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wegen: Feststellung gemäß Punkt 6 des Arbitration Agreements vom Mai 2005

**CONCLUDING STATEMENT
Im Schiedsgerichtsverfahren**

1-fach

**Gleichschriften werden den beiden anderen Schiedsrichtern
sowie den Parteienvertretern direct übermittelt**

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I. SUMMARY OF CONCLUSIONS

The arbitration agreement (paragraph 6¹) presents two specific questions that must be answered by the Panel: (1) how did the Republic of Austria acquire ownership of the five subject paintings, and (2) have the requirements for restitution under the 1998 art restitution law been met? Our conclusions are as follows:

On question one:

- The Republic of Austria acquired ownership of *Häuser in Unterach am Attersee* on April 12, 1948, as a result of the oral agreement made by Dr. Rinesch and Dr. Garzarolli on April 10, 1948 that was also memorialized on April 12, 1948. (. /Z, . /AC).
- The Republic acquired ownership of *Buchenwald (Birkenwald)* on November 23, 1948 from Dr. Wagner of the City of Vienna *Städtische Sammlungen* as a result of the assistance provided by Dr. Rinesch pursuant to the oral agreement of April 10, 1948 that was memorialized on April 12, 1948. (. /AC, . /GS, . /GU, . /HT, . /HU).
- The Republic acquired ownership of *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II* and *Apfelbaum* in either 1945 or 1955 as the successor to property obtained by the German Reich, and obtained (or maintained) ownership as a result of the agreement of April 10, 1948 by Dr. Rinesch memorialized on April 12, 1948. (. /AC).

On question two:

- The painting *Häuser in Unterach am Attersee* satisfies § 1 Z 1 *KunstrückgabeG*, because the painting was obtained by the Republic from Ferdinand's heirs in the course of export permit proceedings for Ferdinand's collection. The painting may

¹ “The issues presented to the Panel shall be: Whether, and in what manner, in the period between 1923 and 1949, or thereafter, Austria acquired ownership of the Arbitrated Paintings, *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Apple Tree I*, *Beech Forest (Birch Forest)*, and *Houses in Unterach am Attersee*; and whether, pursuant to section 1 of Austria's Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections dated 4th December 1998 (including the subparts thereof), the requirements are met for restitution of any of the Arbitrated Paintings without remuneration to the heirs of Ferdinand Bloch-Bauer.”

also satisfy § 1 Z 2, as a painting obtained legally by the Republic that was previously subject to a transaction falling under the *NichtigkeitsG*.

- The painting *Buchenwald (Birkenwald)* satisfies § 1 Z 1 *KunstrückgabeG*, because the painting was restituted to the Republic with the assistance of Ferdinand's heirs in the course of export permit proceedings for Ferdinand's collection. The painting also satisfies § 1 Z 2 as a painting obtained legally by the Republic that was previously subject to a transaction falling under the *NichtigkeitsG*.
- The paintings *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II* and *Apfelbaum* satisfy § 1 Z 1 *KunstrückgabeG* because those three paintings were obtained by the Republic from the German Reich and kept in the Republic's possession as a direct result of the April 10, 1948 agreement made by Dr. Rinesch in the course of seeking export permits for Ferdinand's collection. The paintings also satisfy § 1 Z 2 because they were all subject to transactions falling under the *NichtigkeitsG* before being acquired by the Republic in 1945 or 1955.

The legal and factual issues have been set forth in great detail already in the previous submissions by the parties, as well as the more recent opinions by Prof. Rabl (./KA, 008133-008144) and Prof. Graf (./KY, 008353-008376). In particular, we believe Prof. Graf's analysis of the *KunstrückgabeG* is correct and quite convincing. Nevertheless, the arbitration panel will, we hope, forgive us for setting forth one last time our argument with regard to the two legal questions that are presented in the Arbitration Agreement for each of the five paintings. Before we begin this analysis, we have several introductory remarks.

II. WHO HAS THE BURDEN OF PROOF?

A. Preamble

Since the end of World War II, there have been two Austrias. There is the Austria that opposes restitution to the victims of Nazism, typified by the now infamous, anti-Semitic post-war comments by Adele's erstwhile friend Dr. Karl Renner and his colleagues.² But there is also

² See, e.g., Karl Renner April 1945 (./LR), 003515-003516 (“*Rückgabe des geraubten Judengutes, dies nicht an die einzelnen Geschädigten, sondern an einem gemeinsamen Restitutionsfonds. Die Errichtung eines solchen und die im folgenden vorgesehenen Modalitäten sind notwendig, um ein massenhaftes, plötzliches Zurückfluten der Vertriebenen zu verhüten. (Ein Umstand, der aus vielen Gründen sehr zu beachten ist.)*.”) See also, Robert Knight (ed.), “*Ich bin dafür, die Sache in die Länge zu ziehen*”. *Die Wortprotokolle der österreichischem Bundesregierung von 1945 bis 1952 über die Entschädigung der Juden*, Frankfurt a. Main 1988; Robert Knight, *Restitution and*

an Austria that recognizes the injustice committed against Austria's Jewish population and seeks to rectify it, as evidenced by the *NichtigkeitsG* and subsequent restitution laws, as well as Article 26(1) of the Austrian State Treaty.³ The *KunstrückgabeG*, passed unanimously by the Austrian parliament in 1998, is a triumph of the latter view favoring restitution.

In some circles it is popular to suggest that there is a difference between Austria's legal and moral obligations, or to claim that although there is a moral argument in favor of returning Nazi-looted property to Jewish victims, the law does not permit or require it. But this is a false dichotomy. The law and morality point in the same direction in restitution cases. Indeed, as I will demonstrate below, Austrian law *favours* restitution. And in this case, **both** the legal and moral arguments point in favor of restitution of the five subject paintings.

Opponents of restitution -- and there are unfortunately still many of them -- attempt to subvert the law through improper arguments, cloaking themselves in a false veneer of neutrality. But neither the law, nor morality, can afford to be neutral in these types of cases. Even neutrality is a position that is opposed to the moral and legal obligations to do justice to the victims of Nazis. The law is not neutral in restitution cases, and neither should the arbitrators be "neutral" in deciding many of the questions that have been presented in this case.

One could say, in viewing the arguments of both sides (as Prof. Welser and Prof. Rabl have said with respect to Dr. Kremser), that "*Der Wunsch ist Vater des Gedankens.*" That may be true. But if one does not "wish" for restitution, one is not following the law. There are **legal** presumptions that favor the claimants, and burdens of proof that the opponents must meet if they wish to overcome those presumptions.

B. Presumptions and the burden of proof

In this case, there are several legal presumptions that favor the claimants and shift the burden of proof to the opposing side.

Legitimacy in Post-War Austria 1945-1953. Leo Baeck Inst. Year Book XXXVI 1991, p. 413-441 (./KZ, 008377-008391).

³ Article 26(1): "*Soweit solche Maßnahmen noch nicht getroffen worden sind, verpflichtet sich Österreich in allen Fällen, in denen Vermögenschaften, gesetzliche Rechte oder Interessen in Österreich seit dem 13. März 1938 wegen der rassischen Abstammung oder der Religion des Eigentümers Gegenstand gewaltsamer Übertragung oder von Maßnahmen der Sequestrierung, Konfiskation oder Kontrolle gewesen sind, das angeführte Vermögen zurückzugeben und diese gesetzlichen Rechte und Interessen mit allem Zubehör wiederherzustellen.*"

1. § 614 and § 711

*§ 614. Ist eine Substitution zweifelhaft ausgedrückt; so ist sie auf eine solche Art auszulegen, wodurch die Freiheit des Erben, über das Eigentum zu verfügen, am mindesten eingeschränkt wird.*⁴

§ 711. Wenn der Erblasser die Absicht, wozu er den Nachlaß bestimmt, zwar ausgedrückt, aber nicht zur Pflicht gemacht hat, so kann die bedachte Person nicht angehalten werden, den Nachlaß zu dieser Absicht zu verwenden.

These statutes (§ 614 and § 711) provide that if there is any doubt about the directions in a will with regard to the disposition of certain property, the will should be interpreted so that the heirs are **least restricted** in their disposition of the property. As Prof. Kletecka concludes with regard to § 614: “*Führt die Auslegung zu keiner Klärung der Frage, ob eine Ersatzerbschaft angeordnet wurde oder ob zB nur ein unverbindlicher Wunsch oder eine Vorstellungsmittelteilung ohne Rechtsfolgewillen vorliegt, so fehlt der Substitutionsanordnung die Bestimmtheit, und sie ist deshalb unwirksam.*”⁵

Adele’s will provides: “*Meine 2 Porträts und die 4 Landschaften von Gustav Klimt, bitte ich meinen Ehegatten nach seinem Tode der österr. Staats-Gallerie in Wien, die mir gehörende Wiener und Jungfer. Brezner Bibliothek, der Wiener Volks u. Arbeiter Bibliothek zu hinterlassen.*” Adele’s *Bitte* is at the very least “*zweifelhaft ausgedrückt.*” Already in 1926, Adele’s brother-in-law and *Testamentsvollstrecker* Dr. Gustav Bloch-Bauer wrote that Adele’s “*verschiedene Bitten . . . nicht den zwingenden Charakter einer testamentarischen Verfügung besitzen.*”⁶ Dr. Rinesch held the same opinion in 1948 (“*Dies ist zwar nicht die Form eines Legats . . .*”) In a case such as this, therefore, the *Zweifelsregel* of § 614 and § 711 **compels** the presumption that Adele’s *Bitte* is, and never was, binding on Ferdinand.

Put another way, to prevail in its argument **the Republic** would have the burden of demonstrating that Adele’s *Bitte* is binding and enforceable. But of course the Republic cannot

⁴ See also § 652 (“*Der Erblasser kann bei einem Vermächtnisse eine gemeine, oder fideikommissarische Substitution anordnen; dabei sind die in dem vorigen Hauptstücke gegebenen Vorschriften anzuwenden. Gegenstände eines Vermächtnisses.*”)

⁵ See, e.g. Andreas Kletecka, *Ersatz- und Nacherbschaft*, 1999 Wien Manz, pp. 4-8.

