Legal Opinion

regarding the question of whether, in the period between 1923 and 1948, the Republic of Austria acquired a claim to or ownership of the paintings *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Apple Tree I*, *Beech Forest (Birch Forest)*, and *Houses in Unterach am Attersee*, and whether, pursuant to § 1 of Austria's Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections dated 4th December 1998, authority exists to restitute the paintings without remuneration to the heirs of Ferdinand Bloch-Bauer.

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Brief Summary of the Main Conclusions

I. In the period between 1923 and 1948, the Republic of Austria did not acquire a claim to or ownership of the Klimt paintings.

1. Adele Bloch-Bauer's testamentary request to her husband Ferdinand Bloch-Bauer to leave the paintings to the Austrian Gallery after his death constitutes a non-binding wish, and therefore does not constitute the basis for any estate law claims. Even if one assumed there was an intention to establish an obligation, that testamentary order would be ineffective, as it would encroach upon Ferdinand Bloch-Bauer's testamentary freedom. It would only be possible to convert the ineffective testamentary order into a reversionary-heir legacy if the paintings were the property of Adele Bloch-Bauer. A conversion of this kind is impermissible, as it would encroach upon testamentary freedom if the paintings were the property of Ferdinand Bloch-Bauer. Ferdinand Bloch-Bauer 's declaration to the probate court, and the legal presumption pursuant to § 1237 (old version) of the General Civil Code, are indications that the paintings belonged to Ferdinand. Moreover, one cannot infer from Adele Bloch-Bauer's will that she believed the paintings belonged to her.

2. In making his declaration to the probate court that he intended to faithfully fulfill his wife's request, Ferdinand Bloch-Bauer merely non-bindingly held out the prospect of fulfilling that request. In doing so, he did not establish a binding legal obligation with regard to the Austrian Gallery that he would bequeath the paintings. In any case, it would not have been legally feasible to establish a binding obligation of this kind, because not only did Ferdinand Bloch-Bauer have no intention of establishing an obligation to make a donation due upon death, but also the formal requirements were not met. Furthermore, Ferdinand Bloch-Bauer's statement of intent is definitely not an indication that he wished to donate the paintings to the Austrian Gallery during his lifetime. Even if one were to assume he intended to bind himself in this way, the formal requirements (a notarial act) were not met, nor was there an actual surrender of the paintings.

3. The sale of *Adele Bloch Bauer I, Adele Bloch Bauer II* and *Apple Tree I* to the Austrian Gallery and of *Beech Forest (Birch Forest)* to the Vienna City Collections by Dr. Führer, the lawyer officially assigned the task of liquidating Ferdinand Bloch-Bauer's assets between 1938 and 1945, cannot be deemed a legal transaction attributable to Ferdinand Bloch-Bauer. The sale neither constituted the basis of nor fulfilled an obligation on the part of Ferdinand Bloch-Bauer.

II. The prerequisites for authorization to restitute the paintings to the heirs of Ferdinand Bloch-Bauer without remuneration pursuant to § 1 of Austria's Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections dated 4th December 1998 are met.

1. The legal element set forth in § 1 Paragraph 3 of the Restitution Act 1998 is not applicable. Nevertheless, the paintings do fulfill the wording of the legal element regarding restitution set forth in Paragraph 2: As a result of Dr. Führer's transactions, all the paintings were the subject of legal transactions or legal acts as defined in § 1 of the Annulment Act, and after 1945 passed lawfully into the ownership of the Federal Government pursuant to an agreement between Ferdinand Bloch-Bauer's heirs and the Austrian Gallery. However, in light of the legislator's intentions, § 1 Paragraph 2 must be interpreted restrictively, such that it applies only to acquisition from third parties, in particular from authorized dealers or at auctions. Paragraph 2 does not apply to acquisition from parties with a valid claim, because if it did, Paragraph 1 would lose its entire sphere of applicability.

2. The prerequisite for authorization pursuant to § 1 Paragraph 1 of the Restitution Act 1998 is that the artworks were the subject of restitution to their original owners or legal successors upon death and after 8th May 1945 in the course of proceedings arising therefrom passed into the ownership of the Federal Government without remuneration pursuant to the federal Law Regarding the Ban on the Export of Objects of Historical, Artistic or Cultural Significance.

Adele Bloch Bauer I, Adele Bloch Bauer II, and *Apple Tree I* were not restituted; instead, Ferdinand Bloch-Bauer's heirs came to an agreement with the Austrian Gallery that the pictures should remain with the Gallery permanently, and that the heirs would not demand that they be

restituted. In light of the legislator's intentions, a short-cut procedure of this kind is not a barrier to the applicability of Paragraph 1. The question of whether *Houses in Unterach am Attersee* and *Beech Forest (Birch Forest)* also fulfill that legal element hinges on whether the prerequisite for fulfillment of the legal element "subject of a restitution" as set forth in § 1 Paragraph 1 of the Restitution Act 1998 is that the artworks were first restituted *by the Republic*. If that is not a prerequisite, then those two paintings do fulfill that legal element.

All the paintings were surrendered to the Republic without remuneration as defined in § 1 Paragraph 1, because the Federal Government gave no material quid pro quo, and Ferdinand Bloch-Bauer's heirs were not under any legal obligation. The transfer of ownership was carried out in direct connection with the offer to facilitate the granting of export permits for the remaining artworks. Indeed in her reply to a written parliamentary question about artworks in the possession of the Republic of Austria, the current Minister of Education, Science & Culture stated that there was an evident connection between the relinquishment of the paintings and the granting of an export permit.

3. To sum up: § 1 Paragraph 1 of the Restitution Act 1998 is applicable at least to *Adele Bloch Bauer I, Adele Bloch Bauer II* and *Apple Tree I*. Whether the same is true of *Houses in Unterach am Attersee* and *Beech Forest (Birch Forest)* depends on whether it is irrelevant that after 1945 the paintings were in the possession of Dr. Führer and the City of Vienna respectively rather than the Republic. In light of the practices of the Advisory Council established pursuant to § 3 of the Restitution Act 1998, on balance it is fair to say that § 1 Paragraph 1 is probably applicable to those two paintings as well.

Facts of the Case and Question Presented

A. Facts of the Case

Maria Altmann has instructed us to provide an opinion regarding the following case:

Adele Bloch-Bauer died in 1925. She was survived by her husband Ferdinand Bloch-Bauer, having designated him her sole heir in her will dated 19th January 1923[1]:

My Last Will:

In sound mind and subject to no outside influence, I make the following will for the event of my death:

I. My husband, Ferdinand Bloch-Bauer, shall be the sole heir to my entire property.

II. If my husband predeceases me, my sole heir shall be my brother-in-law Dr. Gustav Bloch-Bauer or his descendants if he predeceases me.

III. I leave 50,000 Czech crowns to each of the following organizations:

1) the Viennese workers' association Kinderfreunde [Friends of the Children]*; and*

2) the Viennese association Die Bereitschaft [Be Prepared].

As my sole heir, my husband shall bear the cost of these transfers.

As I am convinced that my husband will fulfill these obligations in their entirety, there is no need to guarantee the claims of these two associations. If, in the period leading up to transfer of the two donations, one of the two associations should be liquidated, the payment that is freed up shall pass to the Wiener Rettungs-Gesellschaft [Vienna Rescue Service].

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 Jungfer, Brezan library, which belongs to me, to the Vienna People's and Workers' Library. I leave it at the discretion of the Vienna People's and Workers' Library to keep the books or to sell them and accept the proceeds as a legacy. No guarantee is required for this legacy.

I ask my husband to divide up my jewelry among our nephews Karl, Robert and Leopold Bloch-Bauer and our nieces Luise and Bettina Bauer after his death[2]*, as far as possible in equal parts.*

IV

If my brother-in-law Dr Gustav Bloch-Bauer or his descendants become my heirs, I obligate him or his descendants <u>immediately</u> after my death to make the following bequests: 50,000 Czech crowns to the Viennese workers' association Kinderfreunde and to the Viennese association Die Bereitschaft respectively; the two portraits and the four landscapes by Gustav Klimt to the Austrian State Gallery in Vienna; and my Vienna and Jungfer, Brezan library to the Vienna People's and Workers' Library.

I have written and signed this will with my own hand.

Adele Bloch-Bauer

Vienna, 19th January 1923

I hereby appoint my brother-in-law Dr Gustav Bloch-Bauer my executor.

