**From:** **E. Randol Schoenberg** randols@BSLAW.NET
**Subject:** Re: More restitution
**Date:** January 26, 2015 at 12:06 PM
**To:** Blimlinger Eva e.blimlinger@akbild.ac.at
**Cc:** E. Randol Schoenberg randols@bslaw.net

Eva,

Because you are my only friend on the Beirat, I want to make sure you understand exactly what I am asking. I would never ask you to do anything that was wrong, or illegal, or not permitted. I have never asked for anything that I did not fully believe was right.

Yes, the arbitrators made a decision in 2006 and it was upheld as not contrary to the *Ordre Public* by the OGH in 2008. However, in 2009, the *KunstrückgabeG* was amended and a new section was added — § 1(1)(2a) — that pertains to wartime transactions outside of Austria. So no one has ever looked at or decided whether this new section of the law might apply to the *Amalie Zuckerkandl* painting. I am asking that the Beirat consider whether the painting should be returned under the new section.

There is good reason to look again at the case under the new section. The Arbitrators determined that Ferdinand somehow managed to give the painting to Minnie Muller-Hofmann at some time after it was listed in the inventory of his home in January 1939. (Again, I find this an impossible conclusion, but leave that aside for the moment and assume for the sake of argument that it is correct.) The fact is that in 1939, Minnie sent her children on a Kindertransport and moved to Bavaria. (The Müller-Hofmann heirs presented several documents evidencing this.) So, if what the Arbitrators say is true, then it is possible, even likely, that the painting was delivered to Minnie in Bavaria, which would make this a transaction squarely covered by the new section of the law enacted in 2009. I am asking that the Beirat consider whether the painting should be returned under the new section. That question has never been answered, and it is not barred by any concept of *res judicata*. I hope you will support my request and ask that the case at least be looked at again from the perspective of the new statute.

I know that in 2008 Prof. Jabloner cited the concept of "*ne bis in idem*." In general this is a defense against prosecution twice for the same crime. In America we call it "double jeopardy." There are good reasons, however, why this criminal law maxim, as well as the civil law doctrines of *res judicata* or collateral estoppel, should not be applied in this case. First, as I mentioned above, there is a new section of the law. So it cannot be said that the Beirat's reconsideration of the matter would violate these principles. But second, none of these principles concern the jurisdiction of a tribunal. In other words, these are defenses that can be asserted, or waived, by a defendant, but they do not bar a court from hearing a case unless they are raised by a party. Since the Beirat is not a court or arbitration panel, but an advisory board, it does not permit any party to participate. This means that no procedural defenses can be presented by either side. It is not the duty of the Beirat to raise procedural defenses to considering the return of artworks. Indeed, the entire purpose of the *KunstrückgabeG* and its structure was to eliminate the technical and procedural defenses (for example, the statute of limitations, inability to pay court fees, or even a prior settlement or dismissal of a lawsuit) so that each case could be considered on the merits.

Third, the defense of *res judicata* in no way prevents the Republic of Austria or the Beirat from deciding on its own to return the painting. In other words, even if someone sues you and you win the lawsuit, you can still decide later to accept the claim. Winning the lawsuit doesn't prevent the Beirat from advising the government that the painting should be returned. This is especially true if, upon reviewing the facts and the law, you conclude that a mistake was made in the prior litigation, and that the government's erroneous legal position was the cause of the mistake. I have already pointed out many times that the legal standard adopted by the Arbitrators in 2006 at the urging of Dr. Toman, is not the standard that the Beirat has used since 2007. The fact is that even if one were to accept the Arbitrators' finding of a free gift of the painting from Ferdinand to Minnie Müller-Hofmann (despite the lack of any supporting evidence, and contrary to the mountain of evidence confirming the liquidation of Ferdinand Bloch-Bauer's entire collection by Dr. Führer), such a gift is by definition void under the longstanding terms of the *RückstellungsG*, just as it was in 1948, when this question was first addressed.