⁶ Dr. Gustav Bloch-Bauer was not only Adele’s lawyer and *Testamentsvollstrecker*, but also her brother-in-law (brother of her husband and husband of her sister) as well as her substitute heir if Ferdinand died first. He was in an excellent position to know her precise intentions. Indeed, the impetus for the drafting of Adele’s will on January 19, 1923 must have been the death on September 30, 1922 of her mother Jeanette Bauer, whose estate was also administered by Dr. Gustav Bloch-Bauer. See ./.4, ./.5, ./.6.

do this because the Republic cannot possibly meet its burden of demonstrating that the will is *unzweifelhaft ausgedrückt*. For example, it does not advance the Republic's case to suggest, in a *non sequitur*, that because Adele had "perfect immaculate manners," that she **must** have meant her request (*Bitte*) to be a command (*Auflage*) -- "*verbindliche Anordnungen in die höfliche Form einer Bitte gekleidet hat.*" Of course, a polite person might also use the word *bitte* to **mean** only *bitte*. (In fact, this would seem to be the more polite construction.⁷) The burden on the Republic is **not** merely to show that it is **possible** that Adele intended a binding request, but rather its burden is to demonstrate that it is **impossible** to see it any other way, that her intention is *unzweifelhaft*. The Republic cannot meet this burden. It cannot remove all doubts about Adele's intentions. In this case, the *Zweifelsregel* controls and Adele's *Bitte* **must** be seen as non-binding.

2. § 1237

§ 1237 (aF). Haben Eheleute über die Verwendung ihres Vermögens keine besondere Übereinkunft getroffen, so behält jeder Ehegatte sein voriges Eigentumsrecht, und auf das, was ein jeder Teil während der Ehe erwirbt, und auf was immer für eine Art überkommt, hat der andere keinen Anspruch. Im Zweifel wird vermutet, daß der Erwerb von dem Manne herrühre.

A similar legal presumption exists with regard to the question of whether Ferdinand or Adele owned the Klimt paintings at the time of Adele's death. Under the legal rules at the time (1925), § 1237 provided that in case of doubt it would be presumed that the husband owned the property. Of course, the contemporaneous written statement by Dr. Gustav Bloch-Bauer in 1926 automatically casts doubt on any claim that Adele had owned the paintings. ("*Bemerkt sei, daß die erwähnten Bilder nicht Eigentum der Erblasserin, sondern des erblasserischen Witwers sind.*") Under the law, therefore, it must be presumed that the paintings belonged to Ferdinand. The Republic obviously cannot meet its burden to rebut this presumption.

3. Restitution laws

The Austrian restitution laws also create legal presumptions and shift the burden of proof on many issues to the persons opposing restitution. So, for example, under the 3. *Rückstellungsgesetz*, the burden is on the **defendant** to prove that the transaction would have occurred **independent** of the Nazi takeover – that is, **with** or **without** the Nazis. 3. RStG § 2. The burden cannot be met merely by demonstrating that it is **possible** that the transaction would have occurred as it did, but rather the defendant has to provide **convincing evidence** that the transaction in question was not at all influenced by the Nazi takeover.

⁷ It must be mentioned that in her will, Adele did not always use the polite term *bitte*. In other parts of the will, she uses the more commanding terms *Verpflichtung*, *verpflichte*, and *hat zu tragen*.

“Wenn nach § 2 (1) der Erwerber ‘dartun’ muß, daß die Vermögensübertragung auch ohne den nationalsozialismus erfolgt wäre, so darf er sich nicht damit begnügen, die maßgebenden Umstände nur zu bescheinigen oder glaubhaft zu machen (wie z. B. nach § 28), die Rückstellungskommission muß vielmehr vom privatrechtlichen Tatbestand und der Wahrheit der prozeßrechtlichen Tatsachen überzeugt werden, ”
-- Oberste Rückstellungskommission vom 11.9.1948 Rkv 116/48, abgedruckt in Heller/Rauscher, Die Rechtsprechung der Rückstellungskommissionen (Wien 1949) Nr. 125, S. 259 ff.

Of course, in this case it is impossible for the Republic to prove in a convincing manner that any of the transactions engaged in by Dr. Führer with respect to the Klimt paintings would have transpired even without the Nazi takeover. It should be noted that the Republic’s sole theory is that it had a claim to the paintings under Adele’s will; but Adele asked only that the paintings be given to the museum **after Ferdinand’s death!** All of the transactions undertaken by Dr. Führer took place **while Ferdinand was still alive.** So it is impossible to argue that any of these transactions would have occurred if the Nazis had not invaded. Ferdinand’s letter to Oskar Kokoschka demonstrates that he was trying to take at least the two portraits of Adele out of Austria.⁸ There is no evidence that Ferdinand ever would have traded two paintings for the return of *Schloss Kammer am Attersee III*. Nor is it plausible to claim that without the pressure imposed by the Nazis he would have sold *Adele Bloch-Bauer II* or *Birkenwald*, or let Dr. Führer keep *Häuser in Unterach am Attersee*. Furthermore, Ferdinand’s last two wills (both during and after the war) did not make any bequest of the paintings to the museum.⁹ Therefore, as a factual matter, Ferdinand did not make the bequests requested by Adele. So it is simply impossible for the Republic to prove in a convincing manner that the transactions by Dr. Führer would have been made by Ferdinand, with or without the Nazi takeover. Again the presumption favoring the claimant must prevail in the absence of convincing evidence to the contrary.

The same presumptions in favor of the victims that applies to the earlier restitution laws should also apply in the interpretation of the *KunstrückgabeG*. Where possible, the law should be read in a way that enables restitution of property to the Jewish victims or their heirs. Established Austrian legal norms (for example, the *NichtigkeitsG*, the 3. *RückstellungsG* and Article 26 of the Austrian State Treaty) command this construction. The burden of proof is heavily on the opponent of restitution to **prove** in a **convincing** manner that the property in question does not fall under the restitution law. As demonstrated below, the Republic cannot possibly meet its burden in this case.

⁸ See ./DN, 002937-002939.

⁹ See ./N, 00316-00318; ./DR, 000304-000306.

III. ANALYSIS OF THE LEGAL QUESTIONS FOR EACH PAINTING

A. *Häuser in Unterach am Attersee*

1. Ownership

The Republic of Austria acquired ownership of *Häuser in Unterach am Attersee* on April 12, 1948 from the Modenapark apartment of Dr. Grimm, as a result of the agreement made by Dr. Rinesch and Dr. Garzarolli on April 10, 1948, in which the heirs of Ferdinand Bloch-Bauer acknowledged the request made by Adele Bloch-Bauer in her will.¹⁰

It should be noted that even if one were to presume, as the Republic does, that Adele's will required Ferdinand's heirs to deliver the Klimt paintings to the museum after Ferdinand's death, the Republic had at most only a **potential claim of ownership against Ferdinand's heirs, that arose only after Ferdinand died in November 1945**. Indeed, Dr. Garzarolli prepared to file such a claim with regard to *Häuser in Unterach am Attersee*.¹¹ Adele's will did not automatically transfer ownership of the paintings to the Republic when Ferdinand died. Ferdinand's heirs were approved as heirs by the Swiss court in 1947¹² and were only entitled to make claims for restitution of Ferdinand's artworks after the various restitution laws were enacted.¹³ The Republic never had a direct claim of ownership against third parties. To claim

¹⁰ See ./Z, 00562; ./AC, 00566-00567; ./AD, 00564.

¹¹ See ./X, 000555 (“*In dieser Angelegenheit läuft bereits ein Rückstellungsbegehren [sic] durch die Finanzprokuratur . . .*”)

¹² See Erbbescheinigung 23.05.1947, ./AN, 000378-000379. Note that because Ferdinand had been a Czech citizen, and died in Switzerland, all questions of entitlement to property from his estate raise potential choice of law questions. The same is true for questions of claims to personal property (e.g., paintings) purportedly from the estate of Adele Bloch-Bauer, which might be subject to Czechoslovakian, rather than Austrian law. (See ./B, 000027 (“*die Gebührenvorschreibung hinsichtlich des übrigen Nachlassvermögens durch die tschechoslowakische Gebührenbehörde zu erfolgen haben wird.*”)).)

¹³ Note that Ferdinand's heirs, as nieces and nephew not previously living with their uncle, would not have been entitled to make claims under the first or second restitution laws, but only under the third restitution law, which permitted a broader range of claimants. This is presumably why settlement of claims relating to the shares of the sugar company and the Elisabethstrasse palais, which were considered German property, had to wait until after 1955 for resolution.

the paintings, the Republic had to wait until Ferdinand's heirs recovered them. So the Republic only obtained ownership of *Häuser in Unterach am Attersee* in April 1948, when the heirs (through Dr. Rinesch) acknowledged the museum's claim and delivered the painting to the museum.¹⁴

2. The requirements of § 1 *KunstrückgabeG*¹⁵

a) § 1 Z 1

(i) *Gegenstand von Rückstellungen*

Häuser in Unterach am Attersee was apparently recovered by Karl Bloch-Bauer from Dr. Führer after the war, along with about a dozen other paintings from Ferdinand's collection, and then stored in the Modenapark apartment of Karl's attorney Dr. Kurt Grimm.¹⁶ For several of the other paintings recovered by Karl, there is evidence that Dr. Führer obtained them with the permission of the director of Hitler's Führermuseum, Dr. Posse.¹⁷ It seems likely that the Klimt

¹⁴ See ./AC, 000566-000567.

¹⁵ § 1. Der Bundesminister für Finanzen wird ermächtigt, jene Kunstgegenstände aus den österreichischen Bundesmuseen und Sammlungen, wozu auch die Sammlungen der Bundesmobilienvverwaltung zählen, unentgeltlich an die ursprünglichen Eigentümer oder deren Rechtsnachfolger von Todes wegen zu übereignen, welche

1. Gegenstand von Rückstellungen an die ursprünglichen Eigentümer oder deren Rechtsnachfolger von Todes wegen waren und nach dem 8. Mai 1945 im Zuge eines daraus folgenden Verfahrens nach den Bestimmungen des Bundesgesetzes über das Verbot der Ausfuhr von Gegenständen von geschichtlicher, künstlerischer oder kultureller Bedeutung, StGBI. Nr. 90/1918, unentgeltlich in das Eigentum des Bundes übergegangen sind und sich noch im Eigentum des Bundes befinden;
2. zwar rechtmäßig in das Eigentum des Bundes übergegangen sind, jedoch zuvor Gegenstand eines Rechtsgeschäftes gemäß § 1 des Bundesgesetzes vom 15. Mai 1946 über die Nichtigerklärung von Rechtsgeschäften und sonstigen Rechtshandlungen, die während der deutschen Besetzung Österreichs erfolgt sind, in das Eigentum der Republik Österreich gelangt sind, BGBl. Nr. 106/1946, waren und sich noch im Eigentum des Bundes befinden....