In the probate proceedings for Adele Bloch-Bauer, Gustav Bloch-Bauer, "as the party assigned authority to handle the estate and proceedings" (i.e. Ferdinand Bloch-Bauer's representative) supplied the property affirmation in lieu of an oath, the verification of the estate, and the testamentary compliance confirmation, via the following declaration:

I hereby provide the testamentary compliance confirmation, as follows:

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[1] Authors' note: The underlined phrases are underlined in the original.
[2] Authors' note: At this point, there is a discrepancy between the copy of the original and the transcription that was made available. In the transcription, Luise and Maria-Viktoria, along with Mira and Bettina, are named as the nieces.

In Section I of her will dated 19th January 1923, the testatrix designates her husband Mr. Ferdinand Bloch-Bauer her sole heir.

To verify fulfillment thereof, I hereby refer to the statement of inheritance, which was issued unconditionally in his name and for him, relates to the entire estate, and is hereby accepted.

Section II is irrelevant, as Mr. Ferdinand Bloch-Bauer has survived his wife.

In Section III, Paragraph 1, the testatrix gives instructions regarding legacies in favor of

1) the Viennese workers' association Kinderfreunde; and

2) the association Die Bereitschaft.

These associations have received notification from the court regarding the accrual of the legacy.

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.

The nephews and nieces of the testatrix who are listed in Section III, Paragraph 3, have duly noted the contents of the will.

Their statement is attached in ./5.

The provisions set forth in Section IV are irrelevant (as are those in Section II).

Verification of implementation of the last instruction, which indicates that I am to be appointed executor, is hereby provided, as I confirm that I have accepted that role. [...]

Originally, the painting *Adele Bloch-Bauer I* may have been intended as a gift to the portraitee's parents (at any rate, Adele Bloch-Bauer indicated this in a letter to Julius Bauer dated 15th October 1903, Austrian National Library, collection of hand-written texts, shelf mark

577/52-1, quoted in *Klimt und die Frauen* [Klimt's Women], Natter/Frodl, page 115). According to Adele Bloch-Bauer's statements in that letter, it was Ferdinand Bloch-Bauer who decided to commission Klimt's services ("my husband then decided to have Klimt paint my portrait…"

In 1936, Ferdinand Bloch-Bauer donated one of the Klimt paintings, *Kammer Castle on Lake Attersee III*, to the Austrian Gallery. The gallery responded in a letter dated 25th November 1936:

Dear Mr. Bloch-Bauer,

In the name of the Austrian Gallery, I would like to extend my warmest and most respectful thanks for your generous gift of the Gustav Klimt oil painting Kammer Castle on Lake Attersee *by way of a dedication from Adele and Ferdinand Bloch-Bauer. A few months ago a landscape in oils by Gustav Klimt, which had been loaned to us by a private owner, had to be returned to the owner, and we have been unable to find an appropriate substitute from among our inventory. So your donation is particularly welcome at the present time, and will go a long way towards completing the Klimt room.*

The rest of the paintings remained in the possession of Ferdinand Bloch-Bauer until 1938. Thus, aside from the case of the painting just mentioned, there are no definite facts regarding agreements between Ferdinand Bloch-Bauer and the Austrian Gallery.

In 1938, Ferdinand Bloch-Bauer fled abroad, leaving his art collection in his apartment in the Elisabethstrasse in Vienna.

In his absence, a substantial tax penalty was imposed on him, and his art collection was liquidated to pay it. A lawyer, Dr. Führer, was put in charge of managing these assets, and functioned as Ferdinand Bloch-Bauer's representative.

In 1941, Dr. Führer, invoking the will of Adele Bloch-Bauer, handed over *Adele Bloch-Bauer I* and *Apple Tree I* to the Austrian Gallery. In return, the Gallery gave Dr. Führer *Kammer Castle on Lake Attersee III*. The correspondence between Dr. Führer and Dr. Grimschitz regarding this is available (letter from Dr. Führer to Dr. Grimschitz dated 3rd October 1941; response from Dr. Grimschitz to Dr. Führer dated 8th October 1941):

Dr. Führer to Dr. Grimschitz, letter dated 3rd October 1941:

Dear Professor Grimschitz,

With reference to our oral agreement of Tuesday 30th September of last year, I have the honor of informing you that in fulfillment of the will of Mrs. Adele Bloch- Bauer, pursuant to the testamentary provisions I am placing the following paintings at the disposal of the Modern Gallery (until now they have been stored in the apartment of Mr. Ferdinand Bloch-Bauer):

Klimt, Portrait of a Woman *and*

Klimt, Orchard.

You stated that in return you would be willing to hand over to me the painting Summer Landscape *by Klimt that is in your possession.*

Dr. Grimschitz to Dr. Führer, letter dated 8th October 1941:

Dear Dr. Führer,

Many thanks for your letter dated 3rd October, 1941. I will hand over to you the Gustav Klimt oil painting Kammer am Attersee*, which was given to the Modern Gallery by Mr. Bloch-Bauer, and in return will accept from you the two Klimt oil paintings* Portrait of a Woman on Gold Background *and* Apple Tree*. I will call you to arrange a good time for the handover. Thank you for all your efforts.*

Dr. Führer then sold *Kammer Castle on Lake Attersee III* to Gustav Ucicky. In 1942, he sold *Beech Forest (Birch Forest)* to the Vienna City Collection, and in 1943 he sold *Adele Bloch-Bauer II* to the Austrian Gallery.

The fate of *Houses in Unterach am Attersee* is somewhat unclear. Dr. Führer may well have kept it. The authorities probably awarded it to him as a "reward" for "liquidating" Ferdinand Bloch-Bauer's art collection. We must assume that its being in the possession of Dr. Führer was based on a legal act of this kind. At any rate, after Dr. Führer was arrested in 1945, *Houses in Unterach am Attersee* passed into the possession of Karl Bloch-Bauer, who initially kept it in

safekeeping for the heirs of Ferdinand Bloch-Bauer, until it was subsequently handed over to the Austrian Gallery (see below).

Ferdinand Bloch-Bauer died at the end of 1945. In his will dated 22nd October 1945, there is no reference to the paintings, nor to the instructions of Adele Bloch-Bauer. He designated Louise Baroness Gutmann (half), Maria Altmann and Robert Bentley (one quarter each) his heirs.

Shortly before he died, Ferdinand Bloch-Bauer commissioned the Viennese lawyer Dr. Rinesch to try to bring about the return of his art collection. In a letter dated 28th September 1945, Dr. Rinesch wrote to the director of the Austrian Gallery, Professor Grimschitz, explaining his role as Ferdinand Bloch-Bauer's representative and describing his assigned task:

Although I do not wish to act prematurely with regard to my client's wishes, I have been instructed to first make inquiries regarding the whereabouts of individual items of the collection, so that they can be safeguarded if possible.

I would therefore be grateful if you would first inform me which items are located in national or city galleries in Vienna and which ones have probably been taken to Germany. My main task will be to obtain the aforementioned paintings from the Austrian art inventory with the help of the Allied military authorities.

After Ferdinand Bloch-Bauer's death, Dr. Rinesch functioned as the heirs' representative, though it is unclear whether he actually received power of attorney from all of them or just from Robert Bentley.

In November 1947, Dr. Rinesch requested the return of *Beech Forest (Birch Forest)* and Ferdinand Bloch-Bauer's porcelain collection. This letter is not available, but his request can be reconstructed from the response of Dr. Wagner, director of the Vienna City Collections, dated 3rd December 1947:

Until now we have been unable to respond to your letter dated 18th November 1947 regarding Ferdinand Bloch-Bauer's porcelain collection, because we had to consult our legal department. Now we have received their response, we can inform you that we are prepared to return the Klimt painting Birch Forest *and the Viennese classical porcelain insofar it as it is still present, in return for repayment of the purchase price.*

Dr. Rinesch knew by December 1947 at the latest that three of the Klimt paintings were in the possession of the Austrian Gallery, and that one had been sold to Gustav Ucicky. In a letter to Robert Bentley dated 6th December 1947 (a transcription of part of the letter is available), Dr. Rinesch informs his client about the whereabouts of the paintings and also mentions the Adele Bloch-Bauer will:

I have already requested that the Klimt that was sold to Ucicky be returned.

The Austrian Gallery is in possession of three Klimt paintings, namely two portraits of Adele Bloch-Bauer and one painting entitled Apple Tree.

The Gallery received two of them as a gift, and purchased one (the standing portrait). As is known, Adele Bloch-Bauer bequeathed her Klimts to the museum in her will, but Mr. Ferdinand Bloch-Bauer was entitled to hold onto the paintings during his lifetime. The testator is now deceased, though the museum in any case came into possession of the paintings earlier. The museum is aware of the contents of the aforementioned will. It was informed thereof by Dr. Führer, and correspondence regarding this exists. I believe the museum will assert its claim. How should I proceed? Should I send Adele Bloch-Bauer's will?

