Golden beauty

Gustav Klimt (1862-1918) Portrait of Adele Bloch-Bauer I, 1907, from a postcard obtained summer 2004 from the Osterreichische Galerie Belvedere in Vienna, when the painting was still in possession of the Austrian owned museum.

GOLDEN BEAUTY: THE FOREIGN SOVEREIGN IMMUNITIES ACT (FSIA) & THE GILDED BATTLE FOR ADELE BLOCH-BAUER I

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In this article the authors examine the case of Republic of Austria v. Maria V. Altman and U.S. case law on equitable tolling and implied-in-fact bailment that offers lessons for museum acquisitions by purchase or gift. In Altman, involving a custody battle between Altman and the Austrian government over six Gustav Klimt paintings, the U.S. Supreme Court granted certiorari limited to the question of whether the Foreign Sovereign Immunities Act (FSIA) applies to claims based on conduct that occurred before the Act's enactment. A reading of U.S. case law teaches museums to develop clear legal and ethical acquisition policies.

Introduction

Behold: a beautiful woman enfolded in intricately patterned, exotic fabric, a golden icon of luxury and privilege. Visualize the luxuriant patterns, reminiscent of Japanese lacquer, royal Byzantine mosaics, and divine Egyptian motifs.[1] Behold the genius of Gustav Klimt. The Adele Bloch-Bauer I is one of the great modern artist's prized, treasured, adored work, and most recently, the gilded centerpiece of a hotly-contested custody battle.

In his paper, 'Globalization in Art Law: Clash of Interests and International Tendencies', Erik Jayme states that "current issues of international art law usually bring about a clash of interests of strongly different types."[2] Jayme divides these types into five interests: the global interests of the international civil society; the national interests of states and nations in preserving artworks of national significance in the home country; the private interests of the owners of an artwork or the artists; the interests of the artworks themselves; and finally, the market interests.[3]

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[1] Los Angeles County Museum of Art, (LACMA) *Gustav Klimt: Five Paintings from the Collection of Ferdinand and Adele Bloch-Bauer,* at http://www.lacma.org/art/exhibition/klimt/index.aspx (last visited November 10, 2006).

[2] E. Jayme, 'Globalization in Art Law: Clash of Interests and International Tendencies', *Vanderbilt Journal of Transnational Law* (38) 2005, p. 929.

[3] *Ibid.*

The case of *Altmann v. Republic of Austria*[4] is a poignant and telling example of a "clash of interests between the human rights of the heirs of the former owner and the Austrian national interest of preserving the paintings in Austrian territory."[5] This so-called 'clash of interests' raises many issues of international law, one of which is jurisdiction. Where does one go to claim a property right in an artwork in the possession of an institution of a foreign state? Hence, the rich and telling family history of Maria V. Altmann, a U.S. citizen and Jewish heiress, that unfolds amid the backdrop of a jubilant pre-war Vienna, the rise of Nazi occupation of Austria, and fast forwards six decades later in U.S. federal courts.

In this paper, we will look at at the history behind the legal battle to recover the artworks at issue in *Altmann.* Next, we will look at the FSIA and the U.S. Supreme Court case interpreting its application to the *Altmann* case. Last, we will consider acquisition lessons for museums in light of Altmann and consider other doctrines that could arise in a U.S. court claim to recover artworks: equitable tolling of the statute of limitations, and an implied-in-fact contract in bailment.

I. The History behind the Gilded Battle

Maria V. Altmann was born in Austria in 1916, and escaped the country after it was annexed by Nazi Germany in 1938.[6] Ms. Altmann immigrated to California in 1942 and became an American citizen in 1945.[7] She was the niece and sole surviving named heir of Ferdinand Bloch-Bauer, who died in Zurich in 1945.[8] Ferdinand Bloch-Bauer, a wealthy sugar magnate, maintained his principal residence in Vienna.[9] Ferdinand and his wife Adele, the uncle and aunt of Maria Altmann, lived in an "urban Viennese palace filled with cultural treasures: exquisite furniture, a world-renowned porcelain collection, and paintings by Gustav Klimt as well as other artists."[10] One of the best known of these paintings is Klimt's glorious 1907 painting, *Portrait of Adele Bloch-Bauer I.*[11]

> "Foremost among the rare 'gold style' works, the painting captures its elegant and intelligent subject as the ideal of feminine beauty. The figure dissolves into sumptuous patterning reminiscent of the Byzantine mosaics at Ravenna, Italy, portraying the Empress Theodora, which Klimt had visited in 1903. Klimt's fine craftsmanship in this work is evident in his varied uses of real gold: as a diffuse

