July 2, 2020

Dear Pia,

I must say I am surprised that Prof. Walter Rechberger, one of the three arbitrators in the case of the Bloch-Bauer Klimt paintings, has taken it upon himself to respond to an article by Prof. Georg Graf in NZ 2020/2 (*Amalie Zuckerkandl und der Rechstkraft*) in which Prof. Graf explained that the 2006 arbitration decision denying the return of the Klimt painting "Amalie Zuckerkandl" was inconsistent with the current practice of the Art Restitution Committee and therefore could and should be corrected. The surprise is not only that one of the arbitrators would seek to intervene and interfere in a pending *de novo* review of the 2006 decision, but also that his arguments are so obviously wrong (often bordering on the absurd).

As a preamble, I should note that during the two arbitrations concerning the Bloch-Bauer Klimt paintings, Prof. Rechberger, a former Dean of the Civil Law Department at the University of Vienna who was selected as an arbitrator by the Austrian government, was by far the least engaged of the three arbitrators during the proceedings. When I learned after the first arbitration in our favor that the lawyer for Austria, Dr. Gottfried Toman, had known of the arbitrators' decision several days before I was informed, and had spent considerable energy trying to dissuade the arbitrators and prevent the decision from being released, I presumed that it must have been Prof. Rechberger who had improperly leaked the information to him. Nevertheless, Prof. Rechberger, no doubt thanks to the unwavering position of the other two arbitrators, went along with the initial decision to return the five Klimt paintings that had been mentioned in Adele Bloch-Bauer's will. However, when it came to the second arbitration, the arbitrators did an about-face and refused to return the portrait of Amalie Zuckerkandl. The second arbitration hearing was a great disappointment to me, as it was quite obvious that the arbitrators had decided in advance to "split the baby" and deny our claim, no doubt in an attempt to appear "fair" to the government and their Austrian friends. I believe the arbitrators had assumed that the government would at least agree to purchase and retain the famous gold portrait of Adele Bloch-Bauer, but when that did not happen, the arbitrators faced criticism from their peers and completely abandoned their legal responsibilities, which would have required them also to return the Amalie Zuckerkandl painting.

The pertinent facts concerning the Amalie Zuckerkandl painting are hardly in dispute. The painting hung in Ferdinand Bloch-Bauer's home and was still there in January 1939, eight months after Ferdinand fled the country on the eve of the Anschluss. The painting was never found or recovered by Ferdinand or his heirs after the war, but instead was donated to the Austrian Gallery decades later by Vita Künstler, who claimed that her husband had purchased the painting during the war from Wilhelm Müller-Hofmann, the son-in-law of the subject of the painting, Amalie Zuckerkandl. From the very beginning I considered this the easiest possible case for return under Austria's 1998 Art Restitution Law, which directs the return of paintings in federal collections that had never been returned to their pre-war owners. Of all of the matters that I handled for Maria Altmann and other heirs of Ferdinand Bloch-Bauer (including the five paintings mentioned in Adele Bloch-Bauer's will, a Swiss Bank claim based on the loss of shares

in a sugar company, and the recovery of the Elisabethstrasse 18 home of Ferdinand Bloch-Bauer that had been handed over to the Austrian Railway) I had felt from the start that the Amalie Zuckerkandl painting presented the clearest case for recovery. I said as much in the first and only meeting I ever had with Dr. Rudolf Wran, the section chief for culture who was in charge of the restitution program, when I met him in 1999. And yet, incredibly, this one painting has been the only claim that was denied.

Since the wrongful decision of the arbitration panel in 2006, I have asked repeatedly for a review of the decision by the Art Restitution Advisory Board. Although the heirs agreed to binding arbitration, this did not and could not absolve Austria of the moral duty to return the painting, if the arbitration decision was wrong. [Jabloner, Schlussbericht der Historikerkommission der Republik Österreich, 2003, 436-437, 453 ("Die Beispiele des Kunstraubs, belegt durch zahlreiche (mehr oder weniger genau) recherchierte Einzelfälle brachten das Bild hervor, dass Österreich noch eine „Bringschuld" gegenüber den Opfern und ihren Nachkommen habe.")]. Nor did the ruling itself preclude a new decision. Recently I was able to persuade you and Dr. Jürgen Meindl to ask the Art Restitution Advisory Board to review the matter *de novo*, and I submitted the article by Prof. Graf in support of my position, relying on a number of more recent decisions that were flatly inconsistent with the arbitrators' ruling, as well as two decisions in which the Advisory Board reversed previous negative determinations without any change in evidence or law.

