in the Central District of California, alleging expropriation of property in violation of international law.
- **2000:** Austria moved for dismissal alleging lack of subject matter jurisdiction, lack of venue, failure to join indispensable parties and the doctrine of *forum non conveniens*.
- **2000:** The **Federal District Court**⁵ denied the defendants' motion for dismissal pursuant to the Foreign Sovereign Immunities Act (FSIA).⁶
- **2002:** The **Court of Appeal affirmed**.⁷
- **7 June 2004:** The **United States Supreme Court** determined conclusively that the FSIA applied to events that occurred before the Act's enactment in 1976, thereby overruling the jurisdictional immunity of the Republic of Austria.⁸
- **May 2005:** The Republic of Austria and Maria Altmann reached an **agreement** to end litigation and submit the dispute to binding **arbitration** in Austria.

² See 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.

³ *Republic of Austria et al. v. Maria V. Altmann*, 541 U.S.677 (U.S. 2004), 5.

⁴ Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections of 4 December 1998, Federal Law Gazette 1998/181.

⁵ *Maria V. Altmann v. Republic of Austria, et al.*, 142 F. Supp. 2d 1187 (CD Cal. 2001).

⁶ Foreign Sovereign Immunity Act, October 21, 1976, 90 Stat. 2891.

⁷ *Maria V. Altmann v. Republic of Austria, et al.*, 317 F. 3d 954 (9th Circle, 2002), as amended, 327 F. 3d 1246 (2003).

⁸ *Republic of Austria et al. v. Maria V. Altmann*, 541 U.S.677 (U.S. 2004).

- **2006:** The **arbitral panel ruled** that Austria was obliged to **return** the paintings *Birkenwald*, *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Apfelbaum I* and *Häuser in Unterach am Attersee* to Maria Altmann, but not *Amalie Zuckerkandl*.⁹
- **2006:** Maria Altmann **sold** the Klimt paintings at auction.¹⁰

II. Dispute Resolution Process

Institutional facilitator – Conciliation – Judicial claim – Judicial decision – Arbitration – Arbitral award

- At first, **Maria Altmann** sought restitution of the Klimt paintings through the **Restitution Committee** established by the 1998 Restitution Act. The request was rejected on the ground that Adele's will had transferred the paintings to the Austrian National Gallery prior to German occupation.¹¹ The Committee only recommended the restitution of 16 other Klimt drawings and 19 porcelain pieces not included in Adele's will.¹²
- **Maria Altmann** then **proposed** to submit the dispute to **arbitration**, a proposal which was **refused** by the Republic of Austria.
- Accordingly, Maria Altmann decided to resort to legal **means**. She introduced **legal proceedings in the United States** because Austrian legislation required an advance payment of a percentage of the litigated amount. In the United States, the Supreme Court overruled the jurisdictional immunity of the Austrian State on the basis of the expropriation exception of the FSIA, but the case did not reach the merits. Confronted with the prospect of a long and expensive litigation, the Republic of Austria accepted to resort to **arbitration** in order to avoid another defeat in court.
- The parties agreed to establish a panel of three Austrian arbitrators and to accept the decision of the panel as final and without any right of appeal. Pursuant to the arbitration agreement, the panel had to rule on the ownership situation of the Klimt paintings and determine whether the 1998 Restitution Act was applicable. The parties further agreed that the arbitration tribunal was to apply Austrian substantive and procedural law. In legal terms, its decision was based solely on the facts presented to it by the parties.¹³ All costs were to be covered by the Republic of Austria.

⁹ Arbitral Award, *Maria V. Altmann and others v. Republic of Austria*, May 6, 2006, 7, 12-13, accessed June 16, 2011, <http://bslaw.com/altmann/Zuckerkandl/Decisions/decision.pdf>.

¹⁰ *Adele Bloch-Bauer I* was bought by Ronald Lauder for the Neue Galerie for \$135 million; *Adele Bloch-Bauer II* was sold for \$87,9 million; *Birch Forest* went for \$40,3 million; *Houses at Unterach on the Attersee* sold nearly for \$31,4 million; *Apple Tree I* sold for \$33 million. Eileen Kinsella, "Gold Rush," *ARTnews*, January 2007, accessed June 22, 2011, http://www.artnews.com/issues/article.asp?art_id=2193.