¹⁶ See ./EJ, 000543

¹⁷ See ./H, 000148-000150.

painting was acquired by Dr. Führer in a similar manner, as it was confirmed that Ferdinand's entire collection was liquidated.¹⁸ Dr. Garzarolli also assumed that this painting was “*offensichtlich veruntreut*” by Dr. Führer.¹⁹ Dr. Demus' apparent conclusion in 1948 that the paintings obtained from Dr. Führer were “*nicht entzogenes Vermögen*”²⁰ is probably incorrect as a matter of fact²¹ and law. In any case, the painting was clearly subject to restitution under the 3. *Rückstellungsg*, which pertained not only to sales or trades, but to all types of expropriation and dispossession of property, indeed to any manner in which possession of property owned by persecuted individuals was lost. See Heller/Rauscher, *Die Rechtsprechung der Rückstellungskommissionen*, 1949, ./KI, 008221-00822. Even a gift to a friend by a persecuted individual qualifies as a *Vermögensentziehung*.²² In any case, this painting was actually restituted to the family and is therefore an “object of restitution,” even though no formal restitution proceeding was required.

¹⁸ See Schreiben Dr. Herbert Seiberl (BDA) 24.03.1943, ./ED, 307 (“*Die Sammlung Bloch-Bauer wurde vom Finanzamt zur Gänze liquidiert. Ankäufe erfolgten von Seite des Kunstmuseums Linz, der Städtischen Sammlungen Wien und anderer öffentlicher Museen. Die Angelegenheit erscheint als abgeschlossen.*”).

¹⁹ See ./X, 000555.

²⁰ See ./Y, 000559.

²¹ Dr. Führer's attorney filed an *Anmeldung entzogener Vermögen* on November 15, 1946 identifying without further description “*Möbel, Kunstgegenstände, Bilder*” taken from Ferdinand Bloch-Bauer that were at that time “*in Verwahrung der brit. Mil. Regierung.*” See ./CC, 003791-003793. There is no evidence that Dr. Führer was holding the paintings for Ferdinand. Given the outstanding tax liabilities owed by Ferdinand, it is not possible that Dr. Führer could have continued to hold Ferdinand's property through the end of the war. All of the property had to be liquidated to pay the taxes, and the completed liquidation is confirmed by the *Bundesdenkmalamt* in March 1943. ./ED, 000307. There is no evidence that Dr. Führer willingly returned any property to Ferdinand's heirs. Indeed, Dr. Führer later contested the heirs' claim to recover Ferdinand's library. See ./IS, 001208-001211; ./IT, 001224-001225; ./IU, 001232-001235; ./IV, 001237.

²² See Rkv Wien 817/48 v. 10. 9. 1948 (Heller/Rauscher Nr. 221, p. 445): “*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 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.*”

It is acknowledged by the 1998 *KunstrückgabeG* that formal restitution proceedings were not always necessary for the recovery of artworks. Also for the Rothschild collection it was determined that a formal restitution proceeding was not necessary to satisfy this requirement, as the *Beirat* noted in its very first decision of February 11, 1999:²³

Zu diesem Tatbestandsmerkmal ergibt sich eindeutig aus der unterschiedlichen Textierung in § 1 Z 1 (“.... Gegenstand von Rückstellungen” im Verhältnis zur Textierung in § 1 Z 3 (“.... nach Abschluss von Rückstellungsverfahren”) und auch aus den Gesetzesmaterialien, dass ein formelles Rückstellungsverfahren nach dem in Betracht kommenden RückstellungsG nicht durchgeführt worden sein muss (1390 der Beilagen NR XX. GP: “.... wobei sich in eindeutigen Fällen oftmals ein formelles Rückstellungsverfahren erübrigt hat”).

Dr. Kremser also apparently agrees that no formal restitution proceeding is required.²⁴

It must be noted that the painting *Häuser in Unterach am Attersee* has **precisely the same history** as the 16 Klimt drawings that were returned by the Republic to Ferdinand’s heirs under the *KunstrückgabeG* in 1999. Those drawings were retrieved from Dr. Führer and held in Dr. Grimm’s apartment. They were noticed only when Dr. Benesch of the Albertina reviewed the items being prepared for export to Karl.²⁵ In order to obtain export permits for the remaining 159 drawings, Dr. Benesch was allowed to take 16 others for the Albertina museum. There was never any formal restitution proceeding made concerning these drawings, nor was there any formal export permit proceeding or application. Nevertheless, the Republic returned the drawings to Ferdinand’s heirs in 1999 under § 1 Z 1 *KunstrückgabeG*.

The present claim made by the *Finanzprokuratur* that a formal restitution proceeding is required to fulfill the condition of the law is therefore not consistent with the prior practice of the Republic in other cases, including the case of the Klimt drawings returned to Ferdinand’s heirs. Of course, there is no explanation for why it should matter whether a formal or informal restitution has taken place. The law concerns itself not with the restitution, but with the

²³ See ./KV, 008309.

²⁴ See Dr. Manfred Kremser, *Kunstrückgabegesetz*, BGBl 1998/181 Zusammenstellung von Rechtssätzen, 04.05.2000, ./LZ, 008128 (“*Voraussetzung ist eine erfolgte Rückstellung an die ursprünglichen Eigentümer. Insbes aus den Erläuterungen ergibt sich, dass ein formelles Rückstellungsverfahren nach dem in Betracht kommenden RückstellungsG nicht durchgeführt worden sein muss.*”) (emphasis in original).

²⁵ See ./GK, 000593, 000597; ./HO, 000671-000672.

subsequent donation of the artwork in exchange for export permits. The manner in which the painting was recovered makes no difference to the ultimate object of the legislation. Therefore, there is no reason to read the term *Gegenstand von Rückstellungen* to require a formal restitution proceeding.

(ii) *Im Zuge eines Verfahrens nach Ausfuhrbewilligungen*

The Republic acquired ownership of *Häuser in Unterach am Attersee* on April 12, 1948. This was **nine days after** Dr. Rinesch met with Dr. Demus to discuss export permits for paintings from Ferdinand's collection. During that April 3, 1948 meeting, Dr. Demus and Dr. Rinesch also discussed the Klimt paintings from Ferdinand's collection, as Dr. Rinesch reported in his April 11, 1948 letter to Robert Bentley.²⁶ One week later, on April 10, 1948 Dr. Rinesch discussed export permits and the Klimt paintings with Dr. Garzarolli.²⁷ As Dr. Rinesch reported to Robert Bentley the next day, Dr. Rinesch told Dr. Garzarolli that the heirs would allow the museum to have the Klimt paintings with the hope that this would help get export permits for other paintings.²⁸ On April 12, 1948, the Klimt painting *Häuser in Unterach am Attersee* was delivered to the museum.²⁹ On the very next day, April 13, 1948, Dr. Rinesch submitted a formal request for export permits for Ferdinand's collection to Dr. Demus, with a copy sent to

²⁶ See ./Y, 000559, ./AB, 000563. Note that it does not matter whether Dr. Demus' note of 3. April 1948 specifically references the Klimt paintings, because we know from Dr. Rinesch's April 11, 1948 letter to Robert Bentley that the Klimt paintings and Adele's will were discussed at the April 3, 1948 meeting. Further, the April 3, 1948 meeting followed Dr. Garzarolli's April 2, 1948 letter to Dr. Demus that discussed the Klimt painting *Häuser in Unterach am Attersee* and requested a delay of export permits for Ferdinand's collection for "tactical reasons." See ./X, 005555.

²⁷ See Schreiben Dr. Garzarolli vom 10.4.1948, ./AA, 000560-000561 ("*Eben hat [Dr. Rinesch] in einer Ausfuhrfrage von Gemälden bei mir vorgesprochen, wobei auch das Legat der sechs Klimt-Bilder von Frau Adele- Bloch-Bauer an die Österreichische Galerie zur Sprache kam.*")

²⁸ See ./AB, 000563 ("*Ich bin der Meinung, dass man das Denkmalamt und das Muesum durch eine Ordnung dieser Sache geneigt Stimmen könnnte Hiedurch ist das Museum bereits günstig gestimmt und ich habe gleich die Ausfuhr der übrigen Bilder zur Sprache gebracht.*").

²⁹ See ./AC, 000566-000567; ./AD, 000564; ./AE, 000565.

Dr. Garzarolli.³⁰ In the April 13, 1948 export permit request, Dr. Rinesch referred to the donation of the Klimt paintings, as he did in several subsequent letters over the next 15 months.³¹

The *Finanzprokurator* argues that this requirement is not met because there was no formal request for an export permit for the Klimt paintings, and the paintings had not been held back by the *Bundesdenkmalamt*. However, the law does not include any such requirement, and, indeed, already with the first decision on the Rothschild collection the law was not interpreted to require an export permit proceeding for the artworks that were left with the federal museum.³²

Auch aus der Formulierung in § 1 Z 1 (“... im Zuge eines daraus folgendesn Verfahrens”) ergibt sich eindeutig, dass es nach dem Willen des Gesetzgebers ausreicht, wenn ein die Sammlung überhaupt betreffendes Verfahren nach dem AusfuhrverbotsG stattgefunden hat. Dieses Verfahren muss dann aber nicht die konkret ins Eigentum des Bundes übertragenen Kunstgegenstände betroffen haben.

Dr. Kremser also apparently holds this view.³³ Similarly, with the 16 Klimt drawings that were returned to Ferdinand’s heirs in 1999, there had never been any formal request for export permits for those drawings. Nor were those drawings ever blocked from export by the *Bundesdenkmalamt*. Their history was in this respect identical with the painting *Häuser in Unterach am Attersee*. Both the painting and the drawings were first noticed during a review of Karl’s property in Dr. Grimm’s Modenapark apartment and were shortly thereafter handed over

³⁰ See ./AG, 000569-000573

³¹ See ./AG, 000570-000571 (“*Diese Erklärung ist in Anbetracht der völlig geänderten Vermögensverhältnisse der Familie Bloch-Bauer gewiss dazu angetan, das Interesse unter Beweis zu stellen, welches die Erben Bloch-Bauer an der österreichischen Kunst und an dem österreichischen Musealbesitz nehmen. Ich darf dagegen erwarten, dass das Bundesdenkmalamt und die beteiligten öffentlichen Sammlungen die Bestimmungen des Denkmalschutzgesetzes in einer entgegenkommenden und die Besonderheiten des Falles berücksichtigenden Weise anwenden werden.*”). See also ./HM, 000666-000667; ./JN, 000775-000781.

³² See ./KV, 008309.