[4] Altmann v. Republic of Austria, 142 F. Supp. 2d 1187 (C.D.Cal. 2001); Altmann v. Republic of Austria, 317 F.3d 954 (9th Cir. 2002); Republic of Austria v. Altmann, 541 U.S. 677 (2004); Altmann v. Republic of Austria, 377 F.3d 1105 (9th Cir. 2004); Altmann v. Republic of Austria, 335 F. Supp. 2d 1066 (C.D. Cal. 2004).
[5] Jayme, *supra* note 2, p. 942.
[6] 541 U.S 677, 681.
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*
[10] LACMA, *supra* note 1.
[11] *Ibid.*

> background luster reminiscent of Japanese lacquer, as the fabric of a flowing gown, and as a pattern punctuated with Egyptian god's eye motifs. In contrast with this rich decorative treatment, Adele's face stands out as an extraordinarily modern psychological portrayal, while her hands are arranged gracefully to conceal a deformed finger. Self-assured yet introspective, she comports herself as a woman of privilege devoted to the world of the intellect." [12]

Adele Bloch-Bauer died in 1925, leaving a will in which she made her husband her heir, but requested that after his death the Klimt paintings would go to the Austrian Gallery.[13] Ferdinand never executed any document transferring ownership of the paintings at issue to the Gallery, and he remained their sole legitimate owner until his death.[14] When drafting his will, he knew that many Austrians had supported the Nazi regime, and did not want the Klimt paintings to go to the Austrian Gallery.[15] Therefore, his will bequeathed his entire estate to his niece, Maria Altmann, another niece, and a nephew.[16] In 1938, Ferdinand fled the Nazi anschluss of Austria to avoid persecution, leaving behind all his holdings, including his paintings, a valuable porcelain collection, and his beautiful home, castle, and sugar factory.[17]

The Nazis took over the Bloch-Bauer residence in Austria, and enlisted the help of a lawyer to divide the estate. Dr. Erich Fuhrer took possession of the six Klimt paintings, selling three to the Austrian Gallery, keeping one and selling another to the Museum of the City of Vienna.[18] In 1946 Austria declared that all transactions motivated by the Nazis were void.[19] However, Altmann and her family members were unsuccessful in recovering the Klimt paintings, despite this official policy.[20] In 1998, the Austrian government created a Committee made up of government officials and art historians to advise the Minister for Education and Culture which artworks should be returned and to whom.[21] The Committee recommended against returning the six Klimt paintings at issue.[22] Altmann filed suit in Austria to overturn the Committee's decision. After a voluntary dismissal of her suit in the Austrian courts, due to high Austrian court costs, Altmann filed suit in the U.S. District Court for the Central District of California.[23] The U.S. Supreme Court granted certiorari limited to the question of whether the FSIA applies to claims that are based on conduct that occurred before the Act's enactment.[24]

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[12] *Ibid.*
[13] 541 U.S 677, 681-682.
[14] *Idem,* 682.
[15] LACMA, *supra* note 1.
[16] 541 U.S 677, 682.
[17] 317 F.3d 954, 960 (9th Cir. 2002).
[18] 541 U.S 677, 682.
[19] 317 F.3d 954, 960 (9th Cir. 2002).
[20] *Ibid.*
[21] *Idem,* 961.
[22] *Ibid.*
[23] 541 U.S 677, 685.
[24] *Idem,* 681.

II. FSIA and the U.S. Supreme Court Decision

The "FSIA provides a limited means to obtain jurisdiction over foreign sovereigns and their agencies and instrumentalities and codifies a statutory set of exceptions to foreign sovereign immunity".[25] Those exceptions include actions involving waiver of immunity, commercial activity, rights in property taken in violation of international law, rights in property in the U.S., tortuous acts occurring in the U.S., and actions brought to enforce arbitration agreements with a foreign state.[26] More specifically, the FSIA expropriation exception provides that:

> A foreign state shall not be immune from the jurisdiction of courts of the U.S. or of the States in any case--(3) 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 U.S. in connection with a commercial activity carried on in the U.S. by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the U.S.…[27]

The U.S. District Court held that the FSIA's expropriation exception applied in Altmann's suit against Austria,[28] and the Court of Appeals affirmed that holding.[29] However, the Supreme Court declined to review this aspect of the courts' opinions, confining their grant of certiorari to the issue of the FSIA's general applicability to conduct that occurred prior to the Act's 1976 enactment, and more specifically, prior to the State Department's 1952 adoption of the restrictive theory of sovereign immunity.[30]