Apparently, Prof. Rechberger is fearful of such a review, and for good reason. He knows that the arbitration decision was very wrong. It was wrong at the time, and it is even more clearly wrong now. It is important to know that Prof. Rechberger and the other arbitrators never found that the painting could not be restituted because it was not wrongfully taken from Ferdinand Bloch-Bauer Bauer. Rather, they only decided that they didn't have sufficient evidence of the precise details of the confiscation of the painting. For the very first time in the history of Austrian restitution proceedings, the arbitrators reversed the burden of proof and placed it on the victim, Ferdinand Bloch-Bauer and his heirs, to prove exactly what happened to the painting after Ferdinand fled the country. Rather than accept the ample documentary evidence that Ferdinand Bloch-Bauer's entire collection had been liquidated, or adopt the longstanding presumption in favor of the victims of Nazi persecution that all such transactions were presumed to be invalid as a result of Nazi persecution, the arbitrators rejected the claim simply because Ferdinand Bloch-Bauer's heirs could not demonstrate exactly when and how the painting left Ferdinand's home and ended up in the hands of Vita Künstler.

You might think I am making this up, because it is so absurd. But this is precisely what Prof. Rechberger and the other arbitrators did in this second arbitration decision. The arbitrators admitted in their decision that there was no evidence of what exactly happened to the painting after it was listed in 1939 as being in Ferdinand Bloch-Bauer's home as part of the proceedings liquidating his art collection. That should have been the end of the inquiry. Any transfer of property from a persecuted individual during the Nazi period is invalid unless it can be proven that the transaction would have happened even without the Nazi takeover of Austria. That has been the rule since after the war and is still the rule today. But the arbitrators refused to apply

that rule, notwithstanding Austria's repeated commitment to restitution, from the time of the enactment of the restitution laws, to the Austrian State Treaty of 1955 which expressly obligates Austria to return property to victims, up to and including the Art Restitution Law of 1998, which directs the return of un-restituted property from federal museums. Instead, the arbitrators invented a brand new rule for restitution cases. First they dreamed up the most implausible "plausible scenario," arguing, without really any evidence at all, that Ferdinand Bloch-Bauer had managed to transfer the painting as a gift to Minnie Müller-Hofmann, the daughter of Amalie Zuckerkandl. The ridiculousness of this imagined scenario should be obvious to anyone with even a grade school understanding of the Third Reich. Ferdinand Bloch-Bauer was in exile in Switzerland. The Nazi lawyer Dr. Erich Führer, an SS-Hauptsturmführer who was convicted of treason and sentenced to hard labor after the war, was in charge of the liquidation of all of Ferdinand Bloch-Bauer's property to pay an enormous, discriminatory tax assessment. [For a more complete list of Führer's criminal Nazi activity, see https://www.doew.at/erkennen/rechtsextremismus/neues-von-ganz-rechts/archiv/september-2001/erich-fuehrer.] Dr. Führer attended the January 1939 meeting where the painting was listed as being in Ferdinand's home, and the various museum representatives and Nazi officials determined how the artworks would be disposed of. So, the "plausible scenario" is that the high-ranking Nazi Dr. Führer, instead of selling the painting to pay off the tax judgment, like he did with the rest of the large art collection, made an illegal gift, in violation of the tax judgment, of this one painting to the Jewish woman Minnie Müller-Hofmann, who was, by the way, in hiding in Bavaria while her mother and sister were being deported and murdered at Belzec extermination camp. This is what Prof. Rechberger, the former dean of civil law at the University of Vienna, thinks is "plausible."