³³ See Dr. Manfred Kremser, *Kunstrückgabegesetz*, BGBl 1998/181 Zusammenstellung von Rechtssätzen, 04.05.2000, ./LZ, 008128 (“*Es reicht nach dem Willen des Gesetzgebers aus, wenn ein die Sammlung überhaupt betreffendes Verfahren nach dem AusfuhrverbotsG stattgefunden hat. Dieses Verfahren muss dann aber nicht die konkret ins Eigentum des Bundes übertragenen Kunstgegenstände betroffen haben.*”) (emphasis in original).

to the museum to please the authorities so that export permits for other artworks would be granted. In this sense there is absolutely no distinction between the 16 Klimt drawings and the painting *Häuser in Unterach am Attersee*.

Indeed, there is no rational reason why the law should require a formal export permit proceeding for the painting that was left with the museum. Certainly such a requirement would not serve the purpose of the law in any way. Of course, in this case one could also find that the export permit proceeding, although not formally begun until April 13, 1948, actually began at least two weeks earlier, when Dr. Garzarolli reviewed the paintings that were being prepared for export (including *Häuser in Unterach am Attersee*) and then wrote to Dr. Demus on April 2, 1948 seeking a delay in the export permit proceedings for Ferdinand’s collection “for tactical reasons.”³⁴ Put another way, if there were no export proceedings for *Häuser in Unterach am Attersee*, then why were Dr. Garzarolli and Dr. Demus discussing the painting at the beginning of April 1948? Clearly, the export proceedings for Ferdinand’s collection had begun by the beginning of April 1948, even though Dr. Rinesch’s formal application was not sent until April 13, 1948.

The *Finanzprokurator* also argues that the law requires a firm agreement (*Vereinbarung*, “*Zug um Zug*”-*Leistung, do ut des*) exchanging the donated artworks for export permits. Again, this is not how the law has been interpreted in other cases. There was no such express agreement in the case of the 16 Klimt drawings returned to Ferdinand’s heirs, and there is none set forth in the Rothschild decision either.³⁵ Of course, it should be noted that Dr. Rinesch did in fact report to Robert Bentley “*Ohne definitive Zusagen zu haben, vereinbarte ich, dass eine Liste sämtliche Bilder, die wir bereits festgestellt haben gleich zur Ausfuhr eingereicht wird und daß die Ausfuhr sukzessive nach Rücktransport stattfinden kann.*”³⁶ This was as close to an express agreement as one could get. The *KunstrückgabeG* could not possibly require anything more.

(iii) Unentgeltlich ins Eigentum des Bundes

The Republic did not pay any funds to obtain ownership of *Häuser in Unterach am Attersee*, and the heirs did not receive any. Although the heirs obtained export permits for other paintings as a result of the donation of the Klimt painting, this has not been considered to defeat the condition that the transaction be “*unentgeltlich.*”³⁷

³⁴ See ./X, 000554-000555.

³⁵ See ./KV, 008308-008314.

³⁶ See ./AB, 000563 (emphasis added).

³⁷ See ./KV, 008310.

(iv) What about Adele’s will?

It can be seen from the foregoing that the analysis under § 1 Z 1 does not necessarily require consideration of the Republic’s claim of ownership under Adele’s will. That is because the Republic’s claim arose, if at all, only after Ferdinand’s death in November 1945. The *KunstrückgabeG* does not provide any avenue for consideration of claims of ownership by the Republic. Indeed, it is assumed that the Republic has a valid claim of ownership to the artwork, notwithstanding the wartime or post-war history of the painting giving rise to “*Zweifel an der Unbedenklichkeit der Herkunft*.”³⁸ The *Rückstellungsgesetze* also would not have permitted consideration of the Republic’s post-war claim, which arose, if at all, after Ferdinand’s death in November 1945. Indeed, the restitution commissions would probably have lacked jurisdiction to consider such claims, arising as they did after the war and outside the legal framework of the 3. *RückstellungsgG*.

Of course, the *KunstrückgabeG* does not require the return of any artwork, it only **empowers** the Republic to return certain classes of artworks. Therefore, consideration of exceptional circumstances and counter-claims, such as the one posed by the Republic in this case, might be appropriate in considering **whether** the Republic **should** return an artwork, but not whether the Republic is **empowered** to return it in the first place. In other words, if § 1 Z 1 is satisfied, as it is most certainly in the case of *Häuser in Unterach am Attersee*, the Republic is **empowered** to return the painting. As a general matter, if the Republic believes it has ownership claims arising independent of the Nazi-era and post-war restitution history of an artwork, the Republic may elect not to return that artwork, even if it is empowered to do so.³⁹ However, in this arbitration proceeding, the issue is **limited** to the question of whether §1 *KunstrückgabeG* has been satisfied. The answer to that question is **yes**. The Republic has already agreed in the arbitration agreement that **if** it is empowered to return the paintings, it will do so. There is therefore no need for the arbitration panel to consider the Republic’s claim that there is an independent claim of ownership to the painting, derived from the request in Adele’s will (or any

³⁸ See 1390 der Beilagen NR XX. GP 25.9.1998 (*Erläuterungen*), Summary, p. 91.

³⁹ For example, in the Kantor case, the requirements of § 1 Z 2 were met even though the Kantor heirs and the Republic had concluded a settlement agreement concerning the claim to the drawing in 1974 and the Republic had paid out half the value of the drawing. See ./LT, 008049-008060. The *Beirat* recommended that the Republic voluntarily rescind the 1974 agreement and return the drawing in exchange for a return of the payment. However, even this condition was later dropped and the Republic returned the drawing without getting the settlement proceeds back. See ./LU, 008061-008062. The settlement agreement, which clearly gave the Republic a valid legal claim to the painting, became essentially a non-issue in the case. The drawing was returned because it had never been properly returned beforehand, notwithstanding the prior settlement and the legal claims of the Republic that might arise from it.

other source). The only question is whether the Republic is **empowered** to return the painting under the *KunstrückgabeG*.

Nevertheless, if the arbitration panel wishes to consider, as a hypothetical matter, the likelihood of success of the Republic's independent claim of ownership under Adele's will, if one had been made against Ferdinand's heirs around 1948, we believe that Prof. Welser and Prof. Rabl have adequately dealt with those claims in their analysis, and there is no need for us to repeat those convincing argument here.⁴⁰ Leaving aside the propriety of asserting such claims against a family victimized by the Nazis,⁴¹ the Republic could not possibly have met its burden of proof under the various *Zweifelsregeln* discussed above. And it cannot do so now.

⁴⁰ One comment: The importance of the recent OGH decision 10 Ob 14/04p is not necessarily its direct application to the facts of this case, but rather the **refutation** of the position taken by Dr. Kremser and the Finanzprokurator that the OGH has "rejected" the view of Prof. Welser concerning the impact of *Testierfreiheit* on directions given in a last will. Obviously, the OGH has not rejected Prof. Welser's view and is willing to apply the concept of *Testierfreiheit* to invalidate provisions that require the disposition of property upon the death of the heir. Even in its earlier decision OGH, 4 Ob 194/98b NZ 1999, 91, the OGH did not reject Prof. Welser's opinion (as Dr. Kremser claimed), but rather distinguished the facts of that particular case ("*Auch wenn man die Richtigkeit dieser Lehrmeinung unterstellt, wäre für die Bekl damit noch nichts gewonnen.*").

⁴¹ Only the most cynical practitioner of denial could pretend, as the Republic apparently does, that Adele Bloch-Bauer would have wanted the Klimt paintings to remain in Austria after what had transpired to her family during the Nazi era. Manifestly, her husband, Ferdinand, did not wish to donate the paintings, as he failed to follow through on his earlier (unenforceable) promise to abide by Adele's request and did not make any provision for the donation in his last will. Does the concept of *favor testamenti* not apply to Ferdinand? Ferdinand and Adele's niece Luise Gattin also recognized that the rise of the Nazis changed everything:

Mrs. Gattin: "Yes. I told you she was very pro German, very proud of German culture. And it would have been the shock of her life if she had thought of, you know, of what happened later on with her beloved Germans.

Dr. Grimberg: You mean – you mean the upsurge of Nazism?

Ms. Gattin: Yeah. I think she would have – it would have caught her **terribly**.

.190, p. 7 (emphasis on original tape). Ferdinand expressed similar views in his letter to Kokoschka ("*Europa wird ein Trümmerhaufen, vielleicht die ganze Welt, für Kunst ist auf Jahrzehnte hier kein Platz!*"). See .1DN, 002937-002939.

Indeed, considering also the events that transpired during the Nazi era, no Court could have required Ferdinand's heirs to deliver the Klimt paintings to the Republic after they had been recovered in the post-war era. Dr. Rinesch was therefore correct when he wrote on July 13, 1949:

*wenn auch dieses Legat ursprünglich bereits im Testament der verstorbenen Gattin Ferdinand Bloch-Bauers vorgesehen war, so hätten die Erben sicherlich die Handhabe gehabt, die Legaterfüllung zu verhindern, weil sich inzwischen die Vermögensverhältnisse der Erblasserin in katastrophaler Weise verändert haben und auch die übrigen Voraussetzungen der Widmung durch die Ereignisse des dritten Reiches weggefallen waren.*⁴²

Therefore, to the extent that consideration of Adele's will is relevant at all, it cannot possibly alter the undeniable conclusion that § 1 *KunstrückgabeG* is **satisfied** and the Republic is **empowered** to return the Klimt paintings to Ferdinand's heirs.

It follows from the above that Dr. Rinesch's statement about the purported enforceability of Ferdinand's [sic] *Erklärung* in the April 11, 1948 letter to Robert Bentley ("Dadurch hat die österr. Galerie zweifellos einen Rechtsanspruch, wie auf ein Legat, erworben, und das Testament wird zur Erfüllung gelangen müssen." /AB, 000563) was **objectively incorrect**.⁴³ In Dr. Rinesch's defense, he had only seen Adele's will and estate file for the **first time** on April 10, 1948, the same day that he met with Dr. Garzarolli and agreed to give in to the museum's claims. So he had not had much, if any, time to consider the legal issues involved. One cannot know for certain what his subjective impressions were at the time. In retrospect it seems quite obvious that the declaration of Gustav Bloch-Bauer in 1926 could not possibly have bound Ferdinand or his heirs to make a donation of the Klimt paintings, especially after the terrible events that took place under the Nazis. Dr. Rinesch obviously realized this fact, as he mentioned this already in his April 13, 1948 request for export permits ("Diese Erklärung ist in Anbetracht der völlig geänderten Vermögensverhältnisse der Familie Bloch-Bauer gewiss dazu angetan . . .") (/AG, 000571) and pointed it out later to the authorities in his July 13, 1949 letter to the *Bundesdenkmalamt* quoted above.