The last sentence of the letter could be construed as an indication that Dr. Rinesch was in possession of (a copy) of the will at this point. In fact, however, Dr. Rinesch was not aware of the contents of the will. It is unambiguously clear from a letter to Robert Bentley dated 26th February 1948 that he was not in possession of the will even at that later time.

"The Austrian Gallery has written to me per Attachment IV). I have also spoken to Grimschitz about it. [...] Unfortunately I am not aware of the wording of the will, but I do still hope to find it in Dr. Führer's files. Who actually dealt with the estate at that time? Naturally it is not my business to arrange for implementation of the will, as the paintings are no longer available to me. One painting is in Ucicky's private possession. If the will is legally valid, I do not wish to be involved in a dispute with the acquirers of these paintings; I will leave that to the museum.

In the meantime in a letter dated 19th January 1948, Dr. Rinesch asked the current director of the Austrian Gallery, Dr. Garzarolli, for a response regarding the three Bloch-Bauer collection

Klimt paintings in the Gallery's possession. He asked in particular how Dr. Garzarolli would respond to his clients' restitution claims:

I represent the heirs to the Viennese collector Ferdinand Bloch-Bauer, who died in 1945. His collection included, among other things, three paintings by Gustav Klimt, namely two portraits of Adele Bloch-Bauer and one landscape. Under the Nazis, Mr. Bloch-Bauer's private property was subjected to forced liquidation and handed over to the Austrian Museum by the Bloch-Bauer's lawyer, Dr. Erich Führer. I do not know the exact circumstances of this handover.

I would be grateful if you would inform me how you would respond to my clients' restitution claims.

Dr. Garzarolli then asked the former director of the Austrian Gallery, Dr. Grimschitz, for clarification as to how the paintings had been handed over (letter dated 25th February 1948). From the contents of the letter, it is clear that that the letter must have been preceded by a conversation, in which Dr. Garzarolli was probably informed about Adele Bloch-Bauer's estate:

Please deliver the promised report concerning Adele Bloch-Bauer's estate, how the individual Klimt paintings were handed over, and the disposal of the outstanding items. Please deliver the report in the next few days, as Dr. Rinesch is very concerned about this matter.

The following day, on 26th February 1948, Dr. Garzarolli responded to Dr. Rinesch's letter of 19th January (a copy is available, though the signature is illegible). However, it is clear from the contents that the author of the letter must have been Dr . Garzarolli:

In response to your letter dated 19th January 1948, I wish to politely inform you that as far as I know Mrs. Adele Bloch-Bauer dedicated six paintings by Klimt to the Austrian Gallery. The husband of the deceased testatrix asked the Austrian Gallery to be allowed to keep the paintings at his home until his death.. As far as I can tell from the files, the family gave a summer landscape by Klimt to the Austrian Gallery. In a letter dated 3rd October 1941, the lawyer Dr. Erich Führer handed over two paintings by Klimt in the home of Mr Ferdinand Bloch-Bauer (a portrait of a woman and a painting of an orchard) to the Austrian Gallery asked for the summer landscape previously held by the Austrian Gallery to be returned and received it. At present the Austrian Gallery still lacks four paintings from the will. I have asked Professor Bruno Grimschitz

for a report, which should be delivered shortly. I will send you a copy of this report and will have to ask request that the Ferdinand Bloch-Bauer's heirs be notified regarding the final fulfilment of Mrs. Adele Bloch-Bauer 's will.

On 1st March Dr. Grimschitz sent Garzarolli the report he had requested:

My account of the question of ownership rights to the Klimt paintings that were in the possession of Adele Bloch-Bauer, now deceased, of Elisabethstrasse 18, Vienna I, is as follows: Mrs. Adele Bloch-Bauer was in possession of six paintings by Klimt: Four landscapes (Apple Tree, Beech Forest, Houses in Kammer, Lake Shore with Houses in Kammer) and two portraits (Mrs Bloch-Bauer, seated against a gold background, and Mrs. Bloch-Bauer, standing in front of a colored background). I was a guest in their house between 1919 and 1938. Mrs. Bloch-Bauer and, after her death, her husband Mr. Ferdinand Bloch-Bauer, stated orally on many occasions that the six Klimt paintings would be given to the Modern Gallery in Vienna as a bequest from their owner Mrs. Bloch-Bauer. After his wife died, Mr. Bloch-Bauer asked me several times if he could be allowed to keep the paintings in the room of his deceased wife, which had been left unchanged, until the directors of the Gallery required the paintings for exhibition. When the portrait by Oskar Kokoschka was hung in the Klimt room, the Austrian Gallery was able to acquire the artistically weakest of the four landscapes, in fact before 1938. After the annexation of Austria in 1938, the Bloch-Bauer collection was destroyed, and most of the paintings passed into the possession of German private individuals. I contacted the lawyer Dr Führer, who was representing Mr. Ferdinand Bloch-Bauer, who was residing in Zurich, regarding the Klimt paintings, and asked him to relinquish the five paintings. As he was unaware of Mrs. Bloch-Bauer's will, he refused to do so. Nevertheless, I managed to obtain one of the portraits against a gold background and a landscape with apple tree, in exchange for the less characteristic Kammer landscape. As there was no further interest in the Klimt paintings and they were still in the house at Elisabethstrasse 18, I left the situation unchanged. In 1943 I found out from Mr. Gustav Ucicky that he was in the process of buying one landscape from the Bloch-Bauer collection. I then contacted Dr. Führer again and asserted the Austrian Gallery's claims, but without success. In order to obtain the second portrait for the Modern Gallery – as the Gallery did not have a representative portrait from Klimt's later period – I acquired it in spring 1943 for 7,500 Reichsmark. Despite my objections, Dr. Führer sold the rest of the Klimt paintings.

After this, Dr. Garzarolli may well have contacted the *Finanzprokuratur*[3] , although there are no documents available regarding this. At any rate, in an opinion sent to Dr. Garzarolli on 6th March 1948, the *Finanzprokurator* makes reference to Adele Bloch-Bauer's will. He notes that the questionable issue of ownership is in any case irrelevant, because Ferdinand Bloch-Bauer had stated he would faithfully fulfill the request. He also notes that the probate court had ordered that the Austrian Gallery be notified about Adele Bloch-Bauer's instructions, but says he believes the notification might not have actually been sent.

In a letter dated 9th March 1948, Dr. Garzarolli responded to Dr. Grimschitz. Garzarolli indicates that the *Finanzprokuratur* and the Inner City District Court have informed him about the estate files regarding the Adele Bloch-Bauer estate. He also complains that in the transactions with Dr. Führer Dr. Grimschitz did not take the estate files into account, and speaks of a "rather dangerous situation":

In the documents in the possession of the Austrian Gallery[4]*, no mention is made of these facts, and there are no statements from a district court, nor are there any notarized statements or even a personal statement from Mr. Ferdinand Bloch-Bauer. In my view you should definitely have sorted this out. I am therefore in a particularly difficult situation, especially as the letter from Dr. Führer dated 3rd October 1941, which mentions the will, creates a situation that is inconsistent with the meaning of the will and your knowledge thereof. I cannot understand why, even during the Nazi period, an existing incontestable bequest in favor of a national institution was not taken into account, by making reference to it or by contacting Mr. Bloch-Bauer, who was already abroad, via his temporary asset manager. Furthermore, there are no references in the files regarding the purchase of the late portrait for 7,500 Reichsmark. Therefore please supply me with the necessary statements, as I have to prepare a report.*

The situation is turning into a sea-snake, because at present the City Collections are holding in safekeeping or in possession of one of the landscapes from the former Bloch-Bauer estate.

[3] Translator's note: Office that represents the Republic of Austria and other parties in civil law matters. US equivalent: Office of the Attorney General.
[4] Authors' note: Garzarolli means Adele Bloch-Bauer's will and Ferdinand Bloch-Bauer's declaration to the probate court.

It worries me enormously that so far all the circumstances surrounding the restitution issues are very unclear. It will be in your interest to stick closely to me through all this confusion. That will probably be the best way for us to emerge from this rather dangerous situation.

