In the arbitral case

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and **Dr. Nelly Auersperg**,
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versus

the Republic of Austria
represented by the *Finanzprokuratur*, Singerstrasse 17-19, 1010 Vienna

the arbitration court, consisting of Dr. Andreas Nödl, lawyer, Professor Walter H. Rechberger, and Professor Peter Rummel as chairman,

has ruled as follows:

1. **The Republic of Austria acquired ownership of the paintings by Gustav Klimt, *Adele Bloch-Bauer I, Adele Bloch-Bauer II, Apfelbaum, Buchenwald/Birkenwald,* and *Häuser in Unterach am Attersee* by virtue of the settlement with the representative of the heirs of Ferdinand Bloch-Bauer, Dr. Gustav Rinesch, in 1948.**
2. **The conditions of the Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections dated 4th December 1998, Federal Law Gazette 1 No. 18111998 for the return of the five paintings indicated above without remuneration to the heirs of Ferdinand Bloch-Bauer**

are fulfilled.

3. **Pursuant to Section B of the Arbitration Agreement, the Republic of Austria shall bear the costs of the proceedings.**

Statement of Grounds

1. Subject Matter of the Dispute

The claimants asserted claims against the Republic of Austria for the surrender of five paintings by Gustav Klimt *(Adele Bloch-Bauer I, Adele Bloch-Bauer Il, Apfelbaum I, Buchenwald/Birkenwald, Häuser in Unterach am Attersee)* that are currently in the possession of the Republic and kept in the Austrian Gallery in the Belvedere. The parties ended the proceedings initiated in this matter in courts of general jurisdiction both in the USA and in Austria by means of an Arbitration Agreement, undersigned by the parties in May 2005. Based on this Arbitration Agreement, the arbitration court deciding this matter analyzed the following issues:

"whether, and in what manner, in the period between 1923 and 1949, or thereafter, Austria acquired ownership of the arbitrated paintings, *Adele Bloch-Bauer 1, Adele Bloch-Bauer Il, Apple Tree I, Beech Forrest (Birch Forrest),* and *Haus 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 sub-sections thereof), the requirements are met for restitution of any of the arbitrated paintings without remuneration to the heirs of Ferdinand Bloch-Bauer."

A sixth painting by Gustav Klimt, the portrait *Amalie Zuckerkandl,* is the subject of a Joinder Agreement to the quoted Arbitration Agreement; it was therefore not the subject of these proceedings, but rather of other proceedings before the same arbitration court.

The parties to the Arbitration Agreement agreed that this arbitration court should reach its decision pursuant to the provisions of Austrian substantive law and Austrian procedural law. Consequently, the arbitration court observed the legal demands imposed upon it by the Arbitration Agreement and Austrian law. In legal terms, its decision was based solely on the facts presented to it by the parties on the basis of the evidence they submitted. The arbitration court was neither authorized nor qualified to carry out historical investigations and research of its own. Questioning of historians or other scholars as experts was not requested by the parties, nor did the arbitration court deem it necessary. In keeping with the mandate entrusted to it by virtue of the Arbitration Agreement, the arbitration court's decision had to be based exclusively on legal criteria.

2. Submissions Made by the Parties

The parties' submissions will first be briefly summarized. In instances where the full wording of the documents presented by the parties and regarded as relevant by the arbitration court is of material importance further to the text quoted herein, it is quoted in the section entitled "Legal Analysis".

The **claimants** made the following submission in their **complaint (ON 2,** dated 19th July 2005) requested by the arbitration court:

> Ferdinand Bloch-Bauer, died 13th November 1945 in Zurich, the claimants being his uncontested legal successors (heirs), commissioned Gustav Klimt to paint the arbitrated paintings. He paid for the paintings, and since then they were in his ownership and possession. In her will drawn up in 1923, in which she named her husband the sole heir, Ferdinand Bloch-Bauer's wife Adele, died 24th January 1925, disposed of – in addition to a series of other instructions, in particular legacies – the arbitrated paintings, two of which are portraits of her, as well as of one further painting, as follows:

"I ask my husband after his death to leave my two portraits and the four landscapes by Gustav Klimt to the Austrian State Gallery in Vienna and to leave the Vienna and to leave the Vienna and Jungfer, Brezan library, which belongs to me, to the People's and Workers' Library of Vienna."

(the fate of one of the four landscapes mentioned [*Schloss Kammer am Attersee III*] has been clarified. That painting is not the subject matter of these arbitration proceedings; however, Ferdinand Bloch-Bauer's donation of that painting during his lifetime to the gallery, today's Austrian Gallery in the Belvedere, and its further fate, are referred to in the parties' statements and in the arbitration court's analysis of evidence.)

The executor appointed by the testatrix, her brother-in-law Dr. Gustav Bloch-Bauer, a lawyer and the brother of Ferdinand Bloch-Bauer, made the following statement in the Adele Bloch-Bauer probate proceedings:

"In Section III, Paragraphs 2 and 3, the testatrix makes various requests to her husband; he promises to faithfully fulfill said requests, though they do not have the binding nature of a testamentary disposition. It is important to note that the Klimt paintings are not the property of the testatrix, but rather of the testatrix's widower."

Because of his Jewish descent and political convictions, in March 1938 Ferdinand Bloch-Bauer was forced to flee Austria and seek refuge in Prague. As was common practice at that time in the case of individuals who had fled the country, the Vienna-Wieden tax authorities initiated tax evasion proceedings on 27th April 1938 as an excuse to confiscate the property Ferdinand Bloch-Bauer had left behind in Austria (at that time the German Reich). In the course of these proceedings, the lawyer Dr. Friedrich Führer was appointed temporary administrator of the estate and, among other things, was ordered to liquidate and make appropriate use of the "Bloch-Bauer collection". Dr. Führer was quick to fulfil this task in the interests of the Nazi regime, including in the case of other significant assets belonging to Ferdinand Bloch-Bauer, for example his extensive porcelain collection and a large number of other paintings. In 1939 Ferdinand Bloch-Bauer was forced to leave Prague and settle in Zurich, and in the process lost all access of any kind to his assets. Thereafter, Dr. Führer gave the paintings *Adele Bloch-Bauer I* and *Apfelbaum I* to the gallery, which in turn gave him *Schloss Kammer am Attersee III*, which Ferdinand Bloch-Bauer had given to the gallery in 1936 in fulfilment of his promise made as part of the probate proceedings. Dr. Führer subsequently sold the latter painting for 6,000 Reichsmark to Gustav Ucicky, a son of Gustav Klimt. In 1942 Dr. Führer sold and surrendered *Buchenwald (Birkenwald)* for 5,000 Reichsmark to the City of Vienna Collection. In 1943, Dr. Führer sold *Adele Bloch-Bauer II* to the Austrian Gallery (known as the Modern Gallery at that time), and kept *Häuser in Unterach am Attersee* for himself.

Ferdinand Bloch-Bauer died on 13th November 1945 in Zurich; he left a will establishing the legal succession of the claimants with regard to his estate.

After the end of the war, Ferdinand Bloch-Bauer entrusted Viennese lawyer Dr. Rinesch with the recovery of his artworks as well as generally with restitution of his seized assets. After Ferdinand Bloch-Bauer's death, Dr. Rinesch also acted as the representative of the Ferdinand Bloch-Bauer's heirs. He tried to locate the scattered assets, in particular the paintings from Ferdinand Bloch-Bauer's collection, and attempted to arrange for their return and export. At that time, it was common administrative practice to grant an export permit for rediscovered or restituted artworks of expelled or exiled victims of the Nazi regime only if they in turn declared that they would "donate" to the Republic valuable parts of their restituted assets. This was what happened in the case of numerous objects from the Bloch-Bauer collection, including the five arbitrated paintings by Gustav Klimt. An attempt was made to pass off this procedure as an acknowledgment of Adele Bloch-Bauer's (in fact legally invalid) legacy.

A request by the claimants for restitution of the five Klimt paintings pursuant to the 1998 Art Restitution Act was informally rejected by the minister under whose mandate it fell.

In legal terms, the submitted facts lead one to conclude that Adele Bloch-Bauer's will regarding the five or respectively six paintings was merely a non-binding request; furthermore, even if it was construed as a legacy that was intended to be binding, the validity of this request was incompatible with the principle of testamentary freedom, as it was at best a reversionary legacy of an asset that did not belong to the testatrix, but rather to the heir (Ferdinand Bloch-Bauer). Furthermore, his declaration made in the Adele Bloch-Bauer probate proceedings, namely that he would faithfully fulfil the request, was neither a constitutive acknowledgment nor a valid promise to donate. Nothing regarding the legal position of the other five paintings can be derived from the donation of one painting to the gallery in 1936 .

Accordingly, Ferdinand Bloch-Bauer was, in 1938, the unencumbered owner of the paintings. The paintings, of which the Republic acquired the ownership without remuneration only as part of the export application, therefore fulfil the first element of the 1998 Art Restitution Act. *In eventu*, the second element of the 1998 Art Restitution Act is also fulfilled.

The claimants therefore submitted the following:

We hereby argue that the Republic of Austria only acquired ownership of *Adele Bloch-Bauer I, Adele Bloch-Bauer II,*

***Apfelbaum I, Birkenwald (Buchenwald)* and *Häuser in Unterach am* Attersee by virtue of the agreement dated 10th April 1948 between Dr. Rinesch as representative of the heirs of Ferdinand Bloch-Bauer and Dr. Garzarolli, director of the Austrian Gallery, and that the conditions for restitution without remuneration of all or individual arbitrated paintings to the heirs of Ferdinand Bloch-Bauer pursuant to § 1 of the Austrian Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections dated 4th December 1998 are fulfilled.**

In their **response** (**ON 5** dated 16th August 2005), the **respondents** requested that the complaint be rejected, and submitted the following:

We hereby argue that the Republic of Austria rightfully acquired ownership of the paintings *Adele Bloch-Bauer I, Adele Bloch-Bauer II, Apfelbaum I, Buchenwald (Birkenwald)* and *Häuser in Unterach am Attersee* during the period indicated in Section 6 (lssues Presented) of the Arbitration Agreement dated May 2005, and that the conditions for a restitution without remuneration to the claimants pursuant to § 1 of the Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections dated 4th December 1998 are not fulfilled."

Adele Bloch-Bauer was herself the owner of considerable assets, and in addition to many other paintings, she herself also bought the arbitrated paintings from Gustav Klimt. Adele Bloch-Bauer's ownership of the paintings can be deduced from many documents the claimants have not considered in their submission. Contrary to their allegations, the painting that went to the Gallery first was not donated to it by Ferdinand Bloch-Bauer, but delivered "as a dedication by Adele and Ferdinand Bloch-Bauer". The events associated with the liquidation of the property of Ferdinand Bloch-Bauer by Dr. Führer after 1938, which are basically not disputed, occurred based on an awareness of Adele Bloch-Bauer's legacy. The dispositions with regard to Ferdinand Bloch-Bauer's paintings made after the war were all based on the assumption, on which both Dr. Rinesch and all other persons involved justifiably based their actions, that the paintings were the subject of a valid (reversionary) legacy by Adele Bloch-Bauer to the Gallery. There is nothing to support the claimant's argument that Dr. Rinesch was coerced in connection with the granting of the export permit for the other items in the collection. Accordingly, and in particular, an export permit for the five paintings was never submitted. Thus the 1998 Art Restitution Act is not in any way applicable.