Of course, it should have made no difference that the arbitrators concocted an insane story about a gift of the painting free from the duress of the Nazi period (with not a shred of evidence from either Ferdinand Bloch-Bauer or even Dr. Führer to support the theory), because the law has been clear since the late 1940s that even a seemingly friendly gift of property by a persecuted Jew is a void transaction, except in the unlikely event that someone could prove that the gift would have happened anyway without the Nazi persecution. But here is where Prof. Rechberger and the other arbitrators decided to really veer off the rails. They found that these old rules, and the presumptions in favor of the victims that were the cornerstone of the post-war restitution laws were too unfair to be applied in this case. After so many years, how could anyone prove the impossible defense that a transaction would have occurred even without the Nazis? How unfair to Austria! No, now it would be the victims who would have to prove that the Nazis really acted like Nazis in every particular instance. Of course, the resulting overwhelming unfairness to the victims, who could not possibly have evidence of what the Nazis did with their property, never even crossed their minds. Fairness to the victims of Nazis was apparently not part of the equation.

As I sensed where the arbitration was heading, I argued vociferously against this wrongful distortion of the law. To no avail. The die was cast, and there was no averting the disastrous result. The Austrian Gallery was allowed to keep the obviously looted painting of a murdered woman, taken from the bedroom of a persecuted Jew, as a trophy in its most famous museum,

simply because no one could say for certain exactly how the high-ranking traitorous Nazi lawyer Dr. Erich Führer had disposed of the painting while he was liquidating the rest of Ferdinand's property.

And this is the state of affairs that the brave Prof. Rechberger is rushing to defend.

Prof. Rechberger's article is riddled with strange and confusing arguments, most of them untethered to the facts or law relevant to this matter. Below are some responses:

1. Prof. Rechberger begins with a strange discourse on whether Ferdinand Bloch-Bauer was the "original owner" of the painting. Of course, this term is set forth in the Art Restitution Law, which provides for the return of artworks to the original owner or his heirs. In that context, the term naturally refers to the owner at the time of the dispossession during the Nazi era. If read literally, and out of context, as Prof. Rechberger seems to want, then the original owner would of course be the artist, Gustav Klimt (and not any other intervening owners). In any case, Prof. Rechberger concedes the obvious fact, supported by the documentary evidence (for example, a 1928 catalogue and an insurance inventory of 1932) that the painting was in Ferdinand Bloch-Bauer's possession from the late 1920s through at least January 28, 1939, when it was listed as being in his home. Of course, the good professor doesn't mention that Austrian law (ABGB 323) states that legal ownership can be presumed from the mere fact of possession, and given that there is absolutely no contrary evidence, only someone with an ulterior motive could even question whether Ferdinand Bloch-Bauer was the "original owner" of the painting in the sense of the Art Restitution Law.
2. As set forth above, Prof. Rechberger's entire argument hinges on ignoring the overwhelming documentary evidence of the confiscation of Ferdinand Bloch-Bauer's entire art collection (including not only Ferdinand's own writings, such as his second-to-last will and his letter to Oskar Kokoschka, but also official records confirming that the collection was liquidated in its entirety), and on the unprecedented reversal of the burden of proof to the victim, contrary to the entire history of the restitution laws in Austria. He takes some comfort in the fact that the OGH, in its review of the arbitration decision, called his novel construction of the law "thoroughly reasonable," even though there is absolutely no support for his view in either the wording of the law or its legislative history. Of course, the Art Restitution Advisory Board came (belatedly) to the opposite conclusion, and the practice has been for more than a decade to apply a completely different legal standard. And that is the whole issue. How can anyone tolerate having one rule of decision for one painting, but an opposite rule for every other case? The entire purpose of the Art Restitution Law was for Austria to rid itself of artworks in federal museums that could be considered to have been wrongly taken during the Nazi era. How can that important goal be accomplished if Austria keeps an artwork that it would otherwise return under the currently prevailing standard?
3. It seems that for Prof. Rechberger, it is more important to him that his ludicrous rendering of the facts and his awkward construction of the Art Restitution Law be confirmed, than it is for Austrian law to be consistently applied among similar cases, or