Dr. Garzarolli then tried to obtain the other paintings mentioned in Adele Bloch-Bauer's will (*Beech Forest, Houses in Unterach am Attersee,* and *Kammer Castle on Lake Attersee*) for the Austrian Gallery. In a letter dated 24th March 1948, he requests the support of the Ministry of Education with regard to the painting in possession of the Vienna City Collections. First, he describes the events up until the point Ferdinand Bloch-Bauer emigrated, drawing on Dr. Grimschitz's account. He then goes on:

After the Anschluss*, Mr. Bloch-Bauer emigrated to Switzerland, and Dr. Führer became his temporary asset manager. In a letter dated 3rd October 1941, Dr. Führer contacted the Austrian Gallery, proposing that "in order to execute Mrs Adele Bloch-Bauer's will" he would exchange a portrait of a woman and an "orchard" painting (*Apple Tree*?) for the painting (*Summer Landscape*) that had been donated earlier. It should have been a straightforward matter for Dr. Grimschitz, who was director at that time, to insist on the handing over of all the Klimt paintings, by presenting the will that was available at any time from the District Court of Vienna I. But instead of directing all his efforts at the Reich governor's office, Dr. Grimschitz agreed to Dr. Führer's proposal, and acquired the second portrait of a woman (portrait of Adele Bloch-Bauer) for 7,500 Reichsmark, from among the four Klimt paintings outstanding. Unfortunately no documentation regarding this purchase is available, nor is there any indication of the funds used for the acquisition [...]*

Dr. Führer simply sold the remaining three paintings. One of them, Beech Forest, was purchased by the directors of the Vienna City Collections. Dr. Wagner, the current director of the City Collections, knows the facts of the case, and I have asked him for a response. He has stated that from his point of view there are no grounds for returning the painting, since he paid for it. So I have now asked him for information regarding available legal remedies pursuant to the Restitution Act. I hope this means we can avoid a lawsuit, which I would find very unpleasant for collegial reasons. Furthermore, I intend to ask the Provincial Court of Vienna I to take evidence from Dr. Führer, so that the request for a return of the painting can be initiated, based on knowledge of the current owner of the painting.

Dr. Garzarolli presented the situation in much the same way in a letter to the *Finanzprokuratur* dated 1st April 1948. He asked the *Finanzprokuratur* to clarify the situation by questioning Dr. Grimschitz, who was evidently unwilling to provide information. He also stated that *Lake Shore in Kammer* (*Houses in Unterach am Attersee*) had been found to be in the possession of Karl Bloch-Bauer, and, among other things, requested that the *Finanzprokuratur* help him ask Karl Bloch-Bauer for the paintings[5]. He also noted that the Ministry of Education was in the process of initiating a request that the City Collection return *Beech Forest (Birch Forest)*.

The next day (2nd April 1948) Garzarolli sent a letter to the head of the Federal Monument Office, Dr. Otto Demus. In the letter he describes entering Karl Bloch-Bauer's apartment and viewing the paintings from Ferdinand Bloch-Bauer's collection that were there. He provides recommendations as to how to react to any requests for export permits, and also mentions the Klimt paintings:

On 31st March, in the presence of Dr. Balke, I viewed the paintings from what was formerly Mr. Ferdinand Bloch-Bauer's collection that are currently in Mr. Karl Bloch-Bauer's apartment […]. I noted that they include a series of important Austrian paintings from the first half of the 19th century. The following items are particularly important:

1. Danhauser, Child in Cradle

2. Pettenkofen, After the Battle ...

3. Neder, Soldiers' Scene

4. Ranftl, Child with Dog

5. Nigg, Flowers *(on porcelain)*

6. Fendi, Mother with Children in front of the Madonna

As No. 1 and No. 2 are very important paintings, please do not issue export permits for them. I have proposed that No.1 be acquired by the Austrian Gallery at a reasonable price, and that

[5] Translator's note: Sic. Probably: "painting".

Nos. 2, 3 and 5 be exchanged for items of a similar value from the Austrian Gallery's inventory, and that the Albertina Museum be alerted regarding No. 6.

The collection also includes the Klimt painting Lake Shore with Houses in Kammer, *which is due to the Austrian Gallery pursuant to a legacy of Mrs. Adele Bloch-Bauer (who died on 25th January 1925), which was acknowledged by Mr. Ferdinand Bloch-Bauer. This painting was withheld by and obviously misappropriated by the lawyer Dr. Erich Führer. The* Finanzprokuratur*, which represents the interests of the Ministry of Education, has already initiated a request for its return.*

Please do not announce the acquire/trade plan until the Finanzprokuratur *says it is the right moment (we are awaiting notification), i.e. please delay this for tactical reasons.*

On a memo written by Dr. Demus, probably on 3rd April 1948, there is a handwritten note regarding the above letter from Garzarolli. The handwritten note also makes reference to a conversation with Dr. Rinesch, and the cover sheet of the memo indicates that the subject matter is "The Bloch-Bauer Collection". Dr Demus's handwritten notes are not entirely legible (they are available only in the form of a copy; uncertain/illegible items are indicated below):

P.O.[6] *Discussed with Rinesch. The matter must be treated in context, and* [...[7]] *the paintings brought back from Munich should be taken into account.*

12 paintings were not seized property, and have now been returned by Dr. Führer.

Inform Dr. Rinesch that if the 12[8] *paintings are assessed separately, it will be necessary to hold on to all of them.*

On 10th April, Dr. Garzarolli sent the *Finanzprokuratur* a letter in which he describes a conversation with Dr. Rinesch held in the presence of Dr. Franz Balke:

Dr. Gustav Rinesch [...], who is the legal representative of Mr. Ferdinand Bloch-Bauer's heirs, just spoke to me about the export of paintings. We also discussed Mrs. Bloch-Bauer's bequest of the six Klimt paintings to the Austrian Gallery. In the presence of Dr. Franz Balke, Dr.

[6] Translator's note: Out-of-context abbreviation. Not translated.
[7] Authors' note: Illegible.
[8] Authors' note:*? K?*

Rinesch told me that Mr. Ferdinand Bloch-Bauer's heirs acknowledge the Klimt legacy, and that in the next few days he will send us a written statement regarding this. Dr. Rinesch has also granted the Austrian Gallery a written authorization to take possession of the Klimt painting Lake Shore with Houses in Kammer *which is hanging in Mr. Karl Bloch-Bauer's apartment [...] and which is included in the legacy.*

Dr. Rinesch also told us that in the name of his client he initiated negotiations with Dr. Wagner about three months ago regarding the return of the Klimt painting Birch Forest*, which the Vienna City Collections bought from Dr.Erich Führer for 5,000 Reichsmark. At that time Dr. Wagner said he was willing to hand over the painting in return for repayment of the purchase price, which as far as I know was no longer the case a month ago.*

Dr. Rinesch made it clear he knew that the film producer Gustav Ucicky [...] had bought the last Klimt painting outstanding, Houses in Kammersee*, for 4,000 Reichsmark* (*I had to ask the Provincial Court of Vienna I that evidence be taken from Dr Führer regarding this painting). Dr. Rinesch said he had asked Mr. Ucicky to return the painting, but that Mr. Ucicky had responded by saying he bought the painting from Dr. Führer, Mr. Bloch-Bauer's legal representative, and thus had no reason to return it. Dr. Rinesch also said he was prepared to testify that Mr. Bloch-Bauer, who emigrated to Switzerland, had been subject to coercion. I therefore ask that you withdraw the restitution action against Mr. Gustav Ucicky relating to Klimt's* Houses in Kammer*, which belongs to the Austrian Gallery.*

On 11th April 1948, in a letter to Robert Bentley, Dr. Rinesch explained that he had visited Karl Bloch-Bauer's apartment and held conversations with Dr. Demus and Dr. Garzarolli:

As the contents of Carl's apartment are now being packed up, the Memorial Office also paid their visit this week. As I anticipated, the officials noticed immediately that among the paintings there were several from the Bloch-Bauer collection. I then received a phone call from Dr. Demus, and George and I went to his office. Dr. Demus explained that he and the Austrian Gallery placed great value on the paintings. He also said it would be difficult to reach agreement regarding the small group of paintings for which we want export permits immediately. In my view, we should file a joint application for all the export permits for the paintings in question, including those currently in Munich. We also discussed the Klimt paintings and Adele Bloch-

Bauer's legacy. I think that by resolving this matter we can win the favor of the Memorial Office and the museum, so yesterday I obtained the estate act from the district court.

According to her will dated 19th January 1923, your aunt's legacy of two portraits and four landscapes by Klimt to the Austrian Gallery was in the following form:

[quote from the will]

It is true that this is not in the form of a legacy; nevertheless, the act contains a declaration from your uncle in which he promises to fulfill his wife's request. This doubtless gives the Austrian Gallery a legal claim, just as to a legacy, and it will be necessary to fulfill the terms of the will. You are in any case in agreement (per your letter dated 8th March) that this should happen.