> „Eine auch ohne die Machtergreifung des Nationalsozialismus erfolgte Vermögensübertragung ist nicht bei einer seitens des auswandernden Eigentümers erfolgten Schenkung von Einrichtungsgegenständen an seine Freundin anzunehmen. Denn wenngleich die Gewährung einer Abfindung bei einer Lösung der Beziehungen zu einer Freundin üblich ist, ist nicht dargetan, daß der Eigentümer auch ohne die Machtergreifung, wenn er nicht durch die Verhältnisse zur Auswanderung veranlasst worden wäre, der Erwerberin gerade die in Frage stehenden (Einrichtungs-)Gegenstände geschenkt hätte."
> (Heller/Rauscher, Die Rechtsprechung der Rückstellungskommissionen, 1949, 221, S. 445-6, Rkb Wien 817/48 v. 10.9.1948
> http://www.bslaw.com/altmann/Zuckerkandl/Klage/Heller.pdf ).

The Beirat has confirmed the correctness of my opinion of the law in its more recent decisions. See, for example, Maria Kalbeck Mautner (23. Jänner 2009) ("Gegenständlich lässt sich zwar nicht feststellen, auf welchem Wege die Objekte von der damaligen Theatersammlung erworben wurden. Da jedoch Maria Kalbeck Mautner verfolgt war und im November 1938 Österreich verlassen musste, kann dahingestellt bleiben, ob die Objekte aus dem von der Spedition nicht abgegangenen Umzugslift stammen und in der Folge beschlagnahmt wurden oder von Maria Kalbeck Mautner aus Anlass ihrer Flucht der Theatersammlung **geschenkt** oder an diese veräußert wurden. In jedem Fall handelt es sich um Rechtsgeschäfte, welche durch die Verfolgung von Maria Kalbeck Mautner bedingt (bzw. Teil der Verfolgung) waren. Der Beirat kommt daher zum Ergebnis, dass die Voraussetzungen § 1 Z 2 Kunstrückgabegesetz erfüllt sind.")

Under these circumstances, the doctrine of *res judicata* cannot be used to prevent the Beirat from making a new recommendation based on its current understanding of the law, rather than the erroneous version that the Republic urged the Arbitrators to adopt in the arbirtation. For this reason, I believe it would be proper for the Beirat to reconsider the case in its entirety, and not only under the new section of the law that was enacted in 2009.

Last, I want to address your concern about whether there are new facts. I have a few responses. First, I have presented at least one new fact, and that is that Ruth Pleyer, who was accepted as a historian expert witness, failed to disclose that she had a significant monetary outcome of the case. Has anyone checked to see if this is true? My understanding is that the Beirat completes its own examination of the facts using the Provenance Commission. Since I am not allowed to participate in the proceedings, it cannot be my duty alone to bring new facts. Has the Commission been asked to investigate and find new facts in this case? I have never hidden anything in any restitution case and am eager and willing to participate with the Provenance Commission and the Beirat and assist it in determining all of the relevant facts. If some of the other parties are less forthcoming, maybe that should also be taken into consideration.

As I have explained over and over again, it must not be the duty of the victim to show what the Nazis did with the property after it was seized and the victim fled the country. If there is an unusual defense, the other side (*Erwerber)* has to prove it. That has always been the case, at least since 1948. I have always been very frustrated at the refusal to return this painting, merely based on the suggestion that the Bloch-Bauer heirs have not disproved the existence of a theoretical defense (for which no proof at all has been offered, and which is not even a valid defense!). In no other case decided by the Beirat has this ever been the standard. In any event, because of the potential application of the new section of the law, there should not be any requirement that we present new evidence as well.

I realize that I am asking you, or someone, to do a lot of work. If there is any way I can help lessen the burden, I am eager to do so. But justice requires that I ask you and the Beirat to do what is right. Please let me know if I can help you, or anyone, understand the issues I am raising. I am at a great disadvantage because my German is just not good enough, and I have to write in English. I hope that you can make sure that this does not work against my clients. Please feel free to share this letter with other members of the Beirat, if that makes it easier. I know this is very difficult, but I also know you all want to do what is right, and I hope I have given you a way to do that.

Randy