

**The Lady in Gold : Jurisdictional and Other Legal Issues in Its Recovery**  
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**HISTORY OF THE PAINTINGS**

In the early 20th Century Adolph Hitler had been refused entry to a prestigious art school. He chose another career path and proceeded to loot as much of the outstanding artwork in Europe as possible. Of interest to him were six paintings commissioned or purchased by Ferdinand Bloch-Bauer from Gustav Klimt, including two portraits of Ferdinand's young wife, Adele Bloch-Bauer. Adele died in 1925 of meningitis. In her Will, she asked that her husband consider donating the Klimt paintings to the Austrian National Gallery. He was the owner of the portraits and at some later time indicated his desire to do so.

The Nazis invaded Austria in March 1938. After the *Anschluss* they began a frenzied and quick expropriation of Jewish property, some of it through "aryanization". Ferdinand fled Austria, eventually living in Zurich, Switzerland, where he died in November, 1945. What property the German Reich had not taken through involuntary donation, it now took through tax evasion proceedings. From Ferdinand Bloch-Bauer they confiscated real estate, his financially successful sugar factory, and personal property. From 1939 through 1943, Dr. Führer, an administrator of Ferdinand's assets, began to impound, sell or donate Ferdinand's personal property to a variety of third parties, including the Austrian National Gallery.

Ferdinand Bloch-Bauer left a Will by which he directed that his wealth go to his nephew Robert and nieces Louise and Maria. At the time of his death, Maria Altman had already escaped Austria and was living in Los Angeles.

At the end of the war, much of the confiscated artwork was still in existence, having been stored in bomb-proof underground shelters. The supervision of the disposition of much of the artwork was done by the Allies and returned to the country of origin, but not necessarily to the original owners. It was up to each country to work out who to return it to, if to anybody. Claimants would have to make claims to their property to the country now holding the artwork.

**LEGAL ISSUES**

Was Adele's Will dispositive as to the legatee of the Klimt portraits of her?

Did Ferdinand give the Klimt portraits of Adele to the Austrian government?

Did Austria legally acquire title to the portraits?

Did the U.S. District Court in California have jurisdiction over the suit for return of the Klimt portraits of Adele?

How did the Foreign Sovereign Immunities Act affect the lawsuit?

## **AUSTRIA'S LAWS**

On May 1, 1945, after the collapse of the Nazi regime, the Austrian government passed laws rescinding any laws passed by the National Socialists during their occupation of Austria. The Registration Act of 1945 obligated any person holding "aryanized" assets to register them with Austrian authorities for claim by the rightful owners.

On May 15, 1946, the Austrian Government passed the Annulment Act, which declared null and void all transactions forcibly caused by the Nazi occupation from 1938 to 1945. Other laws were passed to allow people to reclaim their property.

Between 1946 and 1949 Austria adopted seven restitution acts which dealt with the restitution of seized assets. Two dealt with seized works of art held by a public administration or in public ownership. One was applicable to property in private ownership.

The Austrian government applied the provisions of the Export Prohibition Law of 1918 to the release of artwork of note, artwork particularly important to Austria's cultural values and reputation. This required any person wishing to take this artwork out of the country to obtain export permits for it. Oftentimes, the export permits were only granted if the requestor donated artwork of equal value and importance to the government, for display in Austrian museums.

## **THE BLOCH-BAUERS' FIRST ATTEMPT TO RECOVER THE PAINTINGS - THE REQUEST**

In 1947-1949, the Bloch-Bauer heirs, through their Viennese attorney, Dr. Rinesch, worked to obtain restitution of their and their uncle's personal property, including the Klimt paintings. In 1947, he determined that the Klimt paintings were in the Austrian Gallery. The Gallery advised him that it owned all six paintings, although only having three in its possession. It further advised Dr. Rinesch that Adele had given the two Klimt portraits of her to the Gallery via her Will. It told the attorney that he would have to find the three missing paintings and give those to it.

When Dr. Rinesch saw Adele's Will, he told the family that the Will might have left the paintings to the gallery. The Austrian government still maintained that Jews wanting to receive export permits to take artwork out of Austria had to donate valuable artwork in exchange for it. This was ostensibly with the goal of preserving national heritage. Therefore, to obtain a large portion of the artwork and export permits, Dr. Rinesch agreed to donate the paintings *Häuser in Unterach am Attersee*, *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Apfelbaum I*, which were already in the State's possession. In addition, Dr. Rinesch relinquished the paintings *Buchenwald* and *Schloss Kammer am Attersee III*. He stated to be acting on behalf and with the approval of the heirs, although Maria Altman later denied that claim.

The portraits of Adele were left with the Austrian museum. The Bloch-Bauer family believed that they had no choice, that these paintings were owned by the Austrian government.

Years later, in 1998, the Austrian National Gallery exhibited some paintings in New York. The NY District Attorney, Hans Morgenthau, seized at least one, the *Portrait of Wally*, by Schiele, on the basis that it had been looted from its rightful owner. This led to further allegations that the Gallery possessed looted art, which the Gallery denied. The Austrian Minister of Culture denied that anything had been looted.