*Yesterday I visited Dr. Garzarolli of the Austrian Gallery. He has already viewed the paintings in Carl's apartment and knows about your aunt's will and your uncle's declaration. I made a declaration that Ferdinand Bloch-Bauer's heirs will fulfill his (your uncle's) wishes, and I am glad to say this was duly noted. According to the declaration I made, the Klimt painting (*Houses on Attersee*) which is in Carl's apartment, and for which in any case no export permit has been requested, will be given to the museum. Per our agreement, it will be up to the museum to handle the proceedings regarding the return of the painting (*Birch Forest*) in the possession of Vienna City Collections and the one that Ucicky bought from Dr. Führer. The six paintings will be given dedication plates and hung alongside one another in the gallery.*

The museum is already favorably disposed regarding this, so I immediately discussed the question of exporting the other paintings. I have not yet received a definitive commitment, but I agreed to submit a list of all paintings that we want to immediately export, and that they will be exported gradually once they have been brought back here. I will do this immediately, and perhaps some of the things can be sent along with the shipment of Carl's furniture.

On 12th April 1948, in a letter to Dr. Garzarolli, Dr. Rinesch, in the name of Ferdinand Bloch-Bauer's heirs, confirmed the oral agreement to hand over the paintings to the Austrian Gallery:

I hereby confirm the oral agreements that I, the representative of the heirs of the deceased Mr. Ferdinand Bloch-Bauer Robert B. Bentley, Maria Altmann and Luise Gatin [sic], made with you:

The Bloch-Bauer heirs acknowledge the 19th January 1923 will of Mrs Adele Bloch-Bauer, who died in 1925, and the declaration made by Mr. Ferdinand Bloch-Bauer, now deceased, to GZ A II – 14/25 of the Inner City District Court, in which he pledged to fulfill the request of his deceased wife regarding the six Klimt paintings.

*My clients duly note that Adele Bloch-Bauer's will has already partially been fulfilled in that the two portraits (*Portrait of a Woman against Gold Background *and* Portrait of a Woman Standing*) and the painting* Apple Tree *are in the possession of the Austrian Gallery.*

A further painting, Birch Forest*, was sold for 5,000 Reichsmark in November 1942 to the Vienna City Collections by Dr. Erich Führer, Mr. Ferdinand Bloch-Bauer's legal representative. I am currently negotiating with the director of City Collections, Dr. Wagner, regarding its return, and Department 10 notified me in writing on 3rd December 1947 that it is prepared to return the painting in return for repayment of the purchase price.*

Another Klimt painting, Kammer am Attersee*, was sold by Erich Führer to Mrs. Ingeborg Ucicky for 4,000 Reichsmark in 1942. I have already corresponded with the current owner of the painting, the film producer Gustav Ucicky, of Strudelhofgasse 17, Vienna IX, regarding the return of the painting. Mr. Ucicky invoked the fact that he made a bona fide purchase, and refused to return it.*

Furthermore, as I hold power of attorney for the heirs, I have supplied you with an authorization to take possession of the last Klimt painting contained in the legacy. This is the landscape Houses in Kammer am Attersee*. Please have it picked up from Mr. Karl Bloch-Bauer's apartment (Am Modenapark 10, Vienna III).*

I hereby duly note that you yourselves will handle the proceedings regarding requests for return directed at the City Collections and Mr. Ucicky; insofar as I am able to supply documents from the files regarding the sales, I will do so.

In the name of the heirs, I gratefully note that you will create appropriate dedication plates for the six paintings contained in the Bloch-Bauer legacy. Please also update the heirs on regular basis regarding the implementation and receipt of the legacy (Attention: Mr. Robert B. Bentley, 3924 Pine Crescent, Vancouver, British Columbia, Canada).

On 13th April 1948, Dr. Rinesch, as the legal representative of Ferdinand Bloch-Bauer's heirs, submitted an application for export permits to the Federal Monument Office, for all paintings from the Ferdinand Bloch-Bauer collection that had been obtained, returned or were to be returned. He also mentioned the agreement regarding the Klimt paintings:

It is important to note that the heirs I represent currently have Canadian or American citizenship and live abroad. They do not intend to sell these paintings and artworks, because they are the remains of what was once their uncle Ferdinand Bloch-Bauer's significant collection. Nevertheless, understandably they wish to bring the testator's remaining assets to their place of residence. It is also important to note that much of the art collection and formerly substantial assets have been irrevocably lost due to Nazi appropriation methods.

Nonetheless, the heirs whom I represent have spontaneously issued a declaration stating that Klimt paintings from the Bloch-Bauer collection, including several top-quality works, should be passed to the Austrian Gallery pursuant to the last wills of Ferdinand and Adele Bloch-Bauer. In light of the Bloch-Bauer family's completely changed situation with regard to assets, this declaration is specifically intended to demonstrate the Bloch-Bauer heirs' interest in Austrian art and Austrian museum holdings. I hope that in return the Federal Monument Office and the public collections involved will apply the provisions of the Memorial Protection Act in an accommodating manner that takes into account the special circumstances surrounding the case.

At the same time, Dr. Rinesch sent Dr. Garzarolli a copy of the application, asking him for his support (letter dated 13th April):

Please find attached a request for an export permit that I sent to the Federal Monument Office in the matter of the Ferdinand Bloch-Bauer collection paintings. I would be grateful if you would reach agreement with Dr. Demus regarding this as soon as possible, and hope you will invite me to participate in another meeting regarding this. I hope you will be able to provide a report that is favorable from my client's point of view. I am relying on your sense of justice.

The matter remained unresolved for a long time. In particular, there were arguments about a painting by Waldmüller and one by Eybl. Initially, export permits for these paintings were not granted.

Dr Rinesch's activities are reflected in a letter dated 5th November 1948 sent to Dr. Benesch, director of the Albertina Museum:

*As the party assigned authority to handle the estate in the matter of Ferdinand Bloch-Bauer's estate, I am aware that, in connection with an application for export permits for artworks, the Federal Monument Office gave you 16 drawings by Gustav Klimt and one watercolor by Fendi (*Mother with Child in front of Holy Family*) for safekeeping. As I am currently negotiating with the Federal Monument Office regarding an export permit for the Bloch-Bauer collection items returned so far, please send a response regarding this to me and to the heads of the Federal Monument Office in the near future. I wish to take this opportunity to explain that that the Bloch-Bauers have already given several Klimt paintings to the Austrian Gallery, including several representative major works, pursuant to Mrs. Adele Bloch-Bauer's will. Having made this very generous bequest, the heirs are justified in anticipating that the authorities will be accommodating with regard to the export of other artworks of considerably less value.*

In a notification dated 18th June 1949, the Federal Monument Office turned down the application for export permits. Dr. Rinesch thereupon sent a complaint to the Ministry of Education, on 13th July 1949. His arguments were based on, among other things, the fact that the Klimt paintings had been relinquished:

[...]

To demonstrate their interest in the Austrian public collections, the Bloch-Bauer heirs have very loyally agreed that the four main works by the Austrian painter Gustav Klimt from the Bloch-Bauer collection should be passed to the Austrian Gallery as a legacy. Even though this legacy was in any case already set forth in the will of Ferdinand Bloch-Bauer's wife, who predeceased him, the heirs could easily have prevented fulfillment of the legacy, because in the meantime the testatrix's position in terms of assets had changed catastrophically, and the other prerequisites for the donation were no longer met, due to the events of the Third Reich.

The Austrian Gallery has thus become the owner of these valuable works. They have become of particular artistic significance for Vienna, as many of Klimt's major works were destroyed in the war.

In a letter dated 21st July 1949, Dr. Garzarolli sided with the Bloch-Bauer heirs rather than the Federal Monument Office, stating that they had relinquished the Klimt paintings:

The two paintings in question[9] were particular favorites of Mr. Ferdinand Bloch-Bauer, now deceased. The heirs therefore attached special value to exporting them

The Austrian Gallery has now reassessed the issues. In light of the reasons indicated below, we now recommend to the Federal Monument Office (dI) that export permits for the two paintings be granted, by way of an exception.

*Despite various transactions which were carried out during the Nazi period by Mr. Bloch-Bauer's legal representative and which significantly worsened the Austrian Gallery's position, Mr. Ferdinand Bloch-Bauer's heirs immediately acknowledged his declaration – supplied to the District Court of Vienna I for the event of his death – indicating his intention to uphold the desire of his deceased wife to donate five Klimt paintings to the Austrian Gallery. As a result, they have created a situation in which the Austrian Gallery can actually receive this legacy. Furthermore, the lawyer Dr. Gustav Rinesch has already stated that he is prepared to hand over a small painting by August von Pettenkofen (*Scene after the Battle*) pursuant to a declaration from the Bloch-Bauer heirs, in exchange for export permits for the two aforementioned paintings. The small painting is a study for the larger version in the Austrian Gallery.*

In the present Legal Opinion, we also address Minister Gehrer's decision regarding the return of 16 Klimt drawings pursuant to the law mentioned at the beginning. According to Maria Altmann's attorney, E. Randol Schoenberg, restitution was carried out based on the following facts: During the Nazi period, the drawings were in the possession of the lawyer Dr. Führer. After his arrest in 1945, they passed into the possession of Karl Bloch-Bauer, who relinquished them to the Albertina Museum on behalf of Ferdinand Bloch-Bauer's heirs so as to obtain export permits for other artworks. These are the facts on which the present Legal Opinion will be based.