Whether or not Dr. Rinesch or the other heirs **subjectively** believed that the museum had a valid claim to the paintings at the time he made the agreement with Dr. Garzarolli cannot

⁴² See /JN, 000778.

⁴³ Ferdinand's heirs were never made aware of this mistake, which explains why none of them realized until 1998 that the museum had never had a valid claim to the paintings and that the paintings had essentially been given up in exchange for export permits.

possibly be relevant to the question of whether §1 Z 1 has been satisfied. First, the subjective understanding is difficult, if not impossible, to determine. For example, in the case of the Rothschild collection, it could not have been the intent of the legislature to consider whether the obsequious statements made by the family and its lawyers in 1946-48 regarding the various “gifts” and “donations” to the federal museums were in fact heartfelt.⁴⁴ In the present case, Dr. Rinesch and the heirs at least initially believed that they had a claim to the paintings, as Dr. Rinesch made inquiries from 1945 through 1948 concerning them and had negotiated with the City of Vienna for the return of *Birkenwald*.⁴⁵ In his January 19, 1948 letter to Dr. Garzarolli, Dr. Rinesch referred to “*die Rückstellungsansprüchen meiner Klienten.*”⁴⁶ Even after receiving (erroneous) reports from Dr. Garzarolli and Dr. Grimschitz, Dr. Rinesch must still have had some doubts about the museum’s claims, as he wrote to Robert Bentley on February 26, 1948 “*Sollte das Testament Rechtsgültigkeit haben . . .*” At that point, he had not yet located a copy of Adele’s will (because the files were being held by Dr. Garzarolli and the *Finanzprokuratur*). When Robert Bentley wrote to Dr. Rinesch on March 8, 1948 (in a letter that has not been located) and purportedly suggested that he would accept leaving the Klimt paintings at the museum, he was similarly in the dark about the true contents of Adele’s will (and knew nothing at all about the purported *Erklärung* from 1926).

When Dr. Rinesch met with Dr. Demus on April 3, 1948 and discussed the Klimt paintings and export permits, he realized that it was necessary to win the favor of the *Bundesdenkmalamt* in order to get as many paintings out as possible. Dr. Demus had been instructed the previous day by Dr. Garzarolli to delay the proceedings (and any discussion of trades or donations) for “tactical reasons,” and this delaying strategy must have come across to Dr. Rinesch as well, who could not have been ignorant of the *Bundesdenkmalamt*’s practice of requiring donations of artworks to secure export permits. Dr. Rinesch therefore decided that a quick resolution of the dispute over the Klimt paintings would serve the heirs well in obtaining export permits for other paintings. Still, Dr. Rinesch’s doubts must have been great enough that

⁴⁴ For example, as Thomas Trenkler describes in his book *Der Fall Rothschild* (Molden Verlag 1999), p. 87: “*Im Fall der Boucher-Zeichnung zeigte sich Louis Rothschild bereitwillig: Er ließ durch Karl Wilczek in seinem Schreiben vom 2. Juli 1948 mitteilen, er könne sich an diese, ‘die angeblich aus dem Waidhofner Schloss stammt, nicht mehr erinnern’ und würde, falls sie tatsächlich sein Besitz wäre, ‘diese gerne [...] als Widmung überlassen’.*” Indeed, the entire purpose of the §1 Z 1 seems to have been to definitively reverse the subjective judgment that had led one historian to write “*Baronin Clarice Rothschild, geb. Sebag-Montefiore, erklärte sich in großzügiger Weise spontan bereit, der Nationalbibliothek, die schuldlos in diese unwürdige und verdammenswerte Angelegenheit verstrickt worden war, als Anerkennung für die unbeschädigte Bewahrung ihres Besitzes eine der sieben Handschriften zu überlassen.*” Trenkler, p. 109.

⁴⁵ See ./FJ, 000450.

⁴⁶ See ./U, 000465.

(notwithstanding Robert Bentley's March 8 letter) he wanted to see the will to make sure. When Dr. Rinesch finally saw Adele's will on April 10, 1948 (one week after he had met with Dr. Demus and discussed the Klimt paintings and export permits for Ferdinand's collection), it must have confirmed his pre-existing suspicion that Adele had not actually left the paintings to the museum in her will (as Dr. Garzarolli and Dr. Grimschitz had claimed). He concluded, as Dr. Gustav Bloch-Bauer had in 1926, that her wishes were not in the form of an enforceable *Legat*. Yet, the declaration of Dr. Gustav Bloch-Bauer stating that Ferdinand Bloch-Bauer promised to fulfill his wife's wishes certainly added to the already complicated circumstances. Dr. Rinesch must have decided to go ahead with his plan to acknowledge Adele's will on behalf of Ferdinand's heirs and thereby gain the favor of the *Bundesdenkmalamt* and museum authorities.

Although Dr. Rinesch wrote to Robert Bentley on April 11, 1948 that the museum's claims to the Klimt paintings would prevail (based on the *Erklärung*, not the will), Dr. Rinesch certainly must have realized that the heirs could have made an effort to keep the paintings, notwithstanding the *Erklärung*. He believed, however, that this effort might not only be unsuccessful, but would certainly hinder his ability to obtain export permits for the rest of Ferdinand's collection. Dr. Demus had made it clear that none of the recovered paintings would be permitted to leave the country until the dispute over the Klimt painting had been resolved.⁴⁷ There was no reason not to go forward with the plan to acknowledge the will, in the hopes that this "spontaneous" agreement would gain the favor of the *Bundesdenkmalamt* and the museum. Therefore, it would be correct to conclude, notwithstanding the statement to Robert Bentley, that Dr. Rinesch's **subjective** understanding (that the heirs could have attempted to keep the paintings) most likely coincided with the **objective** fact that the museum had no valid claim. At the very least, there must still have been great uncertainty regarding the validity of the museum's claim to the paintings, even if this uncertainty was not conveyed to Robert Bentley.

However, even if Dr. Rinesch did not believe at that moment that the heirs were "donating" the paintings to the museum, but were merely fulfilling an obligation that he mistakenly believed existed, the purpose of § 1 Z 1 would still be satisfied. First, Dr. Rinesch believed that he needed to settle the claim to the Klimt paintings in order to obtain export permits for the rest of Ferdinand's collection. The **pressure** to make the donation, and to make it

⁴⁷ See .Y, 559 ("Dr. Rinesch mitteilen, wenn die 12 Bilder separat beurteilt werden, müßten all zurückgehalten werden."); .AB, 000563 ("Demus erklärte, dass er und die österr. Galerie größten Wert auf diese Bilder legen und daß eine Einigung über die wenigen sofort zur Ausfuhr verlangten Bilder schwer möglich ist. -- Ich bin der Meinung, daß man alle zustandegebrachten Bilder (einschließlich der in München befindlichen) gemeinsam zur Ausfuhr beantragen sollte, dann würde man viel besser wegkommen. Demus pflichtet dem bei. Bei dieser Gelegenheit kam auch die Angelegenheit der Klimt-Bilder und des Legats Adele B.B. zur Sprache. Ich bin der Meinung, daß man das Denkmalamt und das Museum durch eine Ordnung dieser Sache geneigt stimmen könnte....").

quickly, was applied directly by Dr. Demus on April 3, 1948 in furtherance of Dr. Garzarolli's instructions of April 2, 1948 requesting a delayed process for "tactical reasons." Dr. Rinesch knew, and was told, that if there were a dispute concerning the Klimt paintings, that all of the paintings would be held back and no export permits would be granted.⁴⁸ The pressure to make the donation existed even **before** Dr. Rinesch saw the will and *Erklärung* for the first time. In other words, the foreseen scenario of the *KunstrückgabeG* existed already on April 3, 1948; that is, Dr. Rinesch was pressured to settle the issue of the Klimt paintings so that he could get export permits for the other paintings. That he may have, in the course of succumbing to this pressure, also formed the mistaken belief that he was required to do what he was already being pressured to do, cannot diminish the application of the law to this scenario. Second, under this scenario Dr. Rinesch's **subjective** understanding would have been the result of a **mutual mistake** (regarding the enforceability the *Erklärung*). This mistake was caused, at least in part, by the Republic's aggressive claims to the painting and the pressure to make a quick deal for export permits (in response to Dr. Garzarolli and Dr. Demus' strategy of delay), as well as the Republic's retention of the original estate files until early April.⁴⁹ The Republic cannot take advantage of a mistaken belief that it helped cause, especially when it appears that Dr. Garzarolli himself secretly harbored doubts about his legal position, as he confided to Dr. Grimschitz on March 9, 1948:

*.... befinde mich in einer umso schwierigeren Situation
Jedenfalls wächst sich die Angelegenheit zu einer Seeschlange aus
.... Ich bin sehr bekümmert darüber, daß bisher alle mit
Rückstellungsfragen zusammenhängenden Komplexe
unübersehbare Unklarheiten mit sich gebracht haben
Vielleicht kommen wir dadurch noch am besten aus diesen nicht
eben ungefährlichen Situationen heraus.*⁵⁰

Finally, the **subjective** understanding cannot defeat the **objective** fact that the paintings were obtained by the museum in the course of (and as a direct result of) the heirs' seeking export permits for Ferdinand's collection. If the situation were in fact reversed, and the heirs **mistakenly believed** they were making a donation to get export permits, when in fact the paintings already belonged to the museum, one would not conclude that the **subjective** intent controls and the paintings should be returned under § 1 Z 1. The *KunstrückgabeG* therefore must not be based on the **subjective** understanding of the parties, but rather the **objective** facts concerning the donation of the painting. The objective interpretation also matches the stated purpose of the law, as set forth in the legislative history, to apply to transactions where, as in this case, the Republic used the export permit laws to apply pressure. See 1390 XX GP 25.9.1998

⁴⁸ See ./Y, 000559.

⁴⁹ See April 2, 1948 letter from Dr. Garzarolli returning estate files to the Finanzprokurator, ./GD, 000556.

⁵⁰ See ./W, 000522-000523.

(“*Aus heutiger Sicht ist die damals gewählte Vorgangsweise nicht zu rechtfertigen.*”). Certainly the legislature had in mind tactics like those suggested by Dr. Garzarolli to Dr. Demus on April 2, 1948 (“*Ich bitte die Erwerbungs- und Tauschvorhaben erst dann laut werden zu lassen, wenn von der Finanzprokuratur der Zeitpunkt hierfür als gegeben bezeichnet werden wird, wovon augenblicklich Nachricht gegeben wird, d. h. also, daß aus taktischen Gründen um eine verzögernde Behandlung gebeten wird.*”). Given the objective correctness of the application of the law to these facts, the Republic cannot escape the result that the circumstances satisfy the law’s requirements.