In their legal argument, the respondents reiterated that Adele Bloch-Bauer was the owner of the paintings and that she was therefore able to dispose of them with legal effect via

her will. The respondents argued that the *praesumptio Muciana* (assumption that the husband is the owner of a married couple's assets of which the title cannot be assigned unequivocally to either of the spouses) per § 1237 of the General Civil Code applicable at the time, which supports the view that the husband is the owner, is of no consequence in the present case. They also argued that even a legacy regarding an asset belonging to somebody else is valid according to § 662 of the General Civil Code if the asset belongs to the heir – this was confirmed repeatedly by the Supreme Court, with the approval of legal scholars. They argued that by making his declaration in the Adele Bloch-Bauer probate proceedings, Ferdinand Bloch-Bauer waived his right to contest the disposition made therein; *in eventu* this declaration would also have to be interpreted as a promise to donate. Thus, they argued, the surrender of the paintings to the gallery by Dr. Rinesch was made in fulfillment of a legally valid claim to the five paintings on the part of the Republic. They concluded that none of the various provisions of the 1998 Art Restitution Act were met.

In their **written submission ON 7** dated 19th August 2005, the **claimants** further asserted that the newly submitted documents did not undermine their argument concerning the ownership of the paintings. They argued that all legal transactions relating to the paintings between 1938 to 1945 fall within the scope of the Annulment Act, Federal Law Gazette 19461106, and that their arguments with regard to the 1998 Art Restitution Act were therefore not refuted.

In their **written submission ON 9** dated 31st August 2005, the **respondents** replied and again presented their arguments regarding the documents pertaining to ownership of the paintings. They argued that Dr. Rinesch had not been forced to surrender the paintings, and that although Adele Bloch-Bauer's will may have been "taken into provisional custody without warrant" during the Nazi period, as suggested occasionally during the proceedings, its validity could not be doubted since the re-emergence of the Republic as a democracy. In all other respects, the claimants' legal arguments were again disputed. In particular, the applicability of the 1998 Art Restitution Act was again denied.

In their **written submission ON 10** dated 30th August 2005, the **claimants** introduced a new legal argument: Had Adele Bloch-Bauer been the owner of the paintings as per the respondent's argument (though the claimants continued to dispute this), then they would have been assets belonging to the conjugal household of the Bloch-Bauer family and therefore within the scope of the future legacy per § 758 of the General Civil Code prior to amendment (as applicable since 1914), so that they necessarily had to revert to the husband upon her death on these grounds alone. They also argued that the Supreme Court, in its decision 10 Ob 14104p, recently confirmed their argument concerning testamentary freedom relating to disposition of assets not belonging to the testator.

During the oral proceedings on 5th September 2005 (ON 11) the parties, in response to explicit questioning by the arbitration court, explicitly ruled out the possibility of an amicable settlement of the matter at this time, after the respondent indicated that the (renewed) offer submitted by the claimants, in which the respondent would purchase both portraits and release the other three paintings, was unacceptable.

Whilst maintaining their principle position with regard to the facts as expressed in their written submissions, **the claimants** also presented certain legal aspects in a new light.

They explicitly upheld their argument that, assuming the arbitration court interpreted Ferdinand Bloch-Bauer's declaration made as part of the Adele Bloch-Bauer probate proceedings (ON 11 page 47) as a donation, then they would continue to contest (as outlined in an earlier written submission) the donation of the paintings.

Dr. Schoenberg submitted **on behalf of the claimants** (ON 11 page 85 ff) that the Republic was not the rightful owner of the paintings in 1938, and that in 1945 *Adele Bloch-Bauer I, Adele Bloch-Bauer II* and *Apfelbaum* were "German property", as they had been brought to the Modern Gallery by Dr. Führer during the war years. He argued that at this point Austria had no claim to these paintings at all: At that time Ferdinand Bloch-Bauer was still alive; in 1945 *Birkenwald* was the property of the City of Vienna; and *Häuser in Unterach am Attersee* was the property of Dr Führer. Dr. Schoenberg pointed out that under the law per *StGBl* (*Staatsgesetzblatt*) [State Legal Gazette] 1945, 194 regarding "German property", the Republic of Austria was initially only considered

an administrator (ON 11 page 90), and that Ferdinand Bloch-Bauer's death had no impact on this ownership status. He pointed out that Ferdinand's nephew, Karl Bloch-Bauer, then obtained ownership of *Häuser in Unterach am Attersee* (which Dr. Führer had received "via an exchange" from the Modern Gallery, to which Ferdinand Bloch-Bauer had given it before the war) via restitution from Dr. Führer in favor of the heirs. Dr. Schoenberg pointed out that it was only in 1948 that Dr. Rinesch surrendered this painting to the Republic in the name of the heirs; and that it was only with the assistance of Dr. Rinesch that the Republic obtained ownership of *Birkenwald (Buchenwald)* from the City of Vienna. Dr. Rinesch was not able to transfer *Adele Bloch-Bauer I, Adele Bloch-Bauer II* and *Apfelbaum* to the gallery, as they were still German property. In fact they only became the property of the Republic pursuant to the 1st State Treaty Implementation Act (ON 11 page 96), he argued. Given these preceding events, Dr. Schoenberg argued, there was no doubt that it was within the Republic's authority to release these paintings to Ferdinand Bloch-Bauer's heirs (this will be discussed in detail with reference to each individual painting and elements of the 1998 Art Restitution Act). Under these conditions, he argued, it might not even be necessary for the arbitration court to rule upon whether or not Adele Bloch-Bauer's will was binding, or whether the paintings belonged to Adele or Ferdinand (loc cit. page 119 f); it depended solely upon the time at which the Republic acquired possession of the paintings, and whether the Republic was authorized to release them per the 1998 Art Restitution Act. He argued that the paintings were also "German property" as defined in the 1st State Treaty Implementation Act when illegally taken from their previous owners (ON 11 page 122); and that the proceedings during the Third Reich also fell within the scope of the Annulment Act, even where it is not "self-executing".

Dr. Toman again submitted **on behalf of the respondent** that the paintings came into the possession of the Republic on the basis of the will, and that these particular paintings were never the subject of a restitution procedure. There was also no evidence for a "do ut des" in connection with the export permission for other items of property from Ferdinand Bloch-Bauer's estate. He argued that the elements of the 1998 Art Restitution Act had not been fulfilled (for details, see ON 11 page 128 ff).

On behalf of the claimants (ON 11 S. 141), Dr. Gulner again pointed out the importance of the assumption per § 1237 of the General Civil Code, and stressed that all the paintings had counted towards Adele Bloch-Bauer's future legacy and therefore after her death they would, in all events, have passed to her husband Ferdinand Bloch-Bauer (as already stated in ON 10).

In a second reply **ON 14,** the **respondents** made the following submission:

The respondents argued that in connection with the claimant's submission that the paintings belonged to Adele Bloch-Bauer's future legacy, it was not possible to explain with complete certainty where the paintings were at the time of death (1925). However, they were demonstrably exhibited at home and abroad, and in 1936, i.e. at the time of the transfer of *Häuser in Unterach am Attersee* to the State Gallery, hung in the Memorial Room of Ferdinand Bloch-Bauer's residence in Elisabethstrasse in Vienna.

Accordingly, the respondents argued, the paintings were not objects of the future legacy per § 758 of the previous version of the General Civil Code, as they did not serve "household purposes". The Supreme Court decision dated 27th August 2005, 10 Ob 14104p, submitted by the claimants in support of their legal position, was not relevant to the present case, as it was of a different nature, the respondents argued.

The respondents also pointed out that the claimants' argument (which differed from their earlier position) that the paintings were all "German property" per the State Treaty and the State Treaty Implementation Act was mistaken. The respondents noted that per the exceptions to those legal regulations, the former property of the Austrian Galerie was not "German property" as defined therein; and that in any case, in recognition of Adele Bloch-Bauer's will, all the paintings were passed to the gallery by Dr. Rinesch in agreement with Ferdinand Bloch-Bauer's heirs. The respondents also argued that the Republic's authority to release the paintings, as posited by the claimants, was – contrary to the claimants' position – tied to particular legal preconditions not fulfilled in the present case. The case of Kantor, cited by the claimants as a precedent, was not comparable, they argued, and upheld their legal position unchanged.

After submission of several other publications relating to restitution, the **claimants** again submitted a summary of their legal position**,** in **ON 18** dated 12th October 2005. By contrast with their approach in the oral proceedings, the claimants analyzed the question of acquisition of ownership of *Adele Bloch-Bauer I, Adele Bloch-Bauer II* and *Apfelbaum* by the gallery either in 1945 or 1955 (ON 18 page 4). They noted that the regulations per §§ 614 and 711 of the General Civil Code argue for the non-binding nature of Adele-Bloch Bauer's wishes to her husband in her will; and that on this point the respondent should bear the burden of proof for demonstrating the binding nature of the instruction they claimed. Similarly, they argued that the respondent should bear the burden of proof for refuting the presumption of ownership per § 1237 of the General Civil Code, which argues for ownership by Ferdinand Bloch-Bauer. They also argued that, with regard to the elements of restitution legislation, the respondent should bear the burden of proof for demonstrating that instructions would have been carried out regardless of the Nazi regime.

3. Legal Analysis

3.1 Regarding Jurisdiction and Evaluation of the Evidence

Pursuant to the Arbitration Agreement between the parties, the arbitration court was indisputably assigned jurisdiction for the matters in question. Pursuant to the Arbitration Agreement, its objective was to ascertain the ownership situation with regard to the five paintings and determine whether the 1998 Art Restitution Act was applicable. Per the Arbitration Agreement, Austrian substantive law and Austrian procedural law were applicable.

The arbitration court stated to the parties that with regard to procedure it was bound to the provisions of §§ 577 ff of the Code of Civil Procedure [*ZPO*] regarding arbitration court procedures, and that, insofar as the aforementioned provisions do not contain any mandatory instructions, proceedings were to be conducted according to the arbitration court's discretion.

The arbitration court asked the parties for a complaint and a response to be submitted, and subsequently conducted the proceedings according to the formal rules of arbitration in Austria. The parties did not raise any objections to this method of proceeding.

In two written submissions (**ON 4** dated 27th July 2005 and **ON 8** dated 24th August 2005) Dr. Berardino, the legal representative of the claimant Dr. Nelly Auersperg, indicated that his client Dr. Auersperg had signed the Arbitration Agreement but would not participate any further in the proceedings. Nonetheless, she stated that she would abide by the ultimate arbitral ruling.

In written submissions, the parties submitted extensive documentary material (copies were provided in all instances, and in many instances the documents provided by the two parties matched) to the arbitration court; the authenticity thereof was not disputed during the proceedings. By mutual agreement, during the oral proceedings (ON 11, page 21 f) Attachment ./88 was discussed and agreement reached thereon. Furthermore, before the arbitration court sat, the claimants submitted very extensive materials to the arbitration court, which the arbitration court made use of in instances when the claimants explicitly referred to said material in their written submissions, including in the "Summary" (Attachment ./AK). In its evaluation of evidence, the arbitration court only made use of documents which were available to both parties. The only exception to this was the document Attachment ./Y = ./55. This was always submitted to both parties in the form of a copy, but during oral proceedings was submitted by the respondent to the arbitration court per its instructions in the form of an original (written submission ON 14), and was subsequently made available by the arbitration court to the claimants' representative, who was offered the opportunity to comment but did not do so.