[9] Authors' note: One painting by Waldmüller and one by Eybl.

B. Question Presented

Starting from these facts, we discuss whether, in the period between 1923 and 1948, the Republic of Austria acquired a claim to or ownership of the paintings *Adele Bloch-Bauer I, Adele Bloch-Bauer II, Apple Tree I, Beech Forest (Birch Forest),* and *Houses in Unterach am Attersee*.

As part of our legal assessment, we also discuss the legal opinion supplied to the Austrian Ministry of Education, Science and Culture by the *Finanzprokuratur* on 10th June 1999.

First, we discuss whether Adele Bloch-Bauer's testamentary "request" was meant to be binding (see A). Next (see B) we discuss whether, assuming the request was meant to be binding, the instructions were effective, based on the assumption the paintings were the property of the testatrix Adele Bloch-Bauer (see B II), or, alternatively, based on the assumption they were the property of the heir Ferdinand Bloch-Bauer (see B III)). We then examine the legal nature of Ferdinand Bloch-Bauer's declaration that he intended to faithfully fulfill his wife's request (see C). We then assess Dr. Führer's actions between 1938 and 1945 (see D). We then determine whether, pursuant to § 1 of Austria's Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections dated 4th December 1998, authority exists to restitute the paintings to the heirs of Ferdinand Bloch-Bauer without remuneration (see E). At the end we provide a summary of our conclusions (see F).

Legal Analysis

A. The Legal Nature of Adele Bloch-Bauer's "Request": Non-binding Wish or Binding Instruction?

I. Clarifying the Matter By Interpreting the Will

The legal fate of the disputed Klimt paintings depends primarily on how Adele Bloch-Bauer's "request" to her husband to leave the two portraits and four landscapes to the Austrian Gallery after his death is understood. Is it a non-binding request or a binding instruction? We will clarify this issue by interpreting the will.

II. Principles for Interpreting Wills

When interpreting dispositions on death, the starting point is the **usual meaning** of the words. One then asks whether they correspond to the testator's intention (Supreme Court in *GlU* (*Sammlung von Civilgerichtlichen Entscheidungen des k.u.k. oberste Gerichtshofes*, hg. von Glaser und Unger; [*Civil Law Decisions of the Imperial and Royal Supreme Court*, ed. Glaser and Unger]), 965; Welser in *Rummel, 3rd edition*, Section 7 regarding § 552). The goal is to determine the testator's **true intention** (Welser in *Rummel, 3rd edition*, Section 7 regarding § 552; Koziol/Welser, *Bürgerliches Recht, 11th edition* [*Civil Law*] II, 441; Supreme Court in *NZ* (*Österreichische Notariatszeitung* [*Austrian Notaries' Journal*]) 1997, 365). In order to determine this, all circumstances, particularly the testator's oral and written statements, must be taken into account.

Nevertheless, the testator's intentions can only be determined if there are **indications in the wording** of the will; this ensures the formal requirements are fulfilled. This is the so-called

"indication theory" (see Welser in *Rummel, 3rd edition*, Section 9 regarding § 552; Koziol/Welser, *Bürgerliches Recht, 11th edition,* II, 442 and further references; and Rabl, *Altes Testament – Neues Testament* [*Old Will, New Will*] 19 ff and further references).

The testator's intention *at the time the will was drawn up* serves as the basis for assumptions. Subsequent changes in circumstances must also be borne in mind, if this accords with the testator's (hypothetical) intention. The instructions are then interpreted as the orders the testator would have given had he known about the altered circumstances (this is known as "**hypothetical interpretation**" (see Weiß in *Klang, 2nd edition,* III, 226; Welser in *Rummel*, *3rd edition,* Section 8 regarding § 552; and Kralik, *Erbrecht* [*Law of Inheritance*], 125.

These principles are derived from, among other things, § 655 of the Austrian General Civil Code, according to which words "should be interpreted as having their usual meaning, including in the case of legacies; or it must be proved that the testator was accustomed to conveying an idiosyncratic meaning by using certain specific expressions, or that the legacy would otherwise be ineffective." This rule is applied generally, not just in legacy law (Supreme Court in *NZ* 1984, 130; index no. 8 Ob 654/88 in *RIS-Justiz* [the official legal database of the Austrian courts], document no. RS0012348); index no. 6 Ob 1/82 in *RIS-Justiz*, document no. RS0012355).

According to prevailing opinion and court rulings, a binding instruction may also be couched in the form of advice or a **request** if it is determined that the testator **intended a binding instruction**. Thus a legacy in the form of a wish ("request") is feasible provided there are **no doubts** regarding the testator's true intention (Supreme Court in *RZ* (*Richterzeitung* [*Judges' Journal*] 1937, 178; *NZ* 1997, 365). Furthermore, instructions regarding reversionary substitutions (Supreme Court in *GlU* 15.341; *RZ* 1937, 178; *EvBl* 1964/423; *NZ* 1985, 26 and below; see also the rulings in *RIS-Justiz*, document no. RS 0038393) or binding obligations (Supreme Court in *SZ* (*Sammlung der Entscheidungen des Obersten Gerichtshofes in Zivilsachen* [*Rulings of the Supreme Court in Civil Matters*]) 60/225; *NZ* 1998, 109) may be couched in the form of a request provided they are "clearly expressed" (Supreme Court in *SZ* 60/225; see also *NZ* 1985, 26) in a manner that is **beyond doubt** (Supreme Court in *SZ* 25/85).

III. Applying the Principles to the Present Case

1. Ordinary Use of Language and Specialist Legal Language

The provisions of Adele Bloch-Bauer's will dated 19th January 1923 that are relevant to the legal fate of the Gustav Klimt paintings read as follows:

I leave 50,000 Czech crowns to each of the following organizations:

1) the Viennese workers' association Kinderfreunde; and

2) the Viennese association Die Bereitschaft.

As my sole heir, my husband shall bear the cost of these transfers. As I am convinced that my husband will fulfill these obligations in their entirety, there is no need to guarantee the claims of these two associations. If, in the period leading up to transfer of the two donations, one of the two associations should be liquidated, the payment that is freed up shall pass to the Vienna Rescue Service.

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 Jungfer, Brezan library, which belongs to me, to the Vienna People's and Workers' Library. I leave it at the discretion of the Vienna People's and Workers' Library to keep the books or to sell them and accept the proceeds as a legacy. No guarantee is required for this legacy.

There is no further information regarding the circumstances in which Adele Bloch-Bauer's will was prepared. Furthermore, aside from the will itself, nothing is indicated that would help us determine the testatrix's true intention. Interpretation must therefore focus on the **text of the will**, which must be assessed in the **context** of the rest of the will (see Supreme Court in *NZ* 1933, 157; index nos. 7 Ob 675/85 and 2 Ob 70986, both in *RIS-Justiz*, document no. RS0012365).

According to the *Finanzprokurator*[10], the provision regarding the Klimt paintings is not a non-binding wish, but rather a binding order. He argues that "*this is definitely the case*" (Opinion, page 4, paragraph 2), though subsequently he is not quite so adamant (Opinion, page 4, paragraph

[10] Translator's note: See *Finanzprokurator's* Opinion, referred to below as the Opinion.

3: "*basically a legacy*"). According to the Opinion, an important argument in favor of this being a binding order is that it is in the immediate context of the instruction regarding the *library*, which the testatrix calls a "*legacy*" in subsequent lines. The Opinion also refers to Section IV of the will, which states that the *substitute heirs* indicated must fulfill a legacy regarding the books and the paintings. The *Finanzprokurator* argues that the differences in formulation are due to the fact that the beneficiaries differ, and due to the different items to which the instructions relate. He argues that the testatrix chose the form of a request for items to which she was *emotionally attached*.

We agree with the *Finanzprokurator* that when interpreting the instructions, their context with respect to other instructions in the will must be taken into account. However, we do not agree with the conclusions that he draws from this.