¹¹ Cf. Article 1 of the Federal Law of 15 May 1946.

¹² Beat Schönenberger, *The Restitution of Cultural Assets* (Berne: Stämpfli Publishers Ltd., 2009), 210.

¹³ Gunnar Schnabel and Monika Tatzkow, *Nazi Looted Art, Handbuch Kunstrestitution weltweit* (Berlin: Proprietas-Verlag, 2007), 313.

III. Legal Issues

State immunity – Ownership

- **Decision of the United States Supreme Court on the issue of immunity.** The principle of State immunity entails that acts performed by a State in the exercise of its sovereign authority (*jure imperii*) attract immunity from the jurisdiction of foreign domestic courts and from enforcement proceedings. This principle is rooted in the independence and sovereign equality of States, a basic principle of international law enshrined in Article 2, paragraph 1, of the Charter of the United Nations.
- The FSIA contains an expropriation exception that expressly exempts from immunity all cases involving “rights in property taken in violation of international law provided the property has a commercial connection to the United States or the agency or instrumentality that owns the property is engaged in commercial activities in the United States”.¹⁴ *In casu* Maria Altmann relied upon the expropriation exception of the FSIA because: (i) the paintings were taken in violation of international law (stolen by the Nazis); (ii) the paintings were in possession of an agent of the Government of Austria at the time of the case (the Austrian National Gallery); and (iii) the Austrian Gallery was engaged in commercial activity in the United States (publishing and advertising activities of the Klimt paintings).¹⁵
- The Supreme Court limited itself to considering the question of whether the expropriation exception of the FSIA afforded jurisdiction over claims against foreign States based on conduct that occurred before the Act’s enactment in 1976. The Supreme Court admitted an exception to the **principle of non-retroactivity** and held that the FSIA applied to facts occurred before 1976.¹⁶ Thus, the California Court maintained subject matter jurisdiction and Maria Altmann’s suit was allowed to proceed.
- **Decision of the arbitration panel on the ownership of the paintings *Adele Bloch-Bauer I, Adele Bloch-Bauer II, Häuser in Unterach am Attersee, Apfelbaum I and Buchenwald*.**¹⁷ The arbitral panel had to first decide whether Adele’s will was binding. The panel concluded that the will was not legally binding for Ferdinand Bloch-Bauer. More specifically, the arbitral panel held that the clause regarding the Klimt paintings was merely a request which Ferdinand Bloch-Bauer had publicly agreed to fulfil.¹⁸ Consequently, the declaration made by Ferdinand Bloch-Bauer that he would fulfil Adele’s request was merely an expression of his desire to respect her wish. The panel also took into account that the paintings belonged to Ferdinand Bloch-Bauer before Adele’s death.¹⁹

¹⁴ §1605(a) (3) United States, Foreign Sovereign Immunity Act, October 21, 1976, 90 Stat. 2891. For more details on the district court decision see John Henry Merryman, *Law, Ethics and the Visual Arts* (The Netherlands: Kluwer Law International, 2007, 5th edition), 42-50.

¹⁵ Schönenberger, *The Restitution of Cultural Assets*, 211.

¹⁶ *Republic of Austria et al. v. Maria V. Altmann*, 541 U.S.677 (U.S. 2004), 13-21.

¹⁷ Arbitral Award, *Maria V. Altmann and others v. Republic of Austria*, January 15, 2004, 14, accessed June 16, 2011, <http://bslaw.com/altmann/Klimt/award.pdf>.

¹⁸ *Ibid.*, 15-17.

¹⁹ In application of the *praesumptio Muciana*. *Ibid.*, 17-20.