In conclusion, all of the requirements for a return of *Häuser in Unterach am Attersee* pursuant to § 1 Z 1 *KunstrückgabeG* have been met.

b) §1 Z 2

(i) *Rechtmäßig ins Eigentum des Bundes*

The Republic acquired ownership of *Häuser in Unterach am Attersee* in April 1948. Although the practice of obtaining gifts in exchange for export permits has been heavily criticized in recent years, as a technical matter, these deals were “*rechtmäßig*” in the sense that they did not expressly violate any law. There has not been any suggestion that a donation in exchange for export permits could be legally challenged under Austrian law other than the *KunstrückgabeG*.

(ii) *Zuvor Gegenstand von Rechtsgeschäft unter NichtigkeitsG*

NichtigkeitsG BGBl Nr. 1946/106. § 1 Entgeltliche und unentgeltliche Rechtsgeschäfte und sonstige Rechtshandlungen während der deutschen Besetzung Österreichs sind null und nichtig, wenn sie im Zuge seiner durch das Deutsche Reich erfolgten politischen oder wirtschaftlichen Durchdringung vorgenommen worden sind, um natürlichen oder juristischen Personen Vermögensschaften oder Vermögensrechte zu entziehen, die ihnen am 13. März 1938 zugestanden sind.

All of Ferdinand’s paintings were liquidated to pay taxes imposed as a result of Nazi persecution.⁵¹ It cannot be seriously questioned that every war-time transaction or transfer with regard to Ferdinand’s collection is covered by the *NichtigkeitsG*. Indeed, the *Bundesdenkmalamt* confirmed on 25 October 1948 to the *Finanzlandesdirektion Salzburg*:

Herr Ferdinand Bloch-Bauer ist im Jahre 1938 vor dem Einmarsch der Deutschen in Österreich nach der Schweiz emigriert und sein Eigentum wurde aus sogenannten rassistischen Gründen eingezogen. Die in ho. Verwahrung

⁵¹ See Schreiben Dr. Herbert Seiberl (BDA) 24.03.1943, ./ED, 307 (“*Die Sammlung Bloch-Bauer wurde vom Finanzamt zur Gänze liquidiert.*”).

*befindlichen Kunstgegenstände aus dieser Sammlung wurden daher als entzogenes Vermögen angesehen, wenn auch ein Bescheid über die Entziehung nicht vorliegt.*⁵²

Dr. Führer's retention of the Klimt painting *Häuser in Unterach am Attersee* (in Dr. Garzarolli's words "*offensichtlich veruntreut*"⁵³) is also subject to the *NichtigkeitsG*. Dr. Führer's attorney filed an *Anmeldung entzogener Vermögen* on November 15, 1946 identifying without further description "*Möbel, Kunstgegenstände, Bilder*" taken from Ferdinand Bloch-Bauer that were at that time "*in Verwahrung der brit. Mil. Regierung.*"⁵⁴ The *NichtigkeitsG* (and the 3. *RückstellungsG*) pertained not only to sales or trades, but to all types of expropriation and dispossession of property, indeed to any manner in which possession of property owned by persecuted individuals was lost. See Heller/Rauscher, *Die Rechtsprechung der Rückstellungskommissionen*, 1949, ./KI, 008221-00822. Even a gift to a friend qualifies as a *Vermögensentziehung*. See Rkv Wien 817/48 v. 10. 9. 1948 (Heller/Rauscher Nr. 221, p. 445).

The *Beirat* has also applied a broad interpretation of the word "*Rechtsgeschäft*" in the application of the *KunstrückgabeG*. In the Pollak decision, the *Beirat* explained:

*Das Wort "Rechtsgeschäft" in § 1 Z 2 Rückgabegesetz muss somit dahin verstanden werden, dass nicht nur Rechtsgeschäfte im technischen Sinne darunter zu verstehen sind, sondern alle aufgrund der damaligen Rechtslage erfolgten Entziehungshandlungen, also auch unmittelbar vom damaligen gesetzgeber verfügte Konfiskationen. Diese Auslegung wird auch durch den Hinweis auf § 1 des BG vom 15. Mai 1946 BGBl. 106 nahegelegt, der ausdrücklich von "entgeltlichen und unentgeltlichen Rechtsgeschäften und sonstigen Rechtshandlungen" spricht.*⁵⁵

Under this interpretation, the painting *Häuser in Unterach am Attersee* was certainly subject to a transaction falling under the *NichtigkeitsG*.

⁵² ./HG, 000654.

⁵³ See ./X, 000555.

⁵⁴ See ./CC, 003791-003793. As explained above, Dr. Demus' apparent conclusion in 1948 that the paintings obtained from Dr. Führer were "*nicht entzogenes Vermögen*" is probably incorrect as a matter of fact and law, and in any case does not mean that Dr. Führer's retention of the paintings was not covered by the *NichtigkeitsG*.

⁵⁵ See Beschluss 04.12.1998 (Pollak), ./KR, 008291.

The two requirements of § 1 Z 2 have thus been met. The *Finanzprokurator* argues that the 1998 law requires that the property be obtained from a third party. This purported requirement does not appear in the 1998 law, nor is it mentioned in any of the legislative history. Nevertheless, one could argue that §1 Z 1 of the law pertains only to restituted artworks (obtained directly from the prior owners or their heirs), while §1 Z 2 pertains only to unrestituted artworks (obtained from third parties). This is in fact how the law has been interpreted and applied by the *Kunstrückgabebeirat*. Where artworks were restituted, but then donated by the original owners to federal museums in the course of export applications, § 1 Z 1 has been satisfied.⁵⁶ On the other hand, where artworks were never restituted, but were obtained by the museums from third parties after the Nazi era, § 1 Z 2 has been applied to authorize the return of the paintings.⁵⁷ This is true as well for artworks obtained by the museums during the Nazi era, and subsequently transferred to the Republic after the war.⁵⁸ As the *Beirat* stated in the Pollak matter:

*Ermächtigt der gesetzgeber somit selbst in Fällen, in denen das später für nichtig erklärte Rechtsgeschäft zunächst zum Eigentumserwerb eines Dritten geführt hat und das Eigentum erst in der Folge im Wege eines gutgläubigen Ankaufes auf den Bund übergegangen ist, zur Rückgabe, so muss dies umsomehr dann gelten, wenn der nichtige Vorgang zum Eigentumserwerb des Deutschen Reiches geführt hat und der Kunstgegenstand nach Ende der deutschen Besetzung in Verwahrung des Bundes geblieben ist.*⁵⁹

Although some commentators (including Welser, Rabl, and Krecji) have sought to “reconcile” the *KunstrückgabeG* by making §1 Z 1 and § 1 Z 2 mutually exclusive (non-overlapping), such a construction is not absolutely necessary. Because the law only provides an

⁵⁶ See Beschluss 11.02.1999 (Rothschild), ./KV 008308-008314.

⁵⁷ See Beschluss 18.06.2003 (Bernhard Altmann) ./KM, 008267-008269; Beschluss 18.08.1999 (Czeczowiczka) ./KN, 008270-008276; Beschluss 28.11.2000 (Lasus-Danilowatz) ./KQ, 008284-008287; Beschluss 10.10.2000 (Stiasny) ./KS, 008294-008297.

⁵⁸ See Beschluss 27.03.2000 (Ephrussi) ./KO, 008278-008280; Beschluss 27.04.2004 (Korngold) ./KP, 008281-008283; Beschluss 28.11.2000 (Lasus-Danilowatz) ./KQ, 008284-008287; Beschluss 27.03.2000 (Ernst Pollak) ./KR, 008289-008293; Beschluss 10.10.2000 (Stiasny) ./KS, 008294-008297; Beschluss 27.01.2004 (Reininghaus) ./KT, 008298-008302; Beschluss 27.03.2000 (Brill) ./KU, 008304-008307; Beschluss 22.11.1999 (Kantor) ./LT 008049-008060.

⁵⁹ See Beschluss 04.12.1998 (Pollak), ./KR, 008290-008291.

Ermächtigung, its provisions (and accompanying examples) can more properly be seen as guidelines for restitution. There is no logical reason why the law should not therefore be interpreted in a way that might allow a single case to satisfy both § 1 Z 1 and § 1 Z 2. Again, one must consider the ultimate purpose of the legislation, which is **to make restitution possible**. The **presumption** is in favor of a broad interpretation of the statute, even if that means that certain sections overlap. Given the choice between a broad interpretation that would permit restitution and a narrow one that would not, the choice must be in favor of the broad interpretation.

Regardless of this debate, however, under any rational reading of § 1 Z 1, the requirements are satisfied for the painting *Häuser in Unterach am Attersee*. The *Finanzprokuratur*'s technical arguments with regard to this painting are not only contrary to the text of the law, but also contrary to the practice of the Republic with respect to other artworks it has returned under the *KunstrückgabeG*. Therefore, there is probably no need to consider whether this painting also satisfies § 1 Z 2. Nevertheless, it is clear that it does.

B. *Buchenwald (Birkenwald)*

1. Ownership

The Republic acquired ownership of *Buchenwald (Birkenwald)* on November 23, 1948.⁶⁰

The painting *Buchenwald (Birkenwald)* was purchased by the Städtische Sammlungen for 5.000 RM from Dr. Führer in November 1942.⁶¹ Dr. Wagner of the Städtische Sammlungen had initially offered to return the painting to Ferdinand's heirs (in exchange for a return of the purchase price) on December 3, 1947.⁶² After the April 10, 1948 agreement, Dr. Rinesch assisted Dr. Garzarolli in obtaining the painting for the museum by writing to Dr. Wagner of the Städtische Sammlungen.⁶³ Dr. Garzarolli thanked Dr. Rinesch for this assistance.⁶⁴ It took until November for the City of Vienna to approve the transfer of the painting to the Austrian Gallery.⁶⁵ In 1957, the Republic paid the City of Vienna 5.000 Schilling to reimburse the purchase price that was paid to Dr. Führer.⁶⁶

2. The requirements of § 1 *KunstrückgabeG*

a) § 1 Z 1

(i) *Gegenstand von Rückstellungen*

Already in 1947, Dr. Rinesch obtained the agreement of Dr. Wagner to return the *Birkenwald* painting to Ferdinand's heirs. In his April 12, 1948 letter confirming the agreement to acknowledge Adele's will, Dr. Rinesch informed Dr. Garzarolli that the City of Vienna was willing to restitute the painting if the purchase price was returned.⁶⁷ In May, at the request of Dr. Garzarolli, Dr. Rinesch assisted the museum in obtaining possession of the painting by writing to

⁶⁰ See ./HU, 000679.