It is immediately obvious from the text of the will that it is written in relatively precise **legal language**. The choice of words and the will's structure indicate that the testatrix had considerable legal knowledge herself or received expert advice when drawing up the will. The ordinariness of some of formulations reflect the fact that the testatrix introduces her will with a reference to her "*sound mind*" and *lack of* "*outside influence*"; the same is probably true of the term "*sole heir*". But the specialist legal terms used after that definitely suggest specialist legal competence. Section II contains the clearly formulated order regarding substitute inheritance. Sections III and IV competently *differentiate* between situations in which the estate of the deceased passes to *Ferdinand Bloch-Bauer* (Section III) or to the *substitute heirs* (Section IV). The testatrix twice uses the estate law term "*transfer*" in reference to the donations regarding which she gives instructions. Finally, she states that the *form* of the will, which was written in her own hand, has been *upheld*. Gustav Bloch-Bauer, who was probably the legal adviser, is named the *executor*.

The specialist knowledge on which the will is based is reflected very clearly in the case of the two financial bequests of 50,000 Czech crowns each. The fact that the testatrix **waives a guarantee** of these bequests shows that she or her legal adviser knew that under the law an **official guarantee** is required in the case of **bequests involving a beneficiary** (§ 158 of the Non-Litigious Proceedings Act), and that a testator can waive this guarantee (Ehrenzweig, *System, 2nd edition,* II/2, 561).

2. The Significance of the "Legacy" to the Vienna People's and Workers' Library

The subsequent passages are particularly relevant to us (Section III, Paragraph 2). When reading them, it is important to bear in mind that, as explained above, competent formulations and legal instruments are used. The *Finanzprokurator* rightly points out that the instruction regarding the six paintings is *linguistically directly linked to* the instruction regarding the books. It is also important to note that the testatrix *gave instructions in the same way for both* (the paintings and the books), aside from the person of the beneficiary. It is also true that the term "legacy" is used, and that the "the guarantee is waived" regarding the library. The *Finanzprokurator* concludes from this that a (binding) legacy is present in the case of the paintings (Opinion, page 4) and in the case of the library.

This argument is unconvincing. First, it is important to remember that, from the outset, the wording of the instructions is not unclear or misleading. Adele Bloch-Bauer **asks her to husband to leave** the paintings and the library to specific beneficiaries. In the absence of any other indications, "asking" constitutes a request and is not a binding order. The very wording of the testamentary provision suggests that **both wishes are non-binding**.

In the next sentence, in which the testatrix makes further provisions regarding the library, she twice uses the word "**legacy**". It is left at the discretion of the Vienna People's and Workers' Library to hold on to the books, or sell them and accept the proceeds "as a legacy". The guarantee is waived for this legacy too. Adele Bloch-Bauer refers to the fate of the library *after Ferdinand Bloch-Bauer's death*, as her request is to be fulfilled thereafter. She states that the recipient can do as it pleases with the books, which of course **would only be possible if** they were **bequeathed** to it by Ferdinand Bloch-Bauer, or if the **substitute inheritance** and thus the legacy obligations pursuant to Section IV of the will were to apply (see part 3 below). Her statement indicating that in that case the Vienna People's and Workers' Library may sell the books and keep "the proceeds" as a legacy must be meant figuratively, as the proceeds from a bequeathed item are not in themselves a bequest. The testatrix probably merely wanted to say that the Vienna People's and Workers' Library would be free to use the books as it wished and could also sell them. Then *the money* could be seen as "a donation" by her.

It can therefore be argued that Adele Bloch-Bauer wanted the Vienna People's and Workers' Library to receive a "book legacy", but the instructions can be understood ipso jure to mean that

the bequest was **not ordered unconditionally** but rather **was dependent upon the request being fulfilled by her husband** (or upon the substitute inheritance applying). This undermines the evidentiary value of the *Finanzprokurator*'s argument.

The testatrix was probably, so to speak, thinking ahead from the previous sentence, and meant: "If my husband **fulfills this request** or **the substitute inheritance applies**, the books should be considered a legacy, and I leave it at the discretion of the Vienna People's and Workers' Library to keep them or to sell them and accept the proceeds "as a legacy"." A binding order on the part of Adele Bloch-Bauer cannot be inferred from her instruction.

3. Further Evidence that the Request is Non-binding

We must also look closely at the two options for the sole heir (the testatrix's husband; or substitute inheritance). The first option with regard to the donations applies if her *husband* becomes sole heir; the other option applies if the *substitute inheritance* applies. Adele Bloch-Bauer **asks her husband** to **arrange the legacy**; by contrast, she **unconditionally charges the legacy to the substitute heirs** (Section IV: "I obligate him … immediately after my death to make the following bequests:"). Given that the will was drawn up in a legally competent manner (see above), this differentiation is definitely not accidental: Clearly, no constraints are to be placed on the testatrix's **husband**, who is close to her, and he is to be **free** with regard to arranging the legacies. By contrast, the **substitute heirs**, (Gustav Bloch-Bauer or his descendants if he predeceases her), who are not as close to her, are not meant to have this freedom. They are **unconditionally obligated** to implement a legacy that is due immediately.

In attempting to explain the differing formulations used for the two options (Opinion, page 4), the *Finanzprokurator* argues that they result from "the person of the beneficiary and from the type of item to which the instructions relate". He also states that all the items (money, paintings, books and the jewelry, which we have not mentioned so far) are to be treated equally, namely as a legacy. He is only partly right. It is true that, as we explained above, *the distinction between an instruction regarding a non-binding request regarding a legacy and an immediate order regarding a binding legacy* relates "**to the person**". But it cannot be argued that the words "ask" and "legacy" were chosen based on the type of item. It is very unlikely that, if the testatrix were,

"based on the type of item", choosing expressions that were to be equivalent in terms of how binding they were, she would choose expressions with different meanings with regard to binding versus non-binding. Just because a testator has certain feelings regarding a given item, this does not mean he will use a non-binding formulation to indicate a binding order, or vice-versa. In fact if the testatrix had special feelings for particular items, she would have been particularly careful to specify their fate, and would have paid especially close attention to the **meaning of her words**.

We do not know **why** the testatrix **merely asked** her husband (made a non-binding request) to bequeath the paintings. There may be many reasons for this. One reasonable assumption is that she was working on the **assumption that the property belonged to Ferdinand Bloch-Bauer** (see B. II and IV), and therefore felt she could only make a non-binding request to him. At any rate, the testatrix uses the word "ask" with regard to "the library which belongs to me" too. One must therefore assume that, at least with regard to that item, she wanted to give her husband the freedom to handle her things at his own discretion. This may have been because she wanted to give him the option of deciding based on **subsequent developments** that were not foreseeable at the time.

4. The Interpretation Rule Pursuant to § 614 of the General Civil Code Applies By Way of Analogy

Our remarks so far constitute a fairly strong argument in favor of Adele Bloch-Bauer's "request" being non-binding. Those who disagree must concede that the question of whether or not the "request" is binding is at least **doubtful**. In doubtful cases, **§ 614 of the General Civil Code** applies, and it should be **applied by way of analogy** to the present case. According to that provision, a reversionary substitution cannot be presumed, and doubtful expressions cannot be interpreted as substitution orders (Supreme Court in *GlU* 1179; *SZ* 25/85; NZ 1985, 26; Welser in *Rummel*[3], Section 3 regarding § 614). This also means that **in doubtful cases** a testamentary provision via which the testator enjoins the heir upon his death to **surrender** to a third party an item bequeathed to him by the testator should not be deemed a binding reversionary substitution, but rather should be considered **non-binding** (Supreme Court in *GlU* 1179; *SZ* 25/85; NZ 1985, 26; Welser in *Rummel, 3rd edition,* Section 3 regarding § 614; Eccher in *Schwimann*, *2nd edition,*

Section 1 regarding § 604). The rule regarding doubt set forth in § 614 of the General Civil Code actually applies to the assets of the testator. So it must apply **all the more so** if the testator instructs the heir upon his death **to bequeath an item of his own property (property that belongs to the heir) to a third party**, because in doubtful cases the heir cannot be subject to a stronger obligation in the case of his own items of property than in the case of the testator's items of property (see B. III regarding whether an instruction of this kind can be issued at all). Thus in doubtful cases a testamentary provision of this kind is non-binding.

Therefore in doubtful cases it must be assumed that the testator simply expressed a wish, regardless of whom the disputed items belonged to when the will was drawn up.

IV. Summary

1. In situations involving *ordinary use of language*, the word "ask" constitutes a *non-binding request*. This should be the meaning ascribed to it, unless it can be convincingly demonstrated that the testator's intention was to give a binding order. That cannot be proven in the present case.