The arbitration court determined that in this document (and this was in dispute per the parties written submissions) the third paragraph of the handwritten text said "12 paintings" and not "K. paintings". Insofar as it was necessary, the documents submitted by the parties were assessed during the course of legal assessment.

The inclusion of Dr. Auersperg as a party and the examination of Dr. Grimberg as a witness, which had originally been requested by the respondent, did not take place: The

respondent in fact explicitly forewent examination of Dr. Auersperg (oral proceedings ON, 11 page 59); instead of examination of Dr. Grimberg as originally requested, the respondent submitted a tape-recording of a conversation between Dr. Grimberg and Luise Gattin (formerly Baroness Gutmann), a niece of Ferdinand Bloch-Bauer, along with a transcription thereof. In its written submission regarding this, the respondent did not make any further request for examination of Dr. Grimberg. During deliberations as part of oral proceedings (ON 11, page 59 ff), the arbitration court did not deem it significant to the proceedings to examine this witness.

The parties submitted to the arbitration court two extensive advisory opinions which it had obtained on a private basis to support their positions: The advisory opinion provided by Welser/Rabl, which in the meantime had been published in the form of the book entitled *Der Fall Klimt* [The Klimt Case] (Manzer Verlag, 2005), was provided by the claimants; the advisory opinion by Krejci, which had in the meantime also been published in the form of the book, as *Der Klimt-Streit* [The Klimt Dispute] (Verlag Österreich). In reaching a decision regarding its arbitral ruling, the arbitration court carried out in-depth assessment of the legal arguments stated therein and in various other recent articles on the topic (Georg Graf, "Überlegungen zum Anwendungsbereich des § 1 Z 2 KunstrückgabeG" ["The Scope of Applicability of § 1, Section 2 of the Art Restitution Act"], *NZ (Österreichische Notariatszeitung) [Austrian Notaries Journal*] 2005, page 321; Welser, "Der Fall Klimt-Bloch-Bauer" [The Klimt-Bloch Bauer Case], *ÖJZ* (*Österreichische Juristen-Zeitung)[Austrian Lawyers' Journal]* 2005, page 689; Rab1, Der Fall Klimt-Bloch-Bauer" [The Klimt-Bloch Bauer Case], *NZ* 2005, page 257; Krejci, "Zum Fall Klimt/Bloch-Bauer" [Regarding the Klimt/Bloch-Bauer Case], *ÖJZ* 2005, page 733; Welser, "Krejcis Klimt-Streit und das Erbrecht, Eine Erwiderung", [Krejci's *The Klimt Dispute* and Inheritance Law: A Response] *ÖJZ* 2005, page 817; Krejci, "Zum Diskussionsstand im Klimt-Streit" [Regarding Current Discussions in the Klimt Dispute] *VersRdsch* (*Versicherungsrundschau*)[Insurance Review] 2005, page 293), which were to some extent repeats of the arguments in the advisory opinions. As is often the case with advisory opinions, the aforementioned advisory opinions also, as it were as a precautionary measure, discuss legal questions which the arbitration court did not have to clarify as part of its statements and gathering of the facts of the case or as part

of the legal conclusions which it derived therefrom. Insofar as the arbitration court dealt with arguments presented in the aforementioned advisory opinions, they are indicated in the present document via references to the publications in question.

3.2 Republic's Acquisition of Ownership

Pursuant to the Arbitration Agreement, Section 6, the arbitration court first had to clarify whether, and if so how, Austria acquired ownership of the paintings in question between 1923 and 1949.

3.2.1 General Information

Under the general rules of Austrian civil law, i.e. pursuant to §§ 423 ff of the General Civil Code [*ABGB*], the Republic could only have acquired ownership in this manner if there was valid title and the paintings were surrendered. The arbitration court did not consider the possibility of original acquisition by prescription, because this would have had to be determined on a subsidiary basis and was not asserted by the parties. The possibility that the paintings were acquired first by the German Reich and then subsequently (in particular, as asserted by the claimants, on the basis of the international treaty and its implementation laws) by the Republic of Austria, ultimately on the basis of Dr. Führer's activities, will be discussed later. In assessing the question of acquisition, the arbitration court based its method of procedure on the fact that under Austrian civil law, effective acquisition of the paintings by the Republic would rule out the applicability of any special rules regarding German ownership, though in fact it would not been feasible to assess the relevant provisions without clarifying the general civil law situation regarding the paintings.

As argued by the respondent, Adele Bloch-Bauer's will was considered as a possible acquisition title for the passing of ownership to the Republic. Therefore, regardless of the question (disputed by the parties) of whether the paintings were owned by Adele Bloch-Bauer upon her death or owned by her husband Ferdinand Bloch-Bauer, the first point clarified was whether the instruction in the will regarding the Klimt paintings should be regarded merely as a (legally non-binding) request or as a (reversionary) legacy intended

to be binding. It is only suitable as title for acquisition of ownership by the Republic if it involves a final (and legally binding) instruction which was intended to be binding. If, as argued by the claimants, it should be interpreted merely as request by the testatrix directed at her surviving spouse, then acquisition of ownership by the Republic would have to be based on some other title, in particular on the statements in the probate proceedings, or on the later actions by Dr. Führer, or on the statements by Dr. Rinesch.

The effect of the disputed statement in the will revolves around the testatrix's intent. In the present instance, this has to be deduced solely from the wording of the will and the other known circumstances at the time it was drawn up, as living witnesses and other proof are no longer available. This is all set forth clearly in court rulings and legal scholarship, and was not disputed by the parties in connection with the legal bases of the present decision (see Welser/Rabl, *Der Fall Klimt*, page 29 f; Krejci, *Der Klimt-Streit*, page 60 f).

3.2.2 Adele Bloch-Bauer's Testamentary Instructions

However, the parties did dispute how the statement should be analyzed in concrete terms. The wording "I ask my husband after his death to leave my two portraits and the four landscapes…" initially suggests that all that is involved is a mere request. Welser/Rabl (*Der Fall Klimt*, page 30 ff) argue that the fact that the testatrix uses surprisingly precise legal language for a lay person suggests that this request, in conjunction with the other instructions in the will, should be regarded as non-binding: They argue that she must have been aware of her obligation to guarantee a given legacy and of the option to not guarantee it. For that reason alone, they argue, it is clear that she was aware of the difference between a binding instruction and a mere request. They also point out the very striking difference between the request to her spouse regarding the paintings and the library and the "obligation" of her spouse regarding the financial legacies and the possible substitute heirs in Section IV of the will (regarding all legacies). They also argue that in legal terms the rules regarding doubt per § 614 of the General Civil Code should be applied by analogy, according to which a substitution instruction which is in doubt should be subject to a limiting interpretation with maximum freedom for the encumbered party.

In response, the respondent agreed with Krejci (*Der Klimt-Streit*, page 59 ff) in stating that given the social position of the parties involved, and the customary tone used between spouses, a request formulated in this way could well have been meant to be binding. In interpreting it thus, Krejci (page 62 ff loc cit) cites various rulings by the Supreme Court (relating to various examples of non-binding requests) which support his position, though he does acknowledge that they reflect the Supreme Court's frequent tendency to ("broadly rather than restrictively", page 80 loc cit) interpret "wishes or "request" in wills as binding instructions.

Obviously all these rulings relate to the specific cases in question (and only reflect a small, ultimately disputed part thereof), so no unambiguous conclusions that would help resolve the present problem can be drawn. Krejci's argumentation (along with an analysis of the circumstances surrounding the drawing up of the will, which he himself acknowledges are ultimately not of decisive importance, page 82 loc cit) rests on the fact that in the same paragraph, immediately after the request regarding the paintings, the will sets forth a legacy of books to a library and the guarantee thereof. He argues that if this was intended to be binding, it would be hard to see how the same request regarding the paintings in the first part of the instructions could have been intended to be non-binding.

The arbitration court did not find this argument convincing. Adele Bloch-Bauer, who has named her spouse as the sole heir, asks him to dispose of the paintings and the library in a specific way, namely "after his death to leave" them to the recipients specified by her. If he does so, as she of course expects him to, she leaves it up to the beneficiary, the People's and Workers' Library, to decide whether to keep the books or sell them and "accept the proceeds as a legacy". As the disposition by her husband, which she has requested and expects, would have been a legacy in all instances, it is unconvincing to argue for the desired legal nature of the separate instruction solely on the basis of this phrase (word). The release from the obligation to provide a guarantee can simply be seen as a precautionary measure to release her spouse from any current obligation.

Another point supporting the argument that it was merely a request is the fact that as part of the probate proceedings (see property affirmation in lieu of an oath, Attachment ./B =

./17), and therefore very probably by agreement with Ferdinand Bloch-Bauer (in whose name he promised fulfillment), the executor appointed by Adele Bloch-Bauer, the attorney Dr. Gustav Bloch-Bauer, categorized it as such, by marked contrast with the other legacies bequeathed. In view of the respect shown by the spouses to one another, as stressed repeatedly by the respondent, and as reflected in the surviving spouse's subsequent handling of the paintings (and in his statements during the probate proceedings), it is fair to assume that the spouses had discussed their thoughts on the subject with one another. If, immediately after his wife's death, the surviving spouse made it clear that it was merely a request which he nonetheless intended to faithfully fulfill, this strongly suggests that this view of matters was not attributable merely to the wording of the will (which was possibly surprising to the spouse), but rather to an earlier understanding between the spouses.

Thus the arbitration court felt that in an overall analysis of the rather unambiguous circumstances as known today, it was more convincing to interpret the instruction as merely a legally non-binding wish. The potential objection that a mere request would not have necessitated a testamentary instruction, may be ignored, because in actual practice (as described in detail by Krejci) testators frequently express mere wishes alongside binding instructions. This may be seen as an attempt to give the addressee a certain amount of freedom while at the same time establishing a "moral" obligation (assuming the circumstances remain the same). At any rate, before reaching a final decision regarding the interpretation of this contested passage in the will, it is important to first analyze the ownership situation.

3.2.3 Ownership of the Paintings

At first glance, it is not entirely necessary for one to be fully clear about the ownership situation at the time of Adele Bloch-Bauer's death in order to be able to clarify whether the relevant passages in the will should be understood as a request or as an instruction intended to be binding. In the two advisory opinions submitted by the parties and in the assertions based thereon, the two questions (bindingness of Adele Bloch-Bauer's instruction, ownership rights to the paintings) are essentially analyzed independently of

one another, though in the case of Welser/Rabl there are suggestions that they are intertwined. Nevertheless, the arbitration court felt that the interpretation of Adele Bloch-Bauer's instruction as a mere request does gain additional plausibility if the testatrix assumed that the paintings belonged to her spouse rather than her.