- Since the will was not legally binding for Ferdinand Bloch-Bauer, the Gallery had no valid ownership to the paintings *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II* and *Apfelbaum I*. In addition, the sale of *Buchenwald* to the City of Vienna Collection falls under the Annulment Act of 1948. Moreover, the Republic did not automatically acquire ownership when Ferdinand Bloch-Bauer died since the Republic only had a claim against the heirs (legacy) but not an automatic right to the paintings.
- In 1948, Dr. Rinesh recognised – in the name of the heirs – that the ownership title had passed to the Republic of Austria by acknowledging the validity of Adele Bloch-Bauer’s will. He did so in order to obtain an export permit for the rest of the estate. The transfer of the paintings therefore falls under the 1998 Restitution Act.
- In sum, the Republic of Austria was under an obligation to return the five Klimt paintings pursuant to the conditions of the Restitution Act, which in this case were met.
- **Decision of the arbitration panel on the ownership of *Amalie Zuckerkandl*.**²⁰ The painting was bought by Ferdinand and Adele Bloch-Bauer from Amalie Zuckerkandl in the 1920s. However, it is unclear how the painting came back into the hands of the Zuckerkandl family between 1938 and 1942. The Zuckerkandl heirs and the Republic of Austria claimed that it was donated by Ferdinand Bloch-Bauer with the help of Dr. Führer; Maria Altmann claimed that it was transferred following an unlawful act by Dr. Führer.
- Because of the little evidence available, the arbitration panel held that the most probable factual situation was that **Ferdinand Bloch-Bauer gave the painting** to the Zuckerkandl family to provide **financial help**. He most likely benefited from the help of Dr. Führer in executing the donation. Dr. Führer had already helped him to export a Kokoshcka painting to Switzerland. The panel adopted this decision also because: (i) the heirs of Ferdinand Bloch-Bauer had never requested the restitution of this painting and (ii) the Bloch-Bauers had previously helped the Zuckerkandl family.
- The arbitration panel also held that **the sale of the painting *Amalie Zuckerkandl* to Viktoria Künstler was not a coerced sale**, even though the price was very low. The panel maintained that the price was not disproportionate due to the special circumstances of the case: (i) the friendship between the buyer and the seller; (ii) the risk for the buyer; (iii) the ongoing Nazi repression; and (iv) the state of necessity of the seller.²¹ Therefore, Viktoria Künstler was entitled to donate *Amalie Zuckerkandl* to the Austrian National Gallery and the **Restitution Act of 1998 did not apply**.

IV. Adopted Solution

Unconditional restitution

- The arbitral held that the paintings *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Buchenwald*, *Häuser in Unterach am Attersee* and *Apfelbaum I* were to be handed over to Maria Altmann,

²⁰ Arbitral Award, *Maria V. Altmann and others v. Republic of Austria*, May 6, 2004, accessed June 16, 2011, <http://bslaw.com/altmann/Zuckerkandl/Decisions/decision.pdf>.

²¹ Ibid.

and that the painting *Amalie Zuckerkanndl* was the property of the Republic of Austria. Austria paid the cost of the arbitration.

V. Comment

- Austria acknowledged that the Klimt paintings belonged to the Bloch-Bauer heirs only fifty-eight years after Ferdinand Bloch-Bauer fled from the country. More distressing than that is the attitude of the Republic of Austria. The post-war coercion on emigrating families to make donations to a State that persecuted them is of such appalling moral standing that one would have expected a different attitude from the Austrian authorities. Moreover, it appears that Austria only accepted to submit the case to arbitration because of the prospect of a long and costly procedure in the United States.
- The ruling of the United States Supreme Court was a breakthrough. The Court reversed well established jurisprudence and encouraged claimants of Nazi-looted art to seek redress against foreign nations in the courts of the United States.²² Notwithstanding the importance of the decision, its implications are not as revolutionary as it appears at first glance. Indeed, the Supreme Court merely issued a “statutory holding” that is both narrow and case specific and did not rule out other specific defences that could be used by foreign States such as the Act of State doctrine.²³
- According to Beat Schönenberger, the commercial activity link is examined very superficially by United States courts and the analysis of the Supreme Court reflects the aim to achieve a substantive desired result.²⁴
- The *Altmann* case is widely considered as an ideal settlement because the claimant achieved restitution. In reality, it should be noted that, because of the lengthy and costly procedure, Maria Altmann did not keep the paintings but sold them in order to pay litigation costs. Considering the emotional attachment of the claimant to the paintings, as well as the emotional strain of the protracted procedure, this settlement emphasises the necessity to increase awareness among Holocaust victims about the advantages of alternatives to litigation for the recovery of looted art.

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²³ *Ibid.*, 175-176.

²⁴ Schönenberger, *The Restitution of Cultural Assets*, 213.

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