A Viennese journalist, Hubertus Czernin (Hubertus Alexander Felix Franz Maria Czernin von und zu Chudenitz), heard about this and decided to look further into whether the Austrian government and its museums held any looted paintings. He was a young Viennese aristocrat turned crusading journalist, a count of a thousand year Bohemian lineage. He was the journalist who investigated Kurt Waldheim's Nazi past.

He discovered that in 1941 Dr. Fuhrer had sent a letter handing over the painting to the Austrian government, with the closing "Heil Hitler". It had not been a gift from Ferdinand.

The Austrian government decided that it would now and truly look at everything. If art had been involuntarily donated in order to obtain export permits it would be returned.

Maria Altman heard about this and called Randol Schoenberg's mother, her friend, then Randy.

E. Randol Schoenberg is the grandson of Arnold Schoenberg, the musician. His grandmother was friends with Maria Altman. She brought her documents to Randy. The letter from the lawyer indicated that they might be able to make a deal.

His professional experience before, during and after the suit is impressive.

[www.bslaw.net/schoenberg](http://www.bslaw.net/schoenberg). He accepted the case knowing that he would have to carry it for some time, and having to listen to many others telling him along the way that he would fail. He believed in the rightness of going forward.

## **THE BLOCH-BAUERS' SECOND ATTEMPT TO RECOVER THE PAINTINGS - THE CLAIM**

The new Austrian law did not allow a suit to recover artworks but just set up a commission to determine whether something should be returned. The commission did not have any Jewish members. Schoenberg wrote to the commission asking about the paintings. They did not respond. He then sent copies of his documents setting forth Maria's ownership. They did not respond.

He found an Austrian lawyer to prepare legal opinions about Adele's Will. This lawyer determined that Adele did not own the paintings and that she did not gift them to the Austrian government.

He then asked to speak to the committee, which they denied. Maria made a formal claim to the paintings.

In June, 1999 the commission members met and said that they would not return the Klimt paintings. Their reason was that Adele's Will gave the paintings to the Museum. If she herself did not give the paintings to the museum, her request was a binding legal obligation on her husband to donate the paintings to the Gallery on his death.

The family looked for an Austrian lawyer to take the case.

The new law did not readily allow for a suit. When they were ready to file a lawsuit Maria was told that they would have to deposit a percentage of the value of what is at stake. She would have had to pay about \$2 million just to proceed with the case. They applied for a reduction. The court granted it but she would still have to pay virtually everything she owned to go ahead with a lawsuit. The Bloch-Bauer family said it could not happen; they did not have the money. Maria Altman and her family dropped the claim in Austria.

### **THE BLOCH-BAUERS' THIRD ATTEMPT TO RECOVER THE PAINTINGS - THE U.S. LAWSUIT**

Schoenberg knew that they would not recover the paintings in Austria and that he had to find some way to bring suit in the United States and have it heard here. He found the means when he happened on a copy of a catalogue from the Austrian National Gallery which was for sale in a Los Angeles bookstore. Austria was engaged in a commercial activity. He found his personal jurisdiction.

They filed suit in Los Angeles Federal Court alleging eight causes of action and violations of Austrian, international, and California law. The complaint asserted jurisdiction under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1330(a):

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section [1603 \(a\)](#) of this title as to any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

It stated that the defendants were engaged in a commercial activity in the U.S. and were not entitled to immunity under the FSIA because of the Act's "expropriation exception" in § 1605(a)(3).

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

- (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
- (2) 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;

(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 United States in connection with a commercial activity carried on in the United States 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 United States.

This exception 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 activity here." *Republic of Austria v. Altman*, 541 U.S. 677, 159 L.Ed.2d 1 (2004) at 685-6.

Petitioners filed a motion to dismiss based on their claim of sovereign immunity, that they enjoyed absolute immunity and that the FSIA could not apply retroactively to anything which took place in 1948.

The District Court rejected this argument on the basis that the FSIA did apply to actions taken prior to the adoption of the FSIA in 1976 and that the Act's expropriation exception extends to Altman's specific claims. The court deemed the FSIA a jurisdictional statute which did not alter substantive legal rights. It ruled that the Act would be applied to all cases decided after its enactment regardless of when the plaintiff's cause of action may have accrued.

The 9th Circuit Court of Appeals upheld the lower court's decision. Rather than relying on the Act's jurisdictional nature, the court found that application of the FSIA was not impermissibly retroactive because Austria could not have expected to receive immunity for the wrongdoing when it occurred.

The U. S. Supreme Court accepted *certiorari*. It affirmed the judgment of the Court of Appeals but for different reasons. It ruled solely on the issues of whether the FSIA applied retroactively to pre-1976 actions and specific claims.

## **FOREIGN SOVEREIGN IMMUNITIES ACT**

The U.S. Supreme Court (SCOTUS) cited *Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812) as the source of American jurisprudence on foreign sovereign immunity. This case dealt with ownership of a French ship which had taken refuge in the port of Philadelphia. Chief Justice Marshall had written that foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement. As a matter of comity, the international community had implicitly agreed to waive jurisdiction over other sovereigns in certain classes of cases. 541 U.S. 688-689.