The aforementioned question—namely to whom did the paintings objectively belong and what subjective opinion did the testatrix (rightly or wrongly) have regarding this—is not unambiguously clear from the subject matter of the case. The parties, particularly the respondent, submitted various indicators suggesting one or other view. These include documents regarding exhibitions of the paintings during Adele Bloch-Bauer's lifetime (Attachments ./10, ./12); art history publications (Attachment ./88); later statements by contemporary witnesses (e.g. Attachment ./M = ./20 by Dr. Grimschitz); extracts from documents from the Third Reich (Attachment ./26; ./G = /27); and statements by Dr. Rinesch (Attachment ./GT = ./60). All this information, insofar as it originates from third parties and was only stated in passing as part of notifications regarding an exhibition or Klimt's work, is only of limited significance for the findings of the arbitration court. The designations used in the gallery's inventory list (Attachment .IEZ) are "Dedication, Adele Bloch-Bauer " (*Adele I*) (once), "Dedication, Adele and Ferdinand Bloch-Bauer" (*Apfelbaum*) (once), and "Legacy Bloch-Bauer" (*Adele II* and *Buchenwald/Birkenwald*) (twice). There are only two decisive statements by parties directly involved concerning the ownership situation: In Adele Bloch-Bauer's letter (Attachment ./10), where she speaks of "one of my landscapes painted by Klimt) and "which I purchased from Klimt's estate" (during oral proceedings, it was not possible to ascertain the meaning of the statement (in the aforementioned letter) where she says that the painting in question was unfinished); and in the statement (Attachment ./B) made by Adele Bloch-Bauer's executor, her brother-in-law Dr. Gustav Bloch-Bauer) who indicated during the probate proceedings that the paintings were owned by the husband Ferdinand Bloch-Bauer, which was then used as the basis for further proceedings. In the will itself, Adele Bloch-Bauer speaks of "my" portrait and "the" four landscapes, but also of the library "belonging to me"; since it could be construed that the word "my" before the word "portraits" refers to the fact that she was the subject painted in the portraits, it is not possible to determine what her thoughts were on the matter solely from the wording of the disposition.

After discussing this question in oral proceedings, the arbitration court was unable to find any plausible reason why the lawyer, who was very probably well informed regarding the actual legal situation and the views of Ferdinand Bloch-Bauer, might have wanted to make an untrue statement (deliberately and while at the same time promising fulfillment). The respondent did not contradict the arbitration court's statement that in view of the heir's financial position and the relatively low value of the painting at that time, it was possible to essentially rule out any attempt at tax evasion, which in certain other cases might have been a compelling motive for making an untrue statement. The motive which was brought up during proceedings, that by making this statement the husband might perhaps have wanted to protect his deceased wife against any suspicion surrounding her relationship with Klimt, seems highly constructed: It seemed very far-fetched to the arbitration court to try to use this question of ownership, i.e. the question of ownership of the paintings, which were acquired during the marriage and of which one—*Adele Bloch Bauer I*, which causes the most speculation—was originally to have been painted by order of her husband and was intended as a gift for his parents-in-law (see references in Welser/Rabl, *Der Fall Klimt*, page 5, footnotes 2 and 3; for doubts regarding this, see Krejci, *Der Klimt-Streit* page 29 f) to derive grounds for undesirable speculation (which would then supposedly have to be quelled by making a statement in probate proceedings, which would in any case not be disclosed to the general public). The arbitration court was unable to find any clear motivation for Dr. Gustav Bloch-Bauer to make an untrue statement in the name of his brother Ferdinand Bloch-Bauer or at any rate based on his instructions, especially as the husband at the same time declared his intent to faithfully fulfill his wife's wishes (see Section 3.2.5.1 for further discussion of this statement). Furthermore, it seems very implausible that he and the heir should have made a mistake in the matter.

The arbitration court was not persuaded to the contrary by the respondent's description of Adele Bloch-Bauer's strong financial position. Moreover, the other documents submitted do not refute the argument that Dr. Gustav Bloch-Bauer's statement is of decisive significance. The formulation "my two portraits" is ambiguous, as the testatrix was also the subject painted in the portrait; and the arbitration court did not feel that statements made by third parties in exhibition catalogs etc. presented sufficiently strong evidence.

Furthermore, the arbitration court did not consider the statement made by Adele Bloch-Bauer in her letter a sufficient indicator of a decisive statement regarding ownership of the paintings (and furthermore the legal correctness thereof would require further assessment).

Thus in the arbitration court's view, there was more reason to believe the paintings belonged to Ferdinand Bloch-Bauer than to Adele Bloch-Bauer. Admittedly, this does not constitute certain proof that they belonged to Ferdinand Bloch-Bauer. By contrast with for example the situation in Anglo-American civil proceedings, under Austrian law greater probability is not enough to constitute proof; instead, jurisprudence requires at least strong probability to convince the court (see Supreme Court 7 Ob 260/04t, *JBl* (*Juristische Blätter*) [Lawyers' Journal] 2005, page 64; Rechberger in Fasching/Konecny III Vor § 266 Section 11. Because of what the arbitration court considered lingering doubts surrounding the ownership of the paintings, strong probability of this kind that they were the property of Ferdinand Bloch-Bauer could not be deemed present.

Under these circumstances, the *praesumptio Muciana* which applied at that time in property law (§ 1237 of the General Civil Code)—which meant that in doubtful cases "property acquired was deemed to belong to the husband"—is applicable. In instances of a legal assumption, the beneficiary's opponent can only weaken the claim by proving the opposite (see only Rechberger in Fasching/Konecny III § 270, Section 4). It is true that this assumption was rescinded via the Marital Law Amendment Act 1978; however, it was applicable when the will was drawn up and the statement made in the probate proceedings, and therefore the parties involved were very probably aware of it. From today's perspective, it is not so offensive as to preclude invoking it. In the present instance, in the legal situation prevailing at that time it would have been necessary to demonstrate with (at least) strong probability that the paintings were owned by Adele Bloch-Bauer. As discussed above, this can be unambiguously denied, because in the arbitration court's opinion there is more to suggest the paintings were owned by Ferdinand Bloch-Bauer. Thus the arbitration court's analysis thereof is ultimately in line with the doubt rule per § 1237 aF of the General Civil Code.

3.2.4 Summary Regarding the Testamentary Instructions

The assumption that the paintings belonged to the testatrix's spouse for legal reasons (and also as she saw it), and the interpretation of the testamentary disposition as a non-binding request, fit together plausibly and convincingly. Moreover, as discussed above, even in the absence of ultimate clarification of this doubt regarding ownership of the paintings, the arbitration court felt it was more convincing to interpret the instruction in Adele Bloch-Bauer's will as cited above as a mere request.

It was therefore unnecessary to analyze the question raised by the claimant as to whether the paintings could have accrued to the spouse as a future legacy, as part of the "goods and chattels belonging to the marital household". However, it should be noted that in the legal situation prevailing at that time, it would have been possible to withdraw a future legacy via a will in the absence of a right to a compulsory portion on the part of the surviving spouse (see Weiss in Klang II/1, page 607; remarks regarding III. Partial Amendment [Attachment ./AJ, page 104].

As the arbitration court assumed that the disputed instruction given by Adele Bloch-Bauer was only a non-binding request, it was not necessary to analyze the question disputed by the parties (and by Welser/Rabl and Krejci, who provided the advisory opinions) as to whether a (reversionary) legacy of an item which belonged to the heir could be valid.

Thus any subsequent acquisition of ownership by the Republic cannot be based on Adele Bloch-Bauer's will as title.

3.2.5 Other Possible Grounds for Acquisition

The interim conclusions drawn so far raised the further question as to whether a claim on the part of the Republic can be derived, if not from Adele Bloch-Bauer's will, then from any other subsequent events. It will be significant, and will be analyzed, whether/that the conclusions drawn by the party/ies involved concerning the validity and scope of the testatrix's testamentary request under the prevailing legal conditions differed from those drawn by the arbitration court.

3.2.5.1 Acknowledgment As Part of the Probate Proceedings

First, it is important to analyze the statement made by Ferdinand Bloch-Bauer, according to which he, represented by Dr Gustav Bloch-Bauer in the probate proceedings, promises to "faithfully fulfill" his deceased spouse's request, "even if it is not compelling in nature in the manner of a testamentary disposition".

The claimants submitted Welser/Rabl (*Der Fall Klimt*, page 65 ff), arguing that the wording of Ferdinand Bloch-Bauer's statement does not indicate any desire to undertake an obligation, because along with the promise to faithfully fulfill his spouse's wishes he stresses that all that is involved is a testamentary request and not a binding instruction. One can detect certain weaknesses in this argument, but even if and to the extent that the statement was intended to establish a binding obligation hitherto lacking, it lacks a potential (private) addressee to whom it might have been directed or delivered. Furthermore, there are absolutely no grounds in the subject matter of the present case to assume there was an acknowledgement, which under prevailing jurisprudence would have been needed for there to be an acknowledgement agreement. The same is true with regard to the assumption of a gift, either inter vivos or upon death, as argued by the respondent.

Moreover, Krejci's advisory opinion (*Der Klimt-Streit*, page 135 ff) concedes that it is dubious to interpret the statement as a clarification of a hitherto possibly objectively unclear legal situation (or regarded as unclear by the parties involved?) vis-à-vis the probate court. Furthermore, the author rightly casts aspersions upon any further attempts to "rescue" this statement in any form by viewing it as a binding legal transaction. Instead, he argues that at best the statement was a "desire to bind himself" (loc cit. page 148). The arbitration court wholeheartedly agrees with this. Therefore there is no need to analyze the contestation of a possible gift, which was raised by the claimants as a precautionary measure during the proceedings and explicitly upheld during oral proceedings (ON 11, page 47).

From what has been stated so far, it follows that all the paintings named in Adele Bloch-Bauer's will were (continued to be) the property of Ferdinand Bloch-Bauer. Only one of

them, *Schloss Kammer am Attersee III*, which is not part of the present dispute, was transferred into the gallery's ownership in 1936 with legal effect, in fulfillment of his deceased wife's request and his (for the time being legally non-binding) promise in the probate proceedings. The formulation "Dedication, Adele and Ferdinand Bloch-Bauer" in a thank-you letter from the gallery to Ferdinand Bloch-Bauer (Attachment ./F = ./19) clearly reflects this.

3.2.5.2 The Dispositions of Dr. Führer

It is therefore important to analyze the further legal fate of the paintings between 1938 in 1945, in particular the "transactions of Dr. Führer" (Krejci, page 155; see also Welser/Rabl, page 88 ff).

In 1941, in his capacity as state-appointed administrator of the estate, Dr. Führer invoked ("executed") the will and gave *Adele Bloch-Bauer I* and *Apfelbaum* to the Austrian Gallery (known as the "Modern" Gallery at that time) (Attachment ./I = ./28). In return—and this makes it problematic to categorize this surrender as a straightforward fulfillment of the will—he received *Schloss Kammer am Attersee III* from the gallery (see Attachment ./K), which Ferdinand Bloch-Bauer had donated in 1936. Dr. Führer then sold this painting to Gustav Ucicky, Gustav Klimt's son.