The U.S. Supreme Court found clear evidence that Congress intended the Act to apply to pre-enactment conduct.[31] The preamble of the FSIA expresses Congress' understanding that the Act would apply to all post-enactment claims of sovereign immunity.[32] 28 U.S.C. § 1602 states, in relevant part, that "[c]laims of foreign states to immunity should henceforth be decided by courts of the U.S. and of the States in conformity with the principles set forth in this chapter."[33] The Court stated that "Immunity 'claims' not actions protected by immunity, but assertions of immunity to suits arising from those actions are the relevant conduct regulated by the act this language suggests Congress intended courts to resolve *all* such claims 'in conformity with the principles set forth' in the Act, regardless of when the underlying conduct occurred."[34]

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[25] 317 F.3d 954, 962 (9th Cir. 2002).
[26] *Ibid* (citing 28 U.S.C. § 1605).
[27] 28 U.S.C. §1605 (a).
[28] 142 F.Supp.2d, 1202.
[29] 317 F.3d 954, 967-969, 974.
[30] 541 U.S 677, 692.
[31] *Idem,* 697.
[32] *Ibid.*
[33] 28 U.S.C. § 1602.
[34] 541 U.S 677, 698.

In the opinion, Justice Stevens notes that "any such claim asserted immediately after the statute became effective would necessarily have related to conduct that took place at an earlier date."[35] The Supreme Court affirmed the judgment of the Court of Appeals, emphasizing the narrowness of their holding that the FSIA clearly applies to conduct, like that of Austria's, that occurred prior to 1976, and likewise prior to 1952 when the State Department adopted the restrictive theory of sovereign immunity.[36] The Court held that as to the "Republic of Austria and the national Austrian Gallery, applying the FSIA to the takings of these paintings in the 1930's and 1940's is not an impermissible retroactive application of the Act."[37]

III. Lessons in Acquisitions for Museums

Museums are often thought to have the power to acquire and dispose of artworks as they desire. The story of the portrait of Adele Bloch-Bauer I serves as a caution to museums and not-for-profit institutions that there are legal and ethical restrictions on acquisitions both by purchase and by gift. Acquisitions by purchase or by gift must undergo both legal and ethical scrutiny by either in-house or out-house counsel. Additionally, in considering legal challenges that can be raised within U.S. jurisdiction, the doctrine of equitable tolling and the imputation of an implied-in-fact bailment contract with a claim of breach should be considered. Fortunately, there is an United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention currently in place that can resolve many of the problems that are seen in the cases discussed below.

When a work is acquired, not by purchase, but by gift, determining the validity of title is not an easy task. For example, yet another World War II-related case offers insights on how equitable tolling and the so-called implied-in-fact contract can determine the legal status of museum holdings. In *Rosner v. U.S.*, the plaintiff's brought a class action on behalf of Hungarian Jews and their descendents whose personal property was stolen by Nazis, transported by the "Hungarian Gold Train," and later captured by the U.S. Army in Austria.[38] The complaint alleged a breach of an implied-in-fact contract in bailment and asserted the doctrine of equitable tolling on any applicable statute of limitations.[39] The defendant moved to dismiss the complaint arguing both that the claim was barred by the sovereign immunity of the U.S., and that the allegation of a breach of an implied-in-fact contract failed to state a claim upon which relief could be granted.[40]

The court first addressed the U.S. government's defense of sovereign immunity which included a statute of limitation on civil actions not brought within six years from the time the right of

[35] *Ibid.*
[36] *Idem,* 699.
[37] 317 F.3d 954, 974.
[38] *Idem,* 1203-04.
[39] *Idem,* 1204.
[40] *Ibid.*

action arose.[41] The U.S. argued that the suit was barred by the statute of limitations because Hungarian Jews knew about the U.S. Army's possession of the property as far back as 1947.[42] The plaintiffs responded with two counter-arguments: (1) the doctrine of continuing violation had imposed a new statute of limitations that had not yet expired, and (2) the period for filing the action should be tolled by the principle of equitable tolling.[43] After first rejecting the plaintiff's argument that the doctrine of continuing violation applied, the court considered the plaintiff's argument on the issue of equitable tolling.[44] "The equitable tolling doctrine allows plaintiff's to sue after the expiration of the applicable statute of limitations, provided they have been prevented from doing so due to inequitable circumstances.[45] The plaintiffs argued that the U.S. government "kept them ignorant of vital information" necessary for them to pursue their claims."[46] Additionally, the plaintiff's asserted that the unique circumstances surrounding the Holocaust warranted the application of the equitable tolling doctrine. The court held that the plaintiff's allegations satisfied the Supreme Court's equitable tolling test because "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."[47] The court noted that in the years after World War II, Jewish refugees had a particularly difficult time even maintaining the necessities of life and a failure to allow equitable tolling would result in the government benefiting from its alleged wrongful conduct.