that Austria accomplish its goal of clearing its museums of artworks that were taken from the Jewish victims of the Nazis. Prof. Rechberger leans on the holding of the OGH, which made the same mistake he did. The question was never whether Austria could theoretically reverse the burden of proof or pass a restitution law that made it impossible to restore property unless the victims proved every detail of every confiscation and negated every possible defense. The question was whether Austria did do that, or, more exactly, whether, absent any evidence of such an intent to change course, it was a violation of public policy for an arbitration panel to interpret the new Art Restitution Law in such an unprecedented way, contrary to more than fifty years of legal history, including the Austrian State Treaty. As many times as Prof. Rechberger claims that the OGH dealt with the issue, he cannot say that they answered this question, or that they even mentioned or responded to most of the arguments made in our Revision brief. (See, e.g., Revision, page 20: "Wenn die Missachtung der Legaldefinition der „Entziehung", Leugnung von historischen Tatsachen und Einführung von „plausiblen" Szenarien – eine ganze Serie von abwegigen Vorstellungen - nicht „denkunmöglich" sind, was dann?")

4. Prof. Rechberger tried to distinguish two cases (Mahler-Werfel and Felsövanyi) in with the Art Restitution Advisory Board has changed its original decision and directed the return of artworks notwithstanding prior legal decisions denying restitution. If anything, the present case is even more deserving of such treatment. Here, unlike the other two cases, the Art Restitution Advisory Board itself contributed to the obviously wrong legal decision by the Arbitration Panel that needs to be corrected. Were it not for the incorrect decisions by the Art Restitution Advisory Board from August 18, 2000 and June 29, 2005, no doubt the arbitration would never have happened. The analysis in the 2005 decision, factually unsupported and flatly inconsistent with numerous subsequent decisions, must have greatly influenced the arbitrators. There you will find expressed the bizarre and completely impossible (and legally irrelevant) idea of a "gift" of the painting as an excuse for denying restitution, as well as a whole host of incorrect allegations that were contradicted by the evidence. They even questioned Ferdinand's ownership of the painting, and falsely claimed that none of his heirs ever sought the painting! A generous explanation would be that the members of the Advisory Board at that time lacked the imagination and understanding to reach a more informed conclusion. For example, it did not occur to the members that a "gift" would have been not only contrary to Ferdinand Bloch-Bauer's interests, as well as Dr. Führer's motives and intentions, but also highly illegal, given the requirement to liquidate the collection to pay the tax judgment. Nor is there any discussion of the fact that even gifts during that time are considered confiscations, under the restitution law. (Apparently no one bothered to even look up the restitution decisions in the old Heller/Rauscher books.) By the way, I have always thought it much more likely that Dr. Führer used Wilhelm Müller-Hofmann as a "front" to sell the painting to Vita Künstler, and that perhaps Müller-Hofmann received a commission for the sale, but that idea obviously never even occurred to the Advisory Board at the time, which insisted on making decisions without even asking for comments from the parties involved. Still, we should all understand exactly what was motivating the Art Restitution Advisory Board at that time. Everything

was being done to fight Mrs. Altmann's claim for the other Klimt paintings. There was no desire to award her a victory that might give her more resources for the other claim. So, to return to the issue, in this case we have a wrongful arbitration decision that was in very large part the result of an incorrect decision by the Advisory Board. In my view, this makes a far more compelling case for correction of the decision than either the Mahler-Werfel or Felsövanyi cases, where the Advisory Board not only had to change and correct its prior decision, but also to override a completely independent court decision against restitution. Here the arbitration decision was a direct result of the Advisory Board's prior mistake.

I have submitted numerous briefs and letters concerning this case and I hope very much that whoever is working on it will review those thoroughly and take a close look at the documentary evidence supporting them. It is so difficult for me to have to respond after the fact and refute every crazy idea that seems to pop into the heads of the people opposing restitution of this painting. This is a simple and easy case. The painting belonged to Ferdinand Bloch-Bauer at the time of the Anschluss and was never recovered by him or his family after he fled the country. That is all anyone really needs to know. All of the speculation and phantasy in the world cannot change those facts.

Sincerely yours,

E. Randol Schoenberg

P.S. For completeness, I am attaching a number of our prior briefs and letters. I put everything concerning the Bloch-Bauers at http://bslaw.com/altmann/. The documents most relevant to the Amalie Zuckerkandl painting are at http://bslaw.com/altmann/Zuckerkandl/Docs/, but of course there is much more available in the other restitution matters that can be reviewed to get an overall impression of what happened. If you have a question, please do not hesitate to ask me.