In 1942, Dr. Führer sold *Buchenwald/Birkenwald* to the City of Vienna collection (in 1957 he lied (see Attachment .//L) to the City of Vienna that he had known about Adele Bloch-Bauer's will, at any rate with regard to this painting, and possibly did so to defend himself against claims against him). Dr. Grimschitz, in his letter written in 1948 (Attachment ./M = ./20), noted that Dr. Führer had initially been unaware of Adele Bloch-Bauer's will, so it is uncertain to what extent Dr. Führer was able to use any more than the information provided by Dr. Grimschitz as the basis for what he knew in this regard). In 1943, he sold *Adele Bloch-Bauer II* to the Austrian Gallery (in this case the payment of the purchase price was explained by Dr. Grimschitz (see Attachment ./FV = ./46) as relating to the fact that the tax authorities had levied execution on the entire collection due to Ferdinand Bloch-Bauer allegedly owing tax, and would not have released the painting without a payment, so the payment may also be regarded as a

payment to release this execution). *Häuser in Unterach am Attersee* was found in the possession of Dr. Führer after 1945, though there were no documents indicating any kind of associated legal transaction.

If one assumes, as explained above, that Adele Bloch-Bauer's will regarding the six Klimt paintings was not a legally binding instruction, then Dr. Führer's transfers to the Austrian Gallery, insofar as they are were carried out solely in fulfillment of this alleged legacy, did not establish any grounds for ownership by the gallery, the German Reich or the Republic of Austria with legal effect under civil law, due to the absence of any objectively valid title. In addition, the alleged legacy was, according to the contents thereof, not yet due, as Ferdinand Bloch-Bauer was still alive. The available documents regarding this transaction (Attachment ./I = ./28; ./L = ./29 to ./M = ./20) lead one to conclude that it was not viewed with any great sense of precision, and that instead Dr. Führer may well have been relying on the legally imprecise instructions of Dr. Grimschitz, according to which the paintings were supposed to accrue to the gallery pursuant to Adele Bloch-Bauer's will.

Accordingly, it is very clear that at that time the Republic (or the German Reich as it was) cannot, solely on the basis of the will as title, have acquired ownership of the paintings surrendered to the gallery. The subsuming under the Annulment Act of the actual transfer of (for the time being) two paintings by Dr. Führer to the gallery and the legal consequences derivable therefrom will be discussed later.

If one categorizes the transaction relating to *Adele Bloch-Bauer I* and *Apfelbaum* (see Graf, *NZ* 2005, page 325 f) as an exchange, it would definitely fall within the scope of the Annulment Act. However, the arbitration court inclined towards the interpretation that *Adele Bloch-Bauer I* and *Apfelbaum* were surrendered solely on the basis of the will, and that Dr. Führer simply extorted *Schloss Kammer am Attersee III* from the gallery (see Dr. Garzarolli in Attachment ./FP = ./44: "demanded it back and it was handed over"; see also Dr. Garzarolli in Attachment ./FS = ./48: "had to be handed over to him"), because against a background of a will assumed to be legally valid there was no legally well-founded reason for handing it over to him, which means one cannot speak of a legally

valid (deliberate, even if it were contestable) exchange. In this connection the arbitration court based its argument on the letter of Dr. Führer (Attachment ./I = ./28) which initially states that the two paintings were made available "in execution of the will", but then states in a separate paragraph: "You declared that…you were prepared to hand over to me the painting in your possession". In the arbitration court's view, this is not how a lawyer would describe an exchange agreement (the letter of Dr. Grimschitz to Dr. Führer (Attachment ./K) is neutral, though if a straightforward exchange in the conventional sense were involved there would have been no need for the "warmest thanks" expressed at the beginning). Furthermore, the arbitration court based its categorization on the memorandum (Attachment ./FV), in which a statement by Dr. Grimschitz is reproduced, according to which Adele Bloch-Bauer's will alone was the grounds for the surrender of the paintings by Dr. Führer, and the letter of Dr. Garzarolli to the *Finanzprokuratur*, in which it is again stated that Dr. Führer "declared himself prepared... based on the will of Adele Bloch-Bauer", to hand over the two paintings, "in exchange for which a painting by the same artist... had to be handed over to him".

This is the first instance in the present case of the very significant fact that there are major difficulties in the way civil law approaches the events of the Third Reich and ensuing years, against the background of the Annulment Act and the restitution laws. Although the parties involved in acts of seizure at that time often did everything they could to at least give the appearance of legally valid transactions, hidden for example under alleged powers of attorney from the administrator in question insofar as straightforward acts of seizure or appropriation were not involved, all these acts were declared "null and void" under the Annulment Act in 1945, and yet this nullity was made dependent upon assertion of claims (based on a specified time limit) pursuant to the restitution laws passed after the Annulment Act. This resulted in straightforward contestability, and in cases in which the items had not been taken into official safekeeping pursuant to § 2 of the 1st Restitution Act resulted in ultimate acquisition of the seized items after the specified time limit had elapsed. A rule of this kind may not seem entirely fair with regard to (possibly bona-fide) third party acquirers; vis-à-vis the state, in instances where items had simply been appropriated from their former owners, it meant—and this seems somewhat offensive with regard to civil law—that as a result of

the interplay of the aforementioned post-war laws acquisition of ownership arose in a manner that was quite new in civil law terms. Against this background, and in view of the fact that it was alleged that a will was (prematurely) being fulfilled, the arbitration court felt it was unjustifiable to categorize the actions of Dr. Führer relating to *Adele Bloch-Bauer I* and *Apfelbaum* as an "in itself" (in other words regardless of the nullity under the Annulment Act) valid (legally unobjectionable) exchange agreement, just as the mere fact that Dr. Führer was in possession of the painting *Häuser in Unterach am Attersee* did not constitute grounds for it being his property.

Dr. Führer "sold" *Adele Bloch-Bauer II* to the gallery in 1943, but as indicated above, it seems obvious that the payment by the gallery was intended as a straightforward release from execution (due to the tax authorities claims against Ferdinand Bloch-Bauer's overall assets) (for a similar conclusion, see Krejci, *Der Klimt-Streit* page 158 f); see also the memorandum from Dr. Grimschitz dated 26th February 1948, Attachment ./FV = ./46). Moreover, the arbitration court felt that for this reason the Dr. Führer/gallery relationship involved the (alleged, and definitely premature) fulfillment of an (allegedly valid) legacy, which Dr. Führer, at his own discretion and based on authority assigned to him at the time, made dependent on conditions favorable to the parties for whom he was working.

By contrast, Dr. Führer's legal transaction with the City of Vienna relating to *Buchenwald/Birkenwald*, for which Adele Bloch-Bauer's will was for the time being of no significance, must, as a purchase agreement legally valid under the applicable laws of that time, be categorized as falling exclusively within the scope of the Annulment Act. That means it did not lose its validity until it was later rescinded as part of the reacquisition of the Bloch-Bauer collection (in terms of legal consequences, voluntary restitution would have been equivalent to restitution via legal recourse), which would have necessarily have led to a return of ownership to Ferdinand Bloch-Bauer and his heirs, unless there were a legally valid disposal of the painting by Dr. Rinesch in favor of the gallery (see below), or unless one shares the view of Graf, *NZ* 2005, page 326 f (also analyzed below), who argues that the legal concept of "German ownership" overrode all other prior civil-law considerations. However, ownership by the City of Vienna, which retained its independent legal personality even during the Third Reich, and thus also with

regard to *Buchenwald/Birkenwald*, ought to remain unaffected by this legal concept, as the painting was at no time "German" property.

Thus, during the period between 1938 and 1945, the Austrian Gallery (or Modern Gallery as it was known then) and the German Reich did not acquire ownership of *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II* or *Apfelbaum* under general civil law, as the three paintings were surrendered to the gallery in fulfillment of Adele Bloch-Bauer's will, which, as explained above, did not constitute sufficient title for acquisition of ownership. This conclusion is in line with the conclusion reached by Krejci (only) insofar as he deems that Adele Bloch-Bauer's instruction, which in principle he regards as binding and legally valid, was "suspended" during the period in question, in a manner that cannot be properly categorized from an inheritance law standpoint. Accordingly, he too argues that in the period up to 1945 the will did not constitute title for acquisition by the gallery or the German Reich; instead, he categorizes all dispositions carried out between 1938 and 1945 as independent legal transactions by Dr. Führer, all of which fell within the scope of the Annulment Act. He then argues that because this law did not result in annulment of the legal transactions in question *ex lege*, but rather only on the basis of contestation in restitution proceedings, the acquisition of the paintings by the gallery and the City of Vienna resulting from Dr. Führer's transactions should be upheld for the time being. He also argues that, in light of Adele Bloch-Bauer's will (which, as described above, Krejci deems valid again after the fall of the Nazi regime—a view which the arbitration court does not share), restitution was no longer desired. As the arbitration court categorized the instruction as a mere request, there was no need to analyze the inheritance-law question disputed by Krejci and Welser regarding possible "suspension" and subsequent "healing" of the instruction that originated from the pre-war period.

As explained above, the City of Vienna's ownership of *Buchenwald/Birkenwald* cannot be upheld. Therefore *Buchenwald/Birkenwald*, and also *Häuser in Unterach am Attersee*, can only have been acquired by the gallery in connection with the subsequent agreement with Dr. Rinesch. Krejci also shares this view.

3.2.5.3 The Republic's Agreement with Dr. Rinesch

If the German Reich, and therefore the Republic of Austria as its legal successor, did not, according to general rules of civil law, acquire ownership of the paintings (all five paintings, see above) in the course of Dr. Führer's activities, then it is important to analyze whether title was acquired as a consequence of Dr. Rinesch's activities on behalf of Ferdinand Bloch-Bauer and the heirs. Dr. Rinesch's legal authority to act on behalf of Dr. Ferdinand Bloch-Bauer, and later on behalf of his heirs, was not disputed, per the files and the concurring submissions of the parties.

In accordance with the declarations made in this respect by Dr. Rinesch in the course of his restitution activities, the paintings could therefore have come into the possession of the Republic either in (genuine or putative) fulfillment of Adele Bloch-Bauer's will, in recognition of a (genuine or putative) independent commitment of Ferdinand Bloch-Bauer, or on the basis of a further (independent) legal transaction of Dr. Rinesch.

Insofar as acquisition of the paintings might be based solely on the agreement with Dr. Rinesch (which seems to suggest itself, per the arbitration court's presumptions relating to interpretation of Adele Bloch-Bauer's request in her will), the parties disputed (among other things) whether the Klimt paintings were the “subject matter of restitutions" for the purposes of § 1 Section 1 of the 1998 Art Restitution Act. For this reason alone, Dr. Rinesch's actions relating to Ferdinand Bloch-Bauer's property – and the arbitrated paintings in particular – were analyzed individually.

In his letter dated 28th September 1945 (Attachment ./O = ./41), Dr. Rinesch first requested the co-operation of the gallery (in the person of its then acting director, Dr. Grimschitz, who had been in office and acting as a director since the Thirties) with regard to the replacement of Ferdinand Bloch-Bauer's scattered collection, in this case without distinguishing between different categories of item. Klimt’s paintings *Apfelbaum* (which was in the gallery as a result of the transaction with Dr. Führer) and *Buchenwald/Birkenwald* (which was in the possession of the City of Vienna) had been mentioned expressly under Nos. 33 and 34 in the list of items (Attachment ./41,

but not in the otherwise identical Attachment ./O) (though the three or respectively four other paintings had not).