⁶¹ See ./LM, 000935-000938.

⁶² See ./FJ, 000450.

⁶³ See ./GS, 000607.

⁶⁴ See ./GU, 000610.

⁶⁵ See ./HR, 000677; ./HS, 000675-000676; ./HT, 000678.

⁶⁶ See ./LN, 000939; ./LO, 000940.

⁶⁷ See ./AC, 000556.

Dr. Wagner.⁶⁸ The painting was actually restituted on November 23, 1948, and delivered to the museum in accordance with the April 1948 agreement made by Dr. Rinesch and Dr. Garzarolli. Therefore, this painting was an “object of restitution.” As set forth above, the *KunstrückgabeG* anticipates that in some cases no formal restitution proceedings were required.

An objection can be made that § 1 Z 1 requires that the artwork be “*Gegenstand von Rückstellungen an die ursprünglichen Eigentümer oder deren Rechtsnachfolger von Todes wegen*” but in this case the painting was actually restituted, not to Ferdinand Bloch-Bauer or his heirs, but to the Republic. The question then becomes whether the law requires that the painting be actually restituted to the heirs before it was transferred to the federal museum, or whether, as Prof. Welser and Prof. Rabl very persuasively argue, a direct transfer to the museum from the party owing restitution, facilitated by the heirs, will suffice. In other words, if the two-step transaction of A-B and B-C is sufficient, why not A-C? The end result is the same.

(ii) Im Zuge eines Verfahrens nach Ausfuhrbewilligungen

The Republic acquired ownership in November 1948 with the assistance of Dr. Rinesch, who had agreed on April 10, 1948 to allow the museum to obtain the painting. This was one week after Dr. Rinesch met with Dr. Demus on April 3, 1948 to discuss export permits for paintings from Ferdinand’s collection. During that April 3, 1948 meeting, Dr. Demus and Dr. Rinesch also discussed the Klimt paintings from Ferdinand’s collection. On April 10, 1948 Dr. Rinesch discussed export permits and the Klimt paintings with Dr. Garzarolli. As Dr. Rinesch reported to Robert Bentley the next day, Dr. Rinesch told Dr. Garzarolli that the heirs would allow the museum to have the Klimt paintings with the hope that this would help get export permits for other paintings. On April 13, 1948, Dr. Rinesch submitted a formal request for export permits to Dr. Demus, with a copy sent to Dr. Garzarolli. In the April 13, 1948 export permit request, Dr. Rinesch referred to the donation of the Klimt paintings, as he did in several subsequent letters over the next 15 months.

The *Finanzprokurator* argues that this requirement is not met because there was no request for an export permit for the Klimt painting, and the painting was itself never held back from export. However, as set forth above, the law does not include any such requirement, and indeed, the law has not been interpreted to require an export permit proceeding for the artworks that were left with the federal museum. See III.A.2(a)(ii).

(iii) Unentgeltlich ins Eigentum des Bundes

The Republic eventually paid the City of Vienna 5,0000 Schilling in 1957. It is not clear why the Republic believed it was required to repay these funds, since the restitution laws would not have require repayment of funds that were never actually obtained by Ferdinand, but were instead certainly used to pay discriminatory taxes. In any case, the requirement that the

⁶⁸ See ./GS, 000607.

transaction be “*unentgeltlich*” should be seen from the perspective of the heirs, not the Republic. Because Ferdinand’s heirs never received any money for the painting, this requirement has been met.

Therefore, the conditions of §1 Z 1 have been satisfied for the painting *Buchenwald (Birkenwald)*.

b) § 1 Z 2

(i) *Rechtmäßig ins Eigentum des Bundes*

It is not disputed that the Klimt painting was legally acquired by the Republic in November 1948 from the City of Vienna with the assistance of Dr. Rinesch.

(ii) *Zuvor Gegenstand von Rechtsgeschäft unter NichtigkeitsG*

The City of Vienna’s purchase of the painting from Dr. Führer in November 1942 was quite obviously a transaction subject to the *NichtigkeitsG*. This also is not in dispute.

Therefore, the requirements of §1 Z 2 have been met for the painting *Buchenwald (Birkenwald)*.

This painting demonstrates that it is not necessary to view § 1 Z 1 and § 1 Z 2 as mutually exclusive. From the perspective of § 1 Z 1, the heirs essentially obtained an agreement in 1947 that the painting would be restituted (making the painting an “object of restitution”), but then, in the course of obtaining export permits for the rest of Ferdinand’s collection, the heirs essentially transferred to the right of restitution to the Republic. The purpose of § 1 Z 1 is clearly satisfied in this case even though, unlike *Häuser in Unterach am Attersee*, the painting was not actually restituted to the heirs before it was delivered to the museum. Why should the lack of actual delivery to the heirs make a difference? Put another way, if there were no § 1 Z 2, but only § 1 Z 1, would there be any reason not to find that the conditions of § 1 Z 1 are met in this case?

On the other hand, § 1 Z 2 is also very clearly satisfied. Even if one limits § 1 Z 2 to cases where the painting was obtained from a third party and never actually recovered by the original owner or his heirs, this painting qualifies. The painting was in fact never actually recovered by Ferdinand’s heirs and it was obtained by the Republic from the City of Vienna, a third party. There is no reason that § 1 Z 2 should not also apply to this painting.

C. *Adele Bloch-Bauer II*

1. Ownership

The Republic acquired ownership of *Adele Bloch-Bauer II* in either 1945 or 1955.

The *Finanzprokurator* argues that the Republic obtained ownership of this painting in 1945 because it was part of the collection of the museum, which was owned by the Republic prior to the *Anschluss*, even though the painting was itself only added to the collection in March 1943, when it was purchased by Dr. Grimschitz for 7.500 RM from Dr. Führer.⁶⁹ The decision in the case Rkv 59/49 supports the conclusion that the Republic obtained ownership in 1945, although it should be noted that in that case the *Finanzprokurator* took the opposite position. Indeed, the *Finanzprokurator* has otherwise consistently taken the position that artworks obtained by the various federal museums during the Nazi era were “*Deutsches Eigentum*” that became property of the Republic only in 1955.⁷⁰ Numerous other cases decided under the *KunstrückgabeG* have also been premised on this assumption.⁷¹ Rkv 59/49 is not very convincing in its argument, since there does not seem to be any reason to distinguish between paintings collected by the German Reich and other types of property. The rationale for the Rkv 59/49 decision seems to be more in line with the strong presumption in favor of restitution, than any principled argument. However, the resolution of this dispute has no real bearing on the outcome of the present case. Whether the Republic obtained ownership in 1945 or 1955, the requirements of § 1 *KunstrückgabeG* have been met.

⁶⁹ See ./M, 000520.

⁷⁰ See, e.g., ./LS, 008028-008029 (Kantor).

⁷¹ See Beschluss 27.03.2000 (Ephrussi) (./KO), 008279 (“*Infolge dieser Unterlassung hat der Bund gemäß Art. 22 des Staatsvertrages in Verbindung mit dem ersten Staatsvertragsdurchführungsgesetz rechtmäßig Eigentum an den im Bundesmobiliendepot befindlichen gegenständen erlangt.*”); Beschluss 27.04.2004 (Korngold) (./KP), 008281-008283; Beschluss 28.11.2000 (Larus-Danilowatz) (./KQ), 008284-008287; Beschluss 27.03.2000 (Ernst Pollak) (./KR), 008289-008293; Beschluss 10.10.2000 (Stiasny) (./KS), 008294-008297; Beschluss 27.01.2004 (Reininghaus) (./KT), 008298-008302; Beschluss 27.03.2000 (Brill) (./KU), 008304-008307; Beschluss 22.11.1999 (Kantor) (./LT) 008049-008060.

2. The requirements of § 1 *KunstrückgabeG*

a) § 1 Z 1

(i) *Gegenstand von Rückstellungen*

Dr. Rinesch wrote to the museum on January 19, 1948 concerning the heirs' restitution claim for *Adele Bloch-Bauer II*.⁷² It is conceded that this painting was never restituted to the heirs. It was nevertheless the object of an informal restitution claim made by Dr. Rinesch. As discussed above, the *KunstrückgabeG* itself suggests that formal restitution proceedings were not always necessary for the recovery of artworks. In this sense, there is no reason why the term “*Gegenstand von Rückstellungen*” should not include the term “*Gegenstand von Rückstellungsansprüche*.” If the § 1 Z 1 *KunstrückgabeG* was intended only to pertain to actually restituted paintings, then it would have said “*rückgestellte Gegenstände*” rather than the more general “*Gegenstand von Rückstellungen*.” The more general term was expressly designed to take into account cases that might be discovered through further research. As the proponents of the *KunstrückgabeG* explained:

*Im Zuge der Provenienzforschung konnten drei Kategorien von Kunstwerken identifiziert werden, bei denen aus heutiger Sicht eine Rückgabe in Betracht zu ziehen ist. Da die Erhebungen noch nicht abgeschlossen sind und die einzelnen Kunstgegenstände, die von der haushaltsrechtlichen Ermächtigung erfaßt werden sollen, noch nicht vollständig feststehen, wurde aus rechtspolitischen Erwägungen einer generellen Gesetzesbestimmung der Vorzug gegeben. Damit soll auch die rechtliche Möglichkeit geschaffen werden, bereits identifizierte Kunstgegenstände einer raschen Rückgabe zuzuführen, andererseits für zukünftige, derzeit noch nicht bekannte, Fälle auf einen bereits bestehende gesetzliche Grundlage zurückgreifen zu können ohne erneut den Nationalrat befassen zu müssen. Damit soll der Vollziehung ein rasches Reagieren ermöglicht werden.*⁷³

A broad reading of § 1 Z 1 therefore serves the purpose of the statute. The somewhat generic term “*Gegenstand von Rückstellungen*” should therefore include not only *rückgestellte Gegenstände*, but also *Gegenstände von Rückstellungsansprüche*. As Prof. Welser and Prof. Rabl argue very correctly, it should not make a difference under the law whether a person obtained restitution of an artwork from the museum and then returned it to the museum in exchange for export permits, or whether, in shorter fashion, the restitution claim was abandoned

⁷² See ./U, 000465.