Until 1952, the Executive Branch of the U.S. government followed a policy of requesting immunity in all actions against friendly sovereigns, but then decided that it should no longer be granted in certain types of cases. Rather than applying absolute immunity, it decided to apply a "restrictive theory" of sovereign immunity". Thus, the sovereign would be granted immunity with regard to

sovereign or public acts (*jure imperii*) but not with respect to private acts (*jure gestionis*). 541 U.S. 690.

This change caused great confusion particularly when foreign states requested immunity or even failed to request immunity.

In 1976 Congress sought to remedy the problems by enacting the FSIA. The goal was to implement a set of standards governing claims of immunity in every civil action against a foreign state. It would codify the restrictive theory of sovereign immunity and transfer primary responsibility for immunity determinations from the Executive to the Judicial Branch. This would remove some of the political aspects of the cases.

Of importance to the Court's decision, the preamble states that "henceforth" federal and state courts were to decide claims of sovereign immunity in conformity with the Act's principles. The Act would prescribe the procedure to obtain personal jurisdiction over a foreign state, in § 1330(b) and would carve out certain exceptions to the general grant of immunity, including the expropriation exception. 541 U.S. at 691.

The District and Appellate Courts agreed with Altman that the FSIA's expropriation exception covered Austria's alleged wrongdoing. The U.S. Supreme Court declined to review this aspect.

For the U.S. Supreme Court, the sole issue was the FSIA's general applicability to conduct that occurred prior to the Act's 1976 enactment, more specifically to anything which happened prior to the State Department's 1952 adoption of the restrictive theory of sovereign immunity. 541 U.S. 692.

The Supreme Court first looked at the issue of any law being applied retroactively. It determined that laws cannot be applied retroactively, without explicit statement to that effect by the law maker, when a substantive right would be affected. There is an anti-retroactivity presumption, though it is not a constitutional command. There is generally no retroactive affect on substantive rights when the new law merely confers or changes the tribunal which is to hear a case. When the statute contains no express statement as to a retroactive effect, the court must make this determination.

This brings the Court to the issue of whether the Act affects Austria's substantive rights, and thus would be impermissibly retroactive, or addresses only matters of procedure. 541 U.S. 694.

Prior to 1976, foreign states had an expectation of immunity for their public acts but no "right" to such immunity. The FSIA merely opened up U.S. courts to plaintiffs with pre-existing claims against foreign states. It did not impose new duties or increase those states' liability for past conduct. Thus, the Court reasoned that the Act did not appear to unfairly operate retroactively.

Prior decisions operated to avoid *post hac* changes to legal rules on which parties had relied in shaping their conduct. But foreign sovereign immunity was not to permit foreign states to shape their conduct in reliance on future immunity from suit in U.S. courts but to grant some current protection from the inconvenience of suit as a gesture of comity. 541 U.S. 696, *citing Dole Food Co. v Patrickson*, 538 U.S. 468 (2003).

Based on the preamble to the FSIA, the Court stated to find clear evidence that Congress intended the Act to apply to pre-enactment conduct:

"*Claims* of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.' 28 U.S.C. §1602 (emphasis added)".

541 U.S. 697

The Court held that a prior holding (in *Landgraf v. USI Film Products*, 511 U.S. 244 [1994]) requiring an express command as to retroactivity may not have been met but it found the language sufficient to require claims to "henceforth" be decided by the courts, regardless of when the underlying conduct occurred. 541 U.S. 697-698.

The FSIA was intended by Congress to be the sole basis for obtaining jurisdiction over a foreign state and unquestionably applied to claims based on pre-1976 conduct. 541 U.S. 698

The Austrian government argued that foreign expropriations are public acts for which sovereigns expected immunity, prior to the enactment of the FSIA. The Court held that the FSIA did not affect the application of the doctrine to acts of state. The government still had this argument.

It also quickly rejected the Executive Branch's arguments in favor of the Austrian government having immunity by ruling, on its *amicus* brief, that the reach of the FSIA is purely a question of statutory construction, well within the province of the judiciary. 541 U.S. 701.

The Federal District Court of Los Angeles could hear the case, which it did, until the parties agreed to submit it to arbitration.

Maria Altman was on one side or the other of being 90 years old. Randy Schoenberg suggested that they could spend another year and one-half of vicious litigation or she could take her chances and try arbitration, which the Austrians had previously rejected. Without it, she might not live to see the end of the case. She chose arbitration. As it turned out, they won.

Before submitting the paintings for sale, Schoenberg arranged for a California museum to display all of the paintings in one room, exactly as they had been displayed when Ferdinand had them in his home.

#### References:

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[www.artrestitution.at](http://www.artrestitution.at)

Randy Schoenberg YouTube speech: [www.youtube.com/watch?v=AvXMjq9e2cg](http://www.youtube.com/watch?v=AvXMjq9e2cg)

Randy Schoenberg background: [www.bslaw.net/schoenberg](http://www.bslaw.net/schoenberg)

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