In his letter dated 19th January 1948, Attachment ./U = ./42, Dr. Rinesch – now already aware that three Klimt paintings were there (“two portraits and one landscape") – asked the gallery again what attitude it would adopt if his client made a claim for restitution, declaring that he himself did not know of the exact terms and conditions of the delivery of paintings to the gallery by Dr. Führer.

Dr. Grimschitz’s successor, Dr. Garzarolli, described the current situation with regard to the paintings from his point of view in his letter (Attachment ./FP = ./43, dated 16th February 1948), and assumed that the gallery had a claim to the outstanding four (? he appears to have overlooked the painting *Adele Bloch-Bauer I*, already in the gallery) paintings from Adele Bloch-Bauer's legacy that was due upon Ferdinand Bloch-Bauer's death (the latter had died in the meantime).

In a letter dated 26th February 1948 (Attachment ./FW = ./45), Dr. Rinesch then indicated (after a discussion with Dr. Grimschitz, see AV Attachment .IFV = ./46) that he was not familiar with the will (“should the will be legally valid"). He stated that if it were valid, he would not himself handle negotiations with the current owners of the paintings, but rather would leave that to the museum.

In his letter to the Federal Office for the Protection of Historical Monuments dated 2nd April 1948 (Attachment ./EK = ./54), Dr. Garzarolli made reference to the paintings from the first half of the nineteenth century in the possession of Karl Bloch-Bauer, and requested that the export permit for some be refused in order to facilitate their purchase or acquisition by means of bartering. Following a reference to “*Seeufer mit Häuser in Kammer" (= Häuser in Unterach am Attersee)*, to which “the Austrian Gallery is entitled on the grounds of a legacy of Ms. Adele Bloch-Bauer, deceased on 25th January 1925, that has been duly recognised by President Ferdinand Bloch-Bauer", he stated by way of conclusion: “I request that acquisition and bartering intentions be announced only when the *Finanzprokuratur* indicates that it is the time to do so, of which advice will be given forthwith, i.e. please adopt a delaying strategy for tactical reasons."

In his letter dated 11th April 1948 (Attachment ./AB = ./47), Dr. Rinesch then reported to (his school friend) Dr. Robert Bentley, who was representing the heirs of Ferdinand Bloch-Bauer, about his own opinion of the situation under inheritance law, essentially in the following terms: while (he believed that) the request of Adele Bloch-Bauer did not meet the formal requirements of a legacy, (he believed that) Ferdinand Bloch-Bauer had created an effective commitment through his declaration that he would fulfill his wife's request ("in this way, the Austrian Gallery doubtlessly acquired a legal claim, as though to a legacy, and it will be necessary to comply with the will"). In his correspondence with the City of Vienna (Attachment ./GS = ./62), he emphasized the heirs' obligation (which had, according to this letter, only been created by Ferdinand Bloch-Bauer!) to surrender the painting to the Austrian Gallery.

Dr. Garzarolli, then director of the Gallery, at the same time still believed – knowing the facts – that the situation was "not entirely without danger" (letter to his predecessor Dr. Grimschitz, Attachment ./50). By contrast, however, in later statements to the Federal Ministry and the Provincial Criminal Court (Attachmentes ./GA = ./51 and ./GC = ./52) he left no room for doubt, in connection with his efforts to obtain *Buchenwald/Birkenwald* (sold to the City of Vienna by Dr. Führer), that Adele Bloch-Bauer's will was binding.

In a letter to the *Finanzprokuratur* dated 10th April 1948 (Attachment ./AA = ./56), Dr. Garzarolli wrote that Dr. Rinesch had let it be known that Ferdinand Bloch-Bauer's heirs acknowledged the Klimt legacy and that he (Rinesch) would soon provide written notification thereof. This was then followed by the Dr. Rinesch's declaration (Attachment ./AC = ./59), which will be discussed below.

The parties disputed whether the negotiations conducted in the meantime concerning the restitution of other items from Ferdinand Bloch-Bauer's collection, which (as can be seen from the related documents, some of which will be discussed below) indicated a clear link between the export permit and the demanded surrender of individual objects to the Republic, also related to the arbitrated Klimt paintings.

Having inspected the original of Attachment ./Y = ./55, the arbitration court concluded that the “12 paintings" mentioned in the last two paragraphs of the endorsement were the same ones (and that the third paragraph in fact does not mention other paintings, in particular the disputed “K. paintings” i.e. Klimt paintings), and that therefore this document did not explicitly prove that the authorities exerted pressure with regard to the arbitrated paintings.

In his letter to the Federal Office for the Protection of Historical Monuments, (Attachment ./AG = ./61) dated 13th April 1948, Dr. Rinesch made reference to the heirs' "spontaneous declaration" that they wished to fulfil the will of Ferdinand (? sic!) and Adele Bloch-Bauer notwithstanding the Bloch-Bauer family's fundamentally changed financial situation, by way of an indication of their interest in the Austrian museums, and stated that he therefore expected concessions in the matter of the export permit for the other items in the collection. His exact words were: "I may in turn expect that the Federal Office for the Protection of Historical Monuments and the public collections involved will apply the provisions of the Law on the Protection of Historical Monuments in an obliging manner that considers the special circumstances of the case." (This is followed by a list of the paintings for which export applications have been made.) The fact that notwithstanding the aforesaid, this matter subsequently did not proceed smoothly is confirmed by the following documents: Attachment ./IW =./67, ./KO = ./68, ./KR = ./69, and ./JN =./70. In his letter dated 13th July 1949 (Attachment, ./JN = ./70) to the Federal Office for the Protection of Historical Monuments, Dr. Rinesch emphasised that the heirs "would certainly have had the leverage to prevent the performance of the legacy". The fact that they had refrained from doing so and furthermore donated a series of other objects, he added, all the more justified the granting of the export license for the objects still retained. Thereupon the director of the Gallery Dr. Garzarolli gave his support (Attachment ./71, a letter to the Federal Office for the Protection of Historical Monuments dated 21st July 1949) for the release "as a major exception", making special reference to the recognition of Adele Bloch-Bauer's will which, given the changed circumstances, he did not regard as something that could be taken for granted.

The arbitration court deemed that the decisive statement concerning the acquisition of ownership by the Republic was to be found in the letter of Dr. Rinesch on behalf of the heirs dated 12th April 1948 (Attachment ./AC = ./59), in which he confirmed the "agreement" with Dr. Garzarolli reached on 10th April 1948, namely that the Bloch-Bauer heirs acknowledged Adele Bloch-Bauer's will and Ferdinand Bloch-Bauer's declaration in the probate proceedings in which he promised to fulfill his deceased wife's request. In this letter, Dr. Rinesch stated that they acknowledged that the two portraits and *Apfelbaum* were already in the possession of the gallery. In the case of the paintings still with the City of Vienna and respectively Gustav Ucicky, he described their current situation. He gave his approval for *Häuser in Unterach am Attersee*, the only one at his disposal (which Karl Bloch-Bauer had reacquired from the possession of Dr. Führer), to be picked up, as he believed it belonged to the gallery, having indubitably been donated by Ferdinand Bloch-Bauer.

In his letter to the City of Vienna dated 11th May 1948 (Attachment ./GS = ./62), Dr. Rinesch stated that he had promised the gallery he would "provide a declaration in this regard [meaning that he agreed that the City of Vienna should deliver *Birkenwald/Buchenwald* directly to the gallery] by the fifteenth of this month".

In conclusion:

(with the exception of *Buchenwald/Birkenwald*, which was restituted by the City of Vienna (see Attachment ./IS = ./63) by mutual agreement against payment of the purchase price, albeit without official restitution proceedings, but nevertheless on the grounds of a corresponding request from Dr. Rinesch, see Attachments ./AA = ./56 and ./AC =./59), the arbitrated paintings were never the subject matter of an express request for restitution to either Ferdinand Bloch-Bauer or his heirs, and equally they were not the subject of an export permit application. The latter applies in equal measure to all five paintings; the former of course applies in particular to those that had found their way back into the possession of the Bloch-Bauer family (*Häuser in Unterach am Attersee;* also *Buchenwald/Birkenwald*, with respect to which it was at least assumed that Dr.

Rinesch had power of disposal vis-à-vis the City of Vienna), as well as to those already in the gallery.

Not least because he did not know all the facts, Dr. Rinesch, just like the various representatives of the gallery and of the Federal Office for the Protection of Historical Monuments, initially doubted the scope and validity of Adele Bloch-Bauer's will. These doubts were removed by obtaining the probate files only to the extent that all the involved parties (including Dr. Rinesch; see e.g Attachment ./GS = ./62) now regarded Adele Bloch-Bauer's “request” (understood as such by all parties and therefore considered non-binding!) as having been reinforced by the promise made by the executor Dr. Gustav Bloch-Bauer on behalf of his brother, the heir Ferdinand Bloch-Bauer, and therefore (wrongly, in the arbitration court's view) as possibly of a binding nature. However, both Dr. Rinesch and his counterpart at the gallery, Dr. Garzarolli, repeatedly expressed uncertainty over whether the change in the political and personal circumstances since the declaration was made during the Adele Bloch-Bauer probate proceeding might have entitled the heirs to refuse fulfillment. (Ferdinand Bloch-Bauer himself never wrote a single word about the paintings in his – very short and very general – will, Attachment ./F = ./31). There is no documentary evidence as to whether this was due to their fate being unknown at the time or to other motives. Moreover, there are no instructions concerning the paintings in Ferdinand Bloch-Bauer's will drawn up in 1942 (Attachment ./DR = ./30), though of course the testator believed at the time that all his Viennese assets would be lost. It should be noted that the parties involved later tended towards, and formulated more in favor of, one or another direction depending on the addressee and the associated intentions or expedience; Dr. Rinesch tended much more clearly towards the concept of binding nature if his addressee was Robert Bentley (see Attachment ./AB = ./47 and Attachment ./FK, [which admittedly contains incorrect ideas concerning other details of Dr. Führer's activities, or at least imprecise formulations]) than if the addressee was a representatives of the "opposition".

Under these circumstances – i.e. in view of his own doubts about the legal situation – it is hardly surprising that Dr. Rinesch used the paintings so to speak as weapons for negotiation in connection with the matter of the export permit: The heirs, not being legal

experts, some of them friends of Dr. Rinesch, were relatively easy to convince of a valid obligation; by contrast, it was possible to emphasize to the authorities that the heirs were co-operative, helpful and generous by acknowledging the binding nature of will (see also Dr. Rinesch's letter to the Albertina dated 5th November 1948, Attachment /HM [also quoted by Krejci, page 49]: "This generous legacy justified the heirs' expectation that the authorities would make concessions over the export of other considerably lower-value artworks." It is also worth noting that in his letter dated 25th April 1949 (Attachment ./JB), in which Dr. Rinesch quite clearly uses the term "legacy" to refer to the heirs' donation), there was no need to file a formal export application nor to exert explicit pressure. Instead, it was clear that the heirs' concession would make the agents of the Republic more willing to grant the export permit for the other items (the fact that there were clear connections of this kind in relation to other objects is a matter of record, see the often quoted note written by Dr. Grimschitz (Attachment ./AC = ./59) and the submission made by Dr. Rinesch to the Federal Office for the Protection of Historical Monuments (Attachment ./JN = ./70; see also Attachment ./FK and Attachment ./GL; Attachment ./HO; and Attachment ./JO).