⁷³ 1390 XX GP 25.9.1998 Besonderer Teil zu § 1.

and the artwork was left with the museum in order to get those same export permits.⁷⁴ The beginning and end points are obviously the same.

(ii) Im Zuge eines Verfahrens nach Ausfuhrbewilligungen

The Republic acquired ownership in 1945 or 1955. However, the Republic obtained (or maintained) ownership only as the result of Dr. Rinesch's agreement in April 1948 to forego any restitution claim for the painting. As discussed above, this agreement was made in the course of seeking export permits for Ferdinand's collection. In this sense, the Republic obtained (or maintained) ownership as a direct and proximate result of Dr. Rinesch's plan to acknowledge the request in Adele's will in order to obtain export permits for other paintings. This fact scenario satisfies the purposes of § 1 Z 1, which is designed to return artworks that were left to federal museums in order to obtain export permits. Although the actual ownership was transferred in 1945 or 1955, the key event arguably occurred in April 1948, when Dr. Rinesch agreed not to pursue further the heirs' restitution claims. The *Beirat* has recognized the significance of the failure to institute restitution proceedings with respect to other cases, for example, in the Korngold case where it wrote: "*Infolge der Nichtgeltendmachung von Ansprüchen im Rahmen der RückstellungsGesetzgebung hat die Republik Österreich daran originär Eigentum erworben.*"⁷⁵ The agreement by Dr. Rinesch in April 1948, made in the course of seeking export permits, was the proximate cause of the painting being kept in the possession of the museum. This should satisfy § 1 Z 1.

The *Finanzprokurator* argues that this requirement is not met because there was no request for an export permit for the Klimt painting. However, as discussed above at III.A.2(a)(ii), the law does not include any such requirement and indeed it has not been interpreted to require an export permit proceeding for the artworks that were left with the federal museum. There is no rational reason why the law should require a formal export permit proceeding for the painting that was left with the museum. Certainly such a requirement would not serve the purpose of the law in any way.

(iii) Unentgeltlich ins Eigentum des Bundes

The *unentgeltlich* requirement is clearly satisfied. The Republic neither paid for this painting, nor did Ferdinand's heirs ever receive any money.

Thus, if one considers Dr. Rinesch's April 1948 agreement to be the significant event that led to the painting remaining in the possession of the Republic, then because that agreement was

⁷⁴ The 3. *RückstellungsG* also applied to abandoned claims. See Heller/Rauscher Nr. 109, p. 225, Rkv 100/48 v. 3. 7. 1948 (*Verzicht auf Unterhaltsansprüche ist Vermögensentziehung*).

⁷⁵ See ./KP, 008281.

quite clearly made in the course of seeking export permits for other paintings, the conditions of § 1 Z 1 have been met.

b) § 1 Z 2

(i) *Rechtmäßig ins Eigentum des Bundes*

Adele Bloch-Bauer II was legally acquired by the Republic in 1945 or 1955, as discussed above.

(ii) *Zuvor Gegenstand von Rechtsgeschäft unter NichtigkeitsG*

The museum's purchase of the painting from Dr. Führer in March 1943 was indisputably subject to the *NichtigkeitsG*. All of Ferdinand's paintings were liquidated to pay taxes imposed as a result of Nazi persecution.

The *Finanzprokurator* argues that the law requires that the artwork be obtained from a third party. Of course, in this case, the artwork was obtained from the German Reich, so this condition is met.

Therefore, either § 1 Z 1 applies or § 1 Z 2 applies, or both apply, and the painting *Adele Bloch-Bauer II* must be returned.

D. *Adele Bloch-Bauer I* and *Apfelbaum*

Because these two paintings have an identical history, they will be treated together in the following analysis. Indeed, the only distinction between these two paintings and the painting *Adele Bloch-Bauer II*, discussed above, is that Dr. Grimschitz traded the painting *Schloss Kammer am Attersee III* rather than pay money for the two paintings. This distinction makes no difference whatsoever in the analysis of when the Republic obtained ownership, nor the analysis under § 1 Z 1 or § 1 Z 2.

1. Ownership

The Republic acquired ownership of *Adele Bloch-Bauer I* and *Apfelbaum* in either 1945 or 1955.

The arguments here are identical to those for *Adele Bloch-Bauer II*, above, at III.C.1. Again, it makes little or no difference in the rest of the analysis whether the paintings were obtained in 1945 or 1955. The conclusion is the same.

2. The requirements of § 1 *KunstrückgabeG*

a) § 1 Z 1

(i) *Gegenstand von Rückstellungen*

The arguments here are identical to those for *Adele Bloch-Bauer II*, above, at III.C.2.(a)(i).

(ii) *Im Zuge eines Verfahrens nach Ausfuhrbewilligungen*

The arguments here are identical to those for *Adele Bloch-Bauer II*, above, at III.C.2.(a)(ii).

(iii) *Unentgeltlich ins Eigentum des Bundes*

The *unentgeltlich* requirement is clearly satisfied. The Republic neither paid for these paintings, nor did Ferdinand's heirs ever receive any money.

Thus, if one considers Dr. Rinesch's April 1948 agreement to be significant, then because that agreement was quite clearly made in the course of seeking export permits for Ferdinand's collection, the conditions of § 1 Z 1 have been met for both *Adele Bloch-Bauer I* and *Apfelbaum*.

b) § 1 Z 2

(i) *Rechtmäßig ins Eigentum des Bundes*

The paintings were legally acquired by the Republic in 1945 or 1955, as discussed above with regard to *Adele Bloch-Bauer II* at III.C.2(b)(i).

(ii) *Zuvor Gegenstand von Rechtsgeschäft unter NichtigkeitsG*

The arguments here are essentially identical to those for *Adele Bloch-Bauer II*, above, at III.C.2.(a)(ii).

The only additional question is whether the mention of Adele's will in the trade between Dr. Führer and Dr. Grimschitz makes any difference. It does not. The paintings *Adele Bloch-Bauer I* and *Apfelbaum* were traded in October 1941 by Dr. Führer to Dr. Grimschitz in exchange for *Schloss Kammer am Attersee III*. Although reference is made in the documents to Adele's will, it is clear that the transaction was a simple exchange.⁷⁶ The trade contradicted Adele's will in at least two respects: first, Ferdinand was still alive; and second, the painting *Schloss Kammer am Attersee* was removed from the museum and later sold to a third party! In any case, the transaction most certainly falls under the *NichtigkeitsG*, since it cannot possibly be suggested that the transaction would have occurred at that time or in that manner were it not for the Nazi liquidation of Ferdinand's estate. Ferdinand himself sought to obtain at least the portraits of Adele and bring them to Switzerland. And in his last two wills, he made no donations of the paintings to the museum.

Only a cynic would argue that the 1941 transaction is not subject to the *NichtigkeitsG* because Ferdinand had intended to donate the paintings to the museum upon his death. The fact is that Ferdinand survived the war and (for good reason) did not make any provision for the donation of the paintings to the museum in his will. Ferdinand's heirs therefore had the absolute right to obtain restitution of the paintings based on the *nichtig* transaction of Dr. Führer. Put another way, it is clear that Ferdinand himself would have had a right to obtain restitution of the paintings had he lived long enough to see the restitution laws enacted. His death could not extinguish that right to restitution, which necessarily passed on to his heirs. The Republic's claims, based on Adele's will, and arising, if at all, after Ferdinand's death, would have had no bearing on any restitution claims made by Ferdinand's heirs under the 3. *RückstellungsG*. The museum's claims, arising as they did after the war, would have had to have been brought separately, and it is unlikely that the restitution commission would have had jurisdiction to consider them. Similarly, the *KunstrückgabeG* does not concern itself with separate claims of ownership that the Republic could assert. Rather, the *KunstrückgabeG* **presumes** rightful ownership by the Republic (for example, through lawful acquisition after the war), but

⁷⁶ Of course, wills were also subject to the provisions of the *NichtigkeitsG*. See Graf, *Die Österreichische Rückstellungsgesetzgebung* (Oldenbourg Wien 2003), p. 104-106.

nevertheless directs restitution because of the problematic background of the painting (*Zweifel an der Unbedenklichkeit der Herkunft*).

Therefore, § 1 Z 1 and § 1 Z 2 have both been satisfied, and the paintings *Adele Bloch-Bauer I* and *Apfelbaum* must be returned.

IV. CONCLUSION

At every turn, the *Finanzprokuratur* urges an interpretation of the law that is designed expressly to restrict application of the *KunstrückgabeG* and preclude restitution of the Klimt paintings in this case. Indeed, the **driving principle** behind the *Finanzprokuratur*'s argument seems **only** to be the fervent desire that the Klimt paintings not be returned. How else can one explain the following facts:

- (1) the *Finanzprokuratur* has argued that the law requires a *Rückstellungsverfahren* when the *Kunstrückgabebeirat* has previously stated in other cases that there is no such requirement;
- (2) the *Finanzprokuratur* has argued that the law requires a formal application and denial of export permits for the painting in question, when the *Kunstrückgabebeirat* has previously stated in other cases that there is no such requirement;
- (3) the *Finanzprokuratur* has argued that the paintings belonged to Adele and not Ferdinand, when it is clearly stated in the estate files that the paintings were not Adele's property;
- (4) the *Finanzprokuratur* has argued that Adele's *Bitte* was binding, when already in 1926 it was seen by Adele's *Testamentsvollstrecker* and her husband as non-binding;
- (5) the *Finanzprokuratur* has argued that the three paintings obtained during the war by the museum became property of the Republic in 1945, when for the past 60 years it has taken the position that artworks obtained during the Nazi period did not become property of the Republic until 1955; and
- (6) the *Finanzprokuratur* has refused to apply concepts of inheritance law (*Testierfreiheit, Zweifelsregeln*) in the manner suggested by some of the leading experts in the field, such as Prof. Welser and Prof. Kletecka?

All of this merely to support the *Beirat*'s incredible conclusion that the *KunstrückgabeG* provides "*keine Möglichkeit für eine Restitution.*" **Keine Möglichkeit?** As we have demonstrated, there is indeed a "possibility" (if not a necessity) to find in favor of restitution. One need only interpret the statute in the same manner as in all the other cases that have been decided, to apply the law of inheritance in a manner consistent with the views of Prof. Welser or Prof. Kletecka, to analyze the *KunstrückgabeG* in the manner of Prof. Welser, Prof. Rabl or Prof. Graf, and to view the law through the eyes of someone who **supports** restitution of Nazi-looted artworks. Clearly, there are two Austrias. One favors restitution; the other opposes.

Respectfully submitted,

By: E. Randol Schoenberg