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Case Blumengarten – Deutsch Heirs and Moderna Museet Stockholm

Otto Nathan Deutsch – Moderna Museet Stockholm – Nazi looted art/spoliations nazies – Artwork/œuvre d'art – Ad hoc facilitator/facilitateur ad hoc – Negotiation/négociation – Settlement agreement/accord transactionnel – Ownership/propriété – Inalienability/inaliénabilité – Loan/prêt – Sale/vente

The heirs of Holocaust victims Otto Nathan Deutsch made several requests to the Moderna Museet Stockholm for the restitution of the painting “Blumengarten (Utenwarf)” (1917) by Emil Nolde. Thanks to the incentive provided by the Conference on Holocaust Era Assets held in Prague in June 2009, the parties ultimately reached an agreement 3 months later. The settlement arranged for the sale of the painting to an undisclosed third party and for a 5-year loan to the Museum in Stockholm.

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

- **1939:** Otto Nathan and Bertha Deutsch fled from Frankfurt to Amsterdam to avoid persecution by Hitler's officials. Their belongings, including the **painting "Blumengarten (Utenwarf)" by Emil Nolde (1917)**, were intended to be sent on to Amsterdam. For these purposes, Otto Nathan compiled the requested list of all his property. However, the list was abused by the Nazis to select the objects they wanted.¹ The couple died during the war.
- **Subsequent to World War II:** Many of their belongings **disappeared**. The family was told that they were **destroyed by bombing raids**.²
- **1962:** A decision of the West German public authorities (the so-called "Vergleich") granted the family's heirs what was considered **full compensation for the artwork** at that time (i.e. DM 31,000).³
- **1967:** The **Moderna Museet Stockholm** bought the **painting in good faith** at auction from the Galerie Roman Norbert Ketterer in Lugano, Switzerland.
- **Late 1970s:** The heirs received a letter from the **Nolde Foundation in Seebüll** about the location of the Nolde painting.⁴
- **2002:** A member of the Deutsch family addressed a letter to the Museum asking for a clarification of the facts and for an amicable solution.⁵
- **2003:** **David Rowland**, representing the heirs, sent a request to **the Museum for the restitution** of the painting by referring to the Washington Conference Principles of 1998.⁶ Being a soft-law instrument, the principles are not legally binding. The museum in turn referred the claim to the government.
- **2007:** In return, the **Swedish Government** directed the Moderna Museet **to initiate settlement proceedings** with the heirs.⁷ After having reached a standstill since 2003, negotiations between the parties began again. The Museum publicly announced on **20 June 2007** that it would return the painting, however, failing to follow through with that offer.
- **12 March 2009:** One of the heirs, **Ricardo Lorca-Deutsch** sent a letter to the **Swedish Culture Minister, Lena Adelsohn Liljeroth**, asking her to intervene in the negotiations which had been inconclusive so far.⁸

¹ See Ulrike Knöfel, "Die Liste des Herrn Deutsch," *Der Spiegel* 26 (2009): 143.

² Ibid.

³ Ibid; see also Moderna Museet Press Release, "Emil Nolde."

⁴ See Knöfel, "Die Liste des Herrn Deutsch," 142.

⁵ Ibid, at 143.

⁶ Washington Conference Principles on Nazi-Confiscated Art, *released in connection with The Washington Conference on Holocaust Era Assets, Washington, DC, December 3, 1998*, available on the Website of the Commission for Looted Art Europe.

⁷ See Rowland & Associates Press Release, "Why Sweden Must Return its Nazi Looted Art," *MMD Newswire*, March 16, 2009.

⁸ See Catherine Hickley, "Jewish Heirs, Sweden Settle 7-Year Feud Over Nazi- Looted Nolde," *Bloomberg*, September 9, 2009.

- **June 2009:** The dispute was mentioned during the Holocaust Era Assets Conference held in Prague.⁹
- **9 September 2009:** The parties reached a settlement ending their 7-year dispute.¹⁰

II. Dispute Resolution Process

Ad hoc facilitator – Negotiation – Settlement agreement

- The dispute resolution process of this case was lengthy, mainly because of a see-saw between the Moderna Museet and the Swedish government on the question of competence to respond to the request. When receiving the letter from the heirs, the museum referred the matter to the government that, in turn, “assigned Moderna Museet with the task of coming to a settlement with the heirs, in line with the Washington Conference.”¹¹
- Additionally, negotiations were difficult as the parties could not agree on a solution which would bring an end to the dispute. The heirs suggested several compromises, including an offer to pay the Museum’s purchase price from 1962¹², or 75% of its actual market value (which was about EUR 3 million), in exchange for restitution.¹³ The Museum in turn proposed to transfer the ownership title to the heirs, provided the painting remains in the museum for a long-term loan, or to sell it and split the received amount.¹⁴
- Ultimately agreeing on the latter option, the parties then had to seek a sponsor willing to purchase the painting. As David Rowland, lawyer for the heirs, informed the press, the family was able to find a buyer, who consented to leave the painting with the Museum for another three to five years, whereas the Museum wished to keep it for a period of 10 to 20 years.¹⁵ Again, the parties were not able to agree on the matter.
- Following the request made to the Swedish government in March 2009, the parties finally succeeded in reaching an agreement. It is unknown whether the government intervened again in the matter.¹⁶ The Holocaust Era Assets Conference held in Prague in June 2009 must have brought additional incentives for the parties to reach an agreement as it was expressly pointed out in the Conference’s preliminary overview as a pending case. The country summary of Sweden explicitly mentioned that despite the painting’s uncontested looted nature, the Museum had not to date restituted the painting.¹⁷

⁹ See Holocaust Era Assets Conference, Prague, June 2009, “Holocaust-Era Looted Art: A World-Wide Preliminary Overview,” 26.