3.3 Regarding the Subsuming of Events Under § 1 Section 1 of the 1998 Art Restitution Act

With regard to the events in question and the 1998 Art Restitution Act, the arbitration court ruled as follows:

The statement in Adele Bloch-Bauer's will concerning the five arbitrated paintings constituted a non-binding request to her husband. It was interpreted this way not only by Ferdinand Bloch-Bauer and his representative in the Adele Bloch-Bauer probate proceedings, but also by the representative of Ferdinand Bloch-Bauer's heirs, Dr. Rinesch; the persons acting for the Republic at the time at least had doubts in this regard.

The declarations of the executor, Dr. Gustav Bloch-Bauer, in the Adele Bloch-Bauer probate proceedings did not create a new obligation for the heir Ferdinand Bloch-Bauer, not least because of the absence of a suitable declaration addressee. Hence

these declarations were neither an acknowledgment establishing an obligation, nor a legally valid promise to donate. There may have been misconceptions on the part of Dr. Rinesch and by the persons acting for the Republic, but at this remove it is impossible to clarify how certain the involved parties were of their respective legal positions, in particular as Dr. Rinesch believed that the events of the Nazi period might in any case have invalidated the will.

The final transfer of *Adele Bloch-Bauer I, Adele Bloch-Bauer II, Apfelbaum* to the Gallery, the surrender of *Häuser in Unterach,* and Dr. Rinesch's assistance in the recovery of *Buchenwald/Birkenwald* from the City of Vienna, therefore occurred against the background of (general) doubts about the binding nature of the will.

In particular with regard to the five arbitrated paintings, there is no documentary evidence that Dr. Rinesch was *explicitly* placed under duress via threats that the export permit would be refused. His final written confirmation of the oral agreement with the gallery dated 12th April 1948 (Attachment ./AC =./59) does not – in itself – indicate a connection with the matter of the export permit. However, Dr. Rinesch demonstrably tried to positively influence the decision concerning the export of other items by making concessions, as best as he could, with regard to these paintings, and by refraining from doubting the claim of the Republic, which he regarded at least as feasible. This is clearly reflected in his statement (Attachment ./AG = ./61) regarding the application for an export permit shortly to be filed, which he wrote on the day immediately after [!] the aforementioned confirmation (Attachment ./AC = ./59), where he writes: "I in turn expect that the Federal Office for the Protection of Historical Monuments and the involved public collections will apply the provisions of the Law on the Protection of Historical Monuments in an obliging manner that considers the special circumstances of the case." The phrase "in turn" refers to the declaration of the heirs, mentioned in the same paragraph, that the Klimt paintings are to go to the Austrian Gallery.

The first element of the 1998 Art Restitution Act concerns artworks that were the subject of restitutions to the original owners or their legal successors upon the

original owner's death and passed into the ownership of the Republic without remuneration after 8th May 1945 in the course of ensuing proceedings pursuant to the provisions of the Federal Act on the Prohibition of the Exportation of Objects of Historical, Artistic or Cultural Importance, Criminal Code/ No. 90/1918 and are still in the ownership of the Republic.

Accordingly, as mentioned earlier one must first clarify whether the arbitrated paintings were the "subject of restitutions" for the purposes of this element – especially bearing in mind that it is undisputed with regard to these paintings that an express restitution request was never made. This fact by itself does not rule out the fulfillment of the element of the Act Regarding the Restitution of Artworks § 1 numeral 1, as is confirmed already by the materials pertaining to the Act itself (1390 Attachment No 20. GP p. 4: "in clear-cut cases, a formal restitution request was often unnecessary") (see also the Advisory Council's decision dated 11th February 1999 in the Rothschild case, and Graf, *NZ* 2005, page 325 note 18). In the present case, however, and definitely with regard to the three paintings that were already in the gallery, it is important to note that they never again returned into the possession of the formerly legitimate owners. The arbitration court deemed (contrary to Krejci, *Der Klimt-Streit*, page 179; also Weiser/Rabl, *Der Fall Klimt*, page 132 f; also *Rabl, NZ* 2005, discussed in detail on pages 257 ff, 264 f) that the formal requirement of a restitution request definitely should not be the decisive issue if such a request was not made, because there was a coercive situation (deemed decisive by the law) with regard to other (if appropriate: restituted) objects for which an export permit application was filed: In other words, if a restitution request was specifically not submitted so as to ensure that an export permit for other objects could be obtained (more easily) (and because some objects were in any case already in the possession of the Republic, and some had come to the heirs without official restitution proceedings), in the arbitration court's view it should not be deemed relevant to the fulfillment of the "subject of restitutions" element whether the pressure, which, according to the materials pertaining to the Act, was evidently exerted in many other instances (and in the present case it was demonstrably exerted with regard to other objects!), was exerted only in the course of official restitution or

export proceedings or whether, because of the particular nature of the case (some paintings were already in the possession of the gallery, and in light of the will there were doubts about the Republic's possible claims), it was exerted in the run-up to such proceedings. Accordingly, objects whose restitution was not requested in "pre-emptive obedience", but could (potentially) have been requested, should also be regarded as the "subject of restitutions" for the purposes of § 1 Section 1 of the 1998 Art Restitution Act. Notwithstanding the formulation "in the course of (sic!) ensuing proceedings", the arbitration court deemed that this interpretation was closest to the spirit of the law. The less-than-felicitous wording (in the strict sense of the word, proceedings to obtain an export permit can never ensue from a restitution, but at best subsequent to it or in a temporal connection with it) shows that the Act was, deplorably, in some respects formulated over-hastily, and that therefore its teleology needs to be analyzed with particular care. In truth, in 1998 the legislator only considered the possibility that initially restituted objects were registered for export. In terms of the task of analysis, the arbitration court found itself unable to see a compelling connection between an official restitution request and "pressure to donate" if the purpose of the 1998 Art Restitution Act– and this is sufficiently demonstrated by the materials pertaining to the Act – was to retroactively reverse coerced donations by the legitimate owners.

This therefore constituted a broadening interpretation of the first element of § 1 of the 1998 Art Restitution Act, in keeping with its purpose (see also Rabl, *NZ* 2005, page 264 ff).

In the present case, the decisive issue for the existence of these grounds for restitution is rather whether the element "passed into the ownership of the Republic without remuneration … in the course of ensuing proceedings pursuant to the provisions of the Federal Act on the Prohibition of the Exportation of Objects of Historical, Artistic or Cultural Importance" is fulfilled.

A pure word-by-word interpretation seems clear enough, if the expression “in the course of ensuing proceedings" is interpreted as one that establishes a purely

temporal connection, i.e. as one meaning “during”: There are many documents proving that the settlement between Dr. Rinesch and the Republic to the effect that the paintings would finally remain in the ownership of the Republic was indeed made during pending proceedings for the exportation of restituted artworks and without the payment of a remuneration by the Republic, and this is not disputed by anybody, including the respondent in these arbitration proceedings.

However, in light of the aforementioned broad interpretation of the Act with respect to the element “subject of restitutions", it is important to analyze for a second time the purpose of the provision, as it is expressed clearly in the pertaining legal materials.

Statements made during the drafting of the Act demonstrate beyond doubt that the legislator wanted to reverse a situation that, as mentioned earlier, happened frequently, namely that an export permit for recently restituted objects was only granted provided the applicant was prepared to concurrently donate other items for which in most cases (although the wording of the Act does not actually demand this; see also the Advisory Council in its aforementioned decision in the Rothschild case) an export application had also been made. With respect to the five arbitrated paintings, this connection, i.e. “give donation, get export permit", occasionally referred to by the respondent in these proceedings as "do-ut-des situation", is not as obviously evident in the present case as in many cases of other restitution applicants and with regard to other items in the Bloch-Bauer collection (see above).

As explained in detail above, Dr. Rinesch, who was familiar with the common practice of tying export permits to the donation of other objects and had experienced it himself in connection with other objects, eliminated the doubts that existed on both sides about the validity of Adele Bloch-Bauer’s will, and hence about the validity of the Republic's claims to the paintings, via his declaration of acknowledgment. In the letter to the City of Vienna ./GS = *./62*, he even declared that he had "undertaken" to issue a declaration about *Buchenwald/Birkenwald*. Therefore, one cannot speak, either objectively or subjectively (i.e. from the point of view of Dr. Rinesch), of a

simple fulfillment of an undoubtedly existing obligation. The fact that Dr. Rinesch wanted to influence the matter of the export permit in his favor by making his concession can be concluded with absolute certainty from the documents indicated above. The Austrian federal minister within whose mandate this fell, in response to a parliamentary question (see AB 5184 Attachment NR 20. GP, see also in Rabl, *NZ* 2005, page 266, footnote 50), called the connection between the relinquishment of the arbitrated paintings and the export permit procedure "obvious". Therefore, it can be assumed that the pressure of the pending or imminent export proceedings was responsible to a large extent for the concession/acknowledgment by Dr. Rinesch.

In the opinion of the arbitration court, the facts explained above are sufficient to uphold the claimant’s petition, according to which the conditions of the first element of § 1 of the 1998 Art Restitution Act are satisfied.

The aforesaid applies equally to all five arbitrated paintings: With regard to the paintings that came to the gallery through Dr. Führer *(Adele Bloch-Bauer I and II, Apfelbaum),* he waived restitution; he surrendered *Häuser in Unterach am Attersee*; and he had the City of Vienna deliver *Buchenwald/Birkenwald* directly to the gallery. The fact that some paintings might have been owned by Germany at the time of the conclusion of the settlement, as ultimately asserted by the claimants, is irrelevant to the arbitration court's decision concerning Section 1 of § 1 of the 1998 Art Restitution Act. Even if one were to question the validity of the dispositions of Dr. Rinesch under that title (which is unlikely), the shortcoming would be remedied by the subsequent devolution of German property to the Republic of Austria (one could argue by analogy to § 367, last sentence of the General Civil Code). Moreover, in § 1 Section 1, the 1998 Art Restitution Act ignores such issues when it reverses acquisition procedures affecting what may at that time have been German property. This view is probably conforms with the restitution practices of the time, according to which movable assets were often restituted to the owners without further ado, and without obtaining the Allies' consent, which potentially was required.

3.4 Regarding the Fulfilment of § 1 Section 2 of the 1998 Art Restitution Act

3.4.1 The Legal Elements

§ 1 Section 2 of the 1998 Art Restitution Act concerns artworks which

"although they have legally passed into the ownership of the Republic, were previously the subject of a legal transaction as defined in § 1 of the Federal Act dated 15th May 1946 concerning the Annulment Declaration of Legal Transactions and Other Legal Acts Performed during the German Occupation of Austria [passed into the ownership of the Republic of Austria,] Federal Law Gazette No 106/1946, and are still in the ownership of the Republic."

The passage in brackets in the above text is clearly the result of an editing error (erroneously it was not deleted from an earlier version of the law) and should therefore be deleted (as meaningless) (see for instance Graf, *NZ* 2005, page 321ff [page 322, footnote 61).

As the parties also disputed the implementation of this element, it is once again necessary to analyze the origin and purpose of the Act.