Next, the court addressed the plaintiff's claim for breach of an implied-in-fact contract.[48] Generally, to state such a claim in U.S. courts, a claimant must show "mutuality of intent to contract, offer and acceptance, and that the officer whose conduct is relied upon had actual authority to bind the government in contract."[49] The U.S. government in *Rosner* argued that the plaintiffs had not properly alleged any expression of intent on the part of the government to return the property. The plaintiffs asserted that the government: (1) accepted the property from the "Gold Train" with express knowledge that it belonged to the plaintiffs; (2) never claimed ownership of the property; (3) took possession with the intent of returning it to the owners; (4) expressly indicated that any identifiable property would be returned to the rightful owners in accordance with U.S. custom and policy; and (5) falsely asserted that the property was unidentifiable and, therefore, breached its contract with the rightful owners.[50] Based on these assertions, the court found that the claim could survive a motion to dismiss and could be heard at trial.

Where a claim is brought in a U.S. federal court to recover artwork in the possession of a non-

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[41] *Idem,* 1206 (considering 28 U.S.C. § 2401(a)).
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.* (citing *Ellis v. Gen. Motors Acceptance Corp.,* 160 F.3d 703, 706 (11th Cir. 1998); *Justice v. U.S.,* 6 F.3d 1474, 1475, 1479 (11th Cir. 1993).
[46] *Ibid.*
[47] *Ibid.*
[48] *Ibid.*
[49] *Idem,* 1214.
[50] *Idem,* 1214-15.

U.S. museum, not only will sovereign immunity be at issue, as in the case of *Altmann v. Republic of Austria,* but a plaintiff may argue that the doctrine of equitable tolling should overcome any applicable statute of limitations and that an implied-in-fact contract in bailment was formed and breached. Such disputes can be addressed by the adoption of museum acquisition policies that consider both legal and ethical issues in acquiring artworks either by purchase or by gift. One of the most widely adopted formal statements on museum acquisitions is the "Joint Professional Policy on Museum Acquisitions: The Resolution Concerning the Acquisition of Cultural Properties Originating in Foreign Countries", formulated by two leading professional societies.[51] In essence, the Resolution suggests that museums should individually implement the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The Resolution also suggests that each museum draft a policy on ethics of acquisition. The adoption of such legally and ethically sound policies will reduce the likelihood of property claims against museum acquisitions.

Conclusion

With the Supreme Court's holding in 2004, Altmann had finally found her aureate avenue for justice in her gilded custody battle. However, desiring to avoid a long, drawn out legal process with appeals, Altmann's attorney, E. Randol Schoenberg, entered into legally binding arbitration with the Austrian authorities.[52] In January 2006, an Austrian arbitral panel issued its verdict that five of the six Klimt paintings at issue belonged to the heirs, including the Adele Bloch-Bauer I.[53] Subsequently, the press reported that the Adele Bloch-Bauer I was sold for US$135 million to the cosmetic baron Ronald Lauder and since July 2006 resides in his Neue Galerie in New York City. At the time of this transaction, the Adele Bloch-Bauer I was the most expensive painting ever sold.

Like any custody battle, or clash of interest, there are always two sides to the story. The fact that the battle started in Austrian courts, came to U.S. courts, but was finally resolved through arbitration in Austria shows the complexity and international scope of these battles. The museum acquisition lessons from *Altmann* is that more than 50 years can pass before a claim arises and that jurisdiction can arise in unexpected locales. Additionally, as seen in *Rosner v. U.S.,* a defendant's statute of limitations defense may be overcome in U.S. jurisdictions by raising such doctrines as equitable tolling and implied-in-fact bailment.. The clear lesson for public and privately owned museums is that developing clear legal and ethical acquisition policies is a must, whether developed individually or through recognized resolutions such as that adopted by UNESCO.

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[51] The International Council of Museums (ICOM), composed of approximately 3,000 institutions and national committee in 174 countries, and the Association of Art Museum Directors (AAMD), composed of approximately 90 directors of the major museums in the U.S.

[52] LACMA.

[53] LACMA. See E. Randol Schoenberg, *Causa Bloch-Bauer,* at www.adele.at (last visited November 12, 2006) (Altman's attorney has created a website compiling all the relevant documentation with English translations, including the arbitration documents).