¹⁰ The painting was ultimately sold at Sotheby’s in February 2012 for £ 2,057,250 (“Sotheby’s Impressionist & Modern Art Evening Sale,” February 8, 2012, London, Lot no. 6).

¹¹ Moderna Museet Press Release, “Emil Nolde.”

¹² See Thord Eriksson, “Nittve Keeps Painting Worth Millions,” www.fokus.se, March 13, 2009.

¹³ See Knöfel, “Die Liste des Herrn Deutsch,” 143.

¹⁴ See Eriksson, “Nittve Keeps Painting Worth Millions.”

¹⁵ Rowland & Associates Press Release, “Why Sweden Must Return its Nazi Looted Art.”

¹⁶ See also Section V below.

¹⁷ See Holocaust Era Assets Conference, Prague, June 2009, “Holocaust-Era Looted Art: A World-Wide Preliminary Overview,” 26.

III. Legal Issues

Ownership – Inalienability

- The heirs initiated negotiations based on the Washington Conference Principles of 1998, to which Sweden is signatory. Two further Declarations of the same nature (i.e. non-binding) were adopted subsequent to the Washington Principles to recall and support the principles: The 2005 Vilnius Forum Declaration¹⁸ and the 2009 Declaration of Terezin¹⁹. Bearing in mind the differing legal systems and “that countries act within the context of their own laws”²⁰, the declarations encourage every effort taken to identify Nazi-confiscated art to address restitution claims for such property. In particular, the Washington Conference Principle no. 8 stipulates that “[i]f the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.”
- A possessor of Nazi-confiscated art may be induced to evaluate a restitution demand based on its merits and despite any concerns of limitation periods and property rights.²¹ Nazi-looted art victims are generally asked to prove their family’s ownership to the property prior to its confiscation by the Nazis in the context of the Second World War.
- In addition to issues pertaining to the ownership title, the case under consideration may have also involved concerns of inalienability. When receiving the letter from the lawyer requesting the return of the painting, the museum had to beseech the government for its consent. According to the museum, it was “not authorized to hand over works of art from the collection without the government’s permission”²².

IV. Adopted Solution

Loan – Sale

- In compliance with the Washington Conference Principles and subsequent Declarations on Holocaust-Era confiscated art encouraging disputed parties to seek for a “just and fair solution”, the heirs and the Moderna Museet reached an interesting agreement. They determined that the painting would be bought by an undisclosed, private European collector and remain with the Moderna Museet on loan. The loan was limited to five years, at which time the Museum would receive another Expressionist painting (early 20th century) to be on loan for another five years from the same collector.

¹⁸ Vilnius International Forum on Holocaust Era Looted Cultural Assets Declaration, released in connection with the Washington Conference on Holocaust Era Assets, Vilnius, October 5, 2000.

¹⁹ Terezin Declaration of 30 June 2009, released in connection with the Washington Conference on Holocaust Era Assets, Prague and Terezin, June 26-30, 2009.

²⁰ Washington Conference Principles on Nazi-Confiscated Art, Preamble.

²¹ See also Terezin Declaration, “Nazi-Confiscated and Looted Art,” section 3.

²² Moderna Museet Press Release, “Emil Nolde.”

- Any further details of the agreement, including the price paid to the heirs, are barred by a clause of non-disclosure.²³

V. Comment

- The protracted resolution process and irresponsiveness of both the Swedish government and the Moderna Museet may cast into doubt their motivation to answer the restitution claim. It took the government several years for a decisive response by means of which it directed the Museum to initiate negotiations. Similarly, the Museum did not follow through on its announcement to return the painting nor on any alternative until the heirs directly addressed the Ministry of Culture with their demand. Interestingly, it is said that the Swedish Minister of Culture, Lena Adelsohn Liljeroth, seemed to be rather in disfavour of the restitution claim considering that the Deutsch family had already received a financial compensation for their losses by the West German government in 1962, a rationale which has also been advanced by the Museum direction.²⁴ Another consideration which might have been at the disadvantage of the heirs is the fact that they had waited over 20 years to request the painting all the while knowing that it was located at the Museum. Ultimately, being exposed to pressure at an international level during the Prague Conference on Holocaust Era Assets, the parties found an agreement within a few months. Given the circumstances, the settlement was criticized for not being induced by moral concerns as it is common for Nazi looted art restitution claims.²⁵
- A further relevant aspect of this case is the impact of the Swedish government's involvement. Both the museum and the heirs turned to the government for help and advice. While nothing was said as to the government's precise action in the matter, the facts may speak for themselves. The Cultural Minister was besought by the heirs when negotiations between the parties were at a standstill. Six months later, the case was settled. It is highly likely that the active participation of the government helped the parties not only to approach the restitution request, but also to terminate their dispute.
- While the solution both parties agreed to seems unique and interesting, several points of their understanding remain unknown. It is, for instance, unclear whether and to what extent they followed the suggestion of the Museum in previous negotiations to split the sale revenues between the parties.

²³ Moderna Museet Press Release, "Press Release in re settlement – Blumengarten," 9 September 2009.

²⁴ Eriksson, "Nittve Keeps Painting Worth Millions."

²⁵ Cf. Knöfel, "Die Liste des Herrn Deutsch," 143.

VI. Sources

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