As proven by the materials pertaining to the 1998 Art Restitution Act, the makers of the law had in mind "doubtful purchases" via which items which during the Nazi regime underwent a process later covered by the Annulment Act were subsequently (in a further step) acquired by the Republic. This last step had to have been or could have been "lawful". The typical case presented was acquisition in the art market or at auctions; the motivating aspect for restitution per the 1998 Art Restitution Act was the fact that the objects were at the time appropriated from the owners in a manner described as follows in the Annulment Act:

„§ 1. Legal transactions with and without remuneration and other legal acts during the German occupation of Austria [are null and void] if they were carried out in the course of the political and economic penetration by the German Reich in order to appropriate from natural or legal persons property or property rights that they had rightfully enjoyed on 13th March 1938." Because the Annulment Act, as a result of its § 2, did not automatically lead to the invalidity of the respective appropriations, insisting instead that

the nullity could be asserted only on the basis of the subsequently adopted restitution laws, and as this right to contest of the transactions in question was subject to deadlines and/or had perhaps not been asserted by the entitled parties or their heirs, there were items in public collections which, per the 1998 Art Restitution Act, were restitutable to the (heirs of the) the eligible parties, regardless of the formally legitimate acquisition of property by the Republic. (Instances where it was not possible to return items to the entitled parties after restitution proceedings are provided for in Section 3 of § 1 of the 1998 Art Restitution Act, but this is of no relevance for the present purposes.)

In light of the reference to the Annulment Act, this basically involves items that had been the subject of dispossession prior to 1945. The element of appropriation per the Annulment Act is in fact fulfilled by all items sold by Dr. Führer in his capacity as Nazi-appointed administrator of Ferdinand Bloch-Bauer's property (or property he merely factually surrendered or even kept for himself. Re "legal transactions" in § 1 of the Annulment Act, the arbitration court shared the opinion of Graf, *NZ* 2005, page 322, who argued that by virtue of its purpose the reference in Section 2 of § 1 of the 1998 Art Restitution Act in fact covers the entire scope of § 1 of the Annulment Act and not just the "legal transactions" specified therein. According to the judicial decisions of the Supreme Restitution Commission, which the arbitration court adhered to in the present case, a "legal act" for the purposes of the Annulment Act is "any act or omission that produces a legal effect under the rule of law" (Supreme Restitution Commission Rkv 136/48 dated 7th September 1948, in Helfer/Rauscher, *Die Rechtsprechung der Rückstellungskommissionen* (The Judicial Decisions of the Restitution Commissions) [1949] 311 No.145).

Anything else would apply only if Dr. Führer fulfilled effective legal claims (which originated earlier and were therefore not triggered or affected by the Nazi regime). As this cannot have been the case during Ferdinand Bloch-Bauer's lifetime, regardless of how one interprets the validity/applicability of Adele Bloch-Bauer's will, this element of appropriation is definitely fulfilled with regard to all five paintings. With regard to whether Dr. Führer's activities qualify as legal acts for the purposes of the Annulment Act, it is unnecessary at this point to resolve the issue raised by Krejci, namely whether a

will of Adele Bloch-Bauer interpreted as being binding might or might not have been "suspended" due to Nazi rule.

Therefore it only remains to be seen whether – in addition to the undoubted fact that the appropriation had occurred – the case envisaged by the legislators who drafted the 1998 Art Restitution Act, in which a subsequent lawful acquisition by the Republic must now be reversed, is in fact an indispensable element and, if applicable, how it should be interpreted. In this respect Welser/Rabl and Krejci agree, as they claim that the Section 2 case can only be fulfilled if the item was acquired by a third party, while Graf (*Die österreichische Rückstellungsgesetzgebung* (The Austrian Restitution Laws) [2003], 484), whose argumentation was adopted by the claimants in the oral proceedings and the written submissions filed thereafter, had previously argued that "a simple argumentum a maiori ad minus" suggested that cases where appropriated items unlawfully came directly into the possession of the Republic (without there being a third buyer) did fall under this element of the Act. In the present case (not referred to in the work by Graf cited above, but referred to in the essay in *NZ* 2005, 321/79), acquisition from German property, as argued by the claimants, or due to passing of the restitution law deadlines, or possibly directly from the entitled party but in a doubtful manner, were the subject of deliberation.

The latter, at any rate in instance of acquisition without the involvement of the entitled party, struck the arbitration court as convincing. Hence if the Republic acquired the ownership of certain items directly or indirectly via the German Reich, which had itself executed the void legal transaction, then in principle the corresponding restitution element should, compared with acquisition in good faith from a third party, be deemed to have been all the more fulfilled. Moreover, one could argue that acquisition from a private third party and acquisition by the Republic pursuant to the 1st State Treaty Implementation Act (if the paintings were German property) were of equivalent status, in which case the fulfilment of the element of merely indirect "lawful" acquisition would be fulfilled per the wording. The extent to which this "if x applies, then y applies all the more" type of conclusion also applies to a doubtful acquisition *from a party entitled at the time* is an unresolved issue.

The arbitration court did not feel that it was in any way bound, as discussed by Graf (*NZ* 2005, page 322), by the practices of the Advisory Council pursuant to § 3 of the 1998 Art Restitution Act. It can be argued that the Advisory Council itself and/or the Federal Minister, following its recommendations, should not randomly treat certain (identical) facts one way in one case and another in another; however, the arbitration court was appointed by the disputing parties to independently rule on the legal prerequisites for restitution, regardless of the recommendations of the Advisory Council. This was stated in Section 4 of the Joinder Agreement (which, although it is not directly applicable to the present matter, nevertheless allows conclusions about the parties' general position), which stated that the arbitration court is expressly viewed essentially as a body that is entitled to re-examine the Advisory Council's decisions.

The arbitration court naturally did not ignore the Advisory Council's established practices without compelling reasons, insofar as they came up in the interpretation of the same laws applied by the arbitration court, and insofar as the practices came to the arbitration court's attention in conjunction with the rules of procedure. Nevertheless, Graf's criticism of the Advisory Council's decisions (*NZ* 2005, page 330 f , footnote 38) demonstrates that the Advisory Council's arguments, even those relating to established practices, should, in light of the principle of equal treatment, be open to factual (legal) discussion by the present arbitration court. For example, if the Advisory Council regards a settlement reached at the time by the entitled parties in restitution proceedings as insignificant, this repression of a central principle of settlement law per the General Civil Code, according to which post hoc certainty concerning originally disputed and then settled circumstances cannot result in annulment of the bona fide settlement (§ 1387 of the Civil Code), then special justifications for this must be provided. In the cases described by Graf, in light of the underlying idea behind Section 1 of § 1 of the 1998 Art Restitution Act, the "integrity" of the settlement is called into question, or it is argued that in retrospect the Republic was not in a position to reach a final settlement with the restitution applicants concerning their asserted claims insofar as the items had not yet been surrendered to the restitution applicants. Under the principle of equal treatment emphasised by Graf, if one wishes today to differentiate between different settlements, one ought to present more convincing grounds than has generally been the case so far.

Graf's conclusion regarding this, namely that all items which were appropriated at the time and not restituted in later years, but rather passed into the ownership of the Republic, should be restituted, fails to adequately address the central question as to *why* the items were not restituted. If this happened unknowingly, or in a worse case due to the authorities' ignorance or ill will, if the affected persons were coerced into the settlement because it gave them a means to finally retrieve some of their seized assets, then all of this could lie within the spirit of Section 2, for which the Republic's good faith is of no significance. However, if the reason was that there was an "honest" settlement between the Republic and the owners (or their heirs), reached because of serious doubts regarding the asserted claims, then in the arbitration court's view the spirit of the 1998 Art Restitution Act is not fulfilled. Section 1 of § 1 of the 1998 Art Restitution Act suggests that a settlement reached under duress is not deemed an "honest" settlement. In view of the material distress many of the exiles suffered at the time, the term "under duress" may be interpreted broadly (as the Republic could not have felt a similar pressure to reach a settlement, as compared with what usually happens in the case of private individuals with disputed or doubtful claims). If, however, there is no evidence of inequality of the basic positions and of a resulting lack of "honesty", then subsequent acquisition of an item seized from the owner, into whose possession it has been returned, should be equally as legally valid as acquisition based on a settlement concerning a genuinely "disputed" or "doubtful" claim to surrender or restitution (§ 1380 of the General Civil Code). In the cases quoted by *Graf*, the Advisory Council obviously recognised this, though it did not always use felicitous formulations.

Accordingly, the "defect" of the items, i.e. their having been seized from their owner as defined in the Annulment Act, could (only) be cured by Dr. Rinesch's subsequent effective creation, on behalf of the heirs, of new title for the acquisition of ownership by the Republic. In light of all of the above, this was clearly what happened: Under general civil law, his acknowledgment (or settlement (more detailed qualification is unnecessary, because with regard to legal validity the same rules apply to both, see Ertl in Rummel, General Civil Code[3] § 1380 Section 6 and further references, and § 1387 Section 1) is incontestable in terms of its validity (§ 870 in conjunction with § 1487 ABGB), at least today. Thus if the purpose of the

settlement/acknowledgement was solely to eliminate the uncertainty surrounding the legal validity of the will, in the arbitration court's view it is definitely incontestable with regard to Section *2* of § 1 of the 1998 Art Restitution Act.

The apparent contradiction with the above decision concerning Section 1 § 1 of the 1998 Art Restitution Act derives from the fact that that part of the law involves politically motivated compensation for what is nowadays seen as the duress of the export proceedings, while the second section involves unobjectionable (under general civil law) acquisition of works of objectively offensive provenance. In instances of acquisition from an entitled party based on a post-1945 settlement, the kind of offensiveness presumed in Section 2 cannot apply if, from today's perspective, there were good reasons for the settlement (if one disregards the pressure exerted in the course of the export proceedings, as indicated in Section 1 of § 1), in this case the doubt regarding the Republic's inheritance-law claim. In this respect at least, the arbitration court deemed Section 1 a *lex specialis* vis-à-vis Section 2 of § 1 of the 1998 Art Restitution Act.

Thus in the arbitration court's view, the legal element of § 1 Section 2 of the 1998 Art Restitution Act is not fulfilled. Therefore the arbitration court did not have to analyze whether there was temporary ownership of some or all of the paintings by the German Reich. The prevailing opinion after 1945 was evidently that the forced transactions and legal acts carried out by the exiles, either personally or via administrators assigned to handle their assets, were or became legally effective unless, per the restitution laws, they were annulled upon request by the authorities or courts within the corresponding deadlines or actually annulled. The only exceptions were acts such robbery and theft, though it is assumed that "German property" may also have arisen in that way. Closer examination of restitution decisions reveals that restitution claims directed at German property were decided upon unscrupulously and without regard for the facts (to some extent this was justified by arguing that restitution proceedings only involved obligatory claims), and that it was argued that the Allies' authorization requirements concerning surrender of property would only have to be fulfilled in cases of execution or land register proceedings. In the case of movable assets, restitution was evidently carried out de facto without much regard for the question of German property. As Graf,

Rückstellungsgesetzgebung (Restitution Legislation), page 208 f has shown, restitutions were already being approved in 1947, at least in the British occupation zone.

Vienna, 15th January 2006

[signature] [signature]

Dr. Andreas Nödl, Lawyer Professor Walter H. Rechberger

[signature]

Professor Peter Rummel (Chairman)