2. There are several indications that the meaning of the terms used in the instructions was quite clear to the testatrix. It is true that she intended her request to cover the library as well as the Klimt paintings, and that she left it up to the beneficiary of the books – the Vienna People's and Workers' Library – to keep them or sell them and accept the proceeds "as a legacy". However, one cannot in any way infer that the "request" was of a binding nature, because her granting permission for selling and designating the proceeds a "legacy" could ipso jure *only apply if Ferdinand Bloch-Bauer were to meet the non-binding request to implement the legacy*, or if the substitute inheritance were to apply.

3. If it is argued that there is still doubt as to whether the "request" is binding or non-binding, § 614 of the General Civil Code can be applied by way of analogy. According to this provision, if, in a doubtful case, it cannot be assumed that the testator intended to obligate the heir to pass on the bequeathed assets, then in doubtful cases it is even less reasonable to assume that the testator intended to bindingly obligate the heir to pass on items of his own (the heir's) property to a third party (upon his death). Therefore in doubtful cases it must be assumed that the testator simply

expressed a wish, regardless of whom the disputed items belonged to when the will was drawn up.

Adele Bloch-Bauer's "request" is therefore non-binding.

B. Adele Bloch-Bauer's "Request" as a Binding Order

I. A Legacy of the Testatrix, or a Testamentary Order Directed at the Heir?

If one argues that Adele Bloch-Bauer's "request" constitutes a non-binding wish and not a binding order (see A. IV), her request does not give rise to **a right** or an obligation. That means no beneficiary, including the Austrian Gallery (the Republic of Austria), can derive claims from it. However, if one argues that Adele Bloch-Bauer "bindingly enjoined" her husband to make the donation, additional questions arise, namely: How should the binding nature of the "request" be categorized from an estate law standpoint, and what is the legal nature of the order?

To answer this, the wording of the instructions must be one's starting point, as that is the only available starting point. By contrast with Section III, Paragraph 2 ("I leave"), in Section III Paragraph 2 the testatrix **does not bequeath the paintings herself**, but rather **asks her husband to bequeath** the paintings to the Austrian Gallery after his death. Based on the assumption that she intended to establish an obligation, this constitutes an order (a "charge") as defined in § 709 of the General Civil Code or, more precisely, a **testamentary order** to Ferdinand Bloch-Bauer.

Testamentary orders **infringe the principle of testamentary freedom** and are therefore **invalid**.

The term "testamentary freedom" denotes a testator's right to dispose freely of his assets upon death. That freedom is mandatory and is not at the disposal of a third party or of the testator himself. The Supreme Court has already ruled several times that even a testator's promise to include somebody in his will is invalid (Supreme Court in *SZ* 49/136; *Arb* [Journal of Labor Law Rulings] 9925; see also *SZ* 36/30).

Nevertheless, under the General Civil Code there is an exception to the non-permissibility of binding assurances regarding inheritances – namely in the case of *contracts of inheritance* (§§ 1249 ff of the General Civil Code), which are only feasible between spouses. By analogy, *contracts of legacy* are permitted between spouses, though they are not covered in the General Civil Code (see Welser in *Rummel, 3rd edition,* Section 2 regarding § 552 and further references, and Petrasch in *Rummel, 3rd edition*, Section 2 regarding § 1249 and further references). In general, a binding obligation to give an item upon death is permitted provided it is in the form of a *donation due upon death*. These are subject to very strict formal requirements (§ 952 Section 2 of the General Civil Code, in conjunction with § 1 Section 1 lit d of the Law Regarding Notarial Acts [*NotAktsG*]). However, even the **permitted** cases of the aforementioned kind **are not allowed to** involve establishing an **obligation to make a testamentary disposition at a later date**. Instead, the transaction in question is carried out immediately upon death. By contrast with a last will, it is irrevocable, which to some extent infringes testamentary freedom. It is important to make a distinction between contracts against payment (inter vivos) **which do not constitute grounds for any estate law claims** but rather are only effective in the event of death, and obligations to bequeath somebody something upon death. The former are permitted without any limitations (see Petrasch in *Rummel, 3rd edition*, Section 2 regarding § 1249 and further references regarding court rulings), but are not relevant to the present case.

Unilateral legal transactions via which the testator does not make an immediate testamentary disposition, but rather commits to dispose in a particular way in the future, are therefore invalid, as they encroach upon testamentary freedom. This makes it **all the more non-permissible for the testator to obligate a third party** to dispose in a particular way upon death. This is also true if the party is the testator's heir.

The invalidity of obligations of this kind is confirmed by various individual provisions of the General Civil Code. Pursuant to § 610 of the General Civil Code, a **testamentary prohibition** imposed on the heir by the testator is per se **impermissible**. It may be **converted** into a reversionary substitution in favor of the designated party's legal heirs only insofar as it involves **the testator's assets**. The Supreme Court has ruled (Supreme Court, index no. 2 Ob 382/97, in *RIS-Justiz*, document no. E48734) that a "straightforward testamentary prohibition" that does not serve to pass on assets of the testator should be deemed legally prohibited, as it encroaches upon testamentary freedom pursuant to § 878 of the General Civil Code.

Prevailing opinion treats **testamentary orders** (i.e. a testator's legally binding orders to the heir to dispose in a particular way upon death) in the same way as testamentary prohibitions: They are invalid, as they encroach upon testamentary freedom.

The only **exception** to the invalidity of testamentary orders is if the order can be **converted** into another order (the invalid instruction is converted into a valid one) by applying § 610 of the General Civil Code by way of analogy. The question of whether the testamentary order refers to an item that was (originally) **the testator's own property** or to **property of the heir** is an important factor in determining whether a conversion of this kind is feasible.

The question of whether the Klimt paintings originally belonged to Adele Bloch-Bauer or to her husband Ferdinand Bloch-Bauer is disputed. We will therefore now discuss two alternative scenarios (see II and III). We will then discuss whether the will itself contains indications regarding ownership (see IV).

II. Property of Adele Bloch-Bauer

The question of whether Adele Bloch-Bauer's **testamentary order** to her husband is effective can be answered most easily if one assumes the paintings belonged to her. A testator's testamentary orders that refer to assets originating from the testator himself can be **converted into reversionary substitutions** (reversionary-heir legacies) in favor of the beneficiary stipulated in the testamentary order by applying § 610 of the General Civil Code by way of analogy (Supreme Court in *NZ* 1974, 73; *EvBl* 1961/38; *EvBl* 1988/117; *NZ* 1990, 151; Welser in *Rummel, 3rd edition*, Section 1 regarding § 610; Kralik, *Erbrecht* 200; Eccher in *Schwimann, 2nd edition*, Section 1 regarding § 610; and in the older literature: Zeiller, *Commentar II* [*Commentary II*] 507). The testamentary orders are treated as instructions from the testator himself that are not directed at the heir (the charged party), but rather relate directly to the item in question (which belongs to the testator). The primary designated party receives the assets – the property in question – as prior heir or prior legatee, and the secondary designated party receives it as reversionary heir or reversionary legatee (Supreme Court in *NZ* 1974, 73; *EvBl* 1961/38; *EvBl* 1988/117; *NZ* 1990, 151; Welser in *Rummel*[3], Section 1 regarding § 610; Kralik, *Erbrecht* 200; Eccher in *Schwimann*, *2nd edition*, Section 1 regarding § 610). An instruction stating that the heir

should receive all the assets and should "forward" only a specific asset to the secondary designated party ("reversionary-heir legacy") is also deemed permitted.

The constraint – namely that the assets to which the obligation relates must originate from the testator – has been pointed out repeatedly (Welser, *Das Legat einer fremden Sache* [*Bequeathing the Property of Another Party*], *NZ* 1994, 203; Koziol/Welser, *Bürgerliches Recht*, *11th edition*, II, 464; B. Jud, notes regarding *NZ* 1998, 146; Kletecka, *Das Nachlegat der Sache des Erben* [*Reversionary Bequests of Property of the Heir*) *NZ* 1999, 68). A reversionary substitution obligation relating to **assets of the heir is impermissible**. This is covered by § 609 of the General Civil Code, and definitely not as an exception, but rather explicitly with regard to the relationship between parents and children. **§ 652 of the General Civil Code extends these principles**, which primarily apply to the law of inheritance, **to legacy law**.

Thus if Adele Bloch-Bauer actually was the owner of the paintings, then the *Finanzprokurator*'s arguments on page five of his Opinion, where he states that a reversionary-heir legacy is involved, are accurate.

III. Property of Ferdinand Bloch-Bauer

It is questionable whether testamentary orders that are invalid per se may be converted if they refer to property of the heir. Under Austrian law, **a legacy of the testator** that relates to an item of property of the heir, is **valid** per se. Thus the *Finanzprokurato*r's opinion can be used to try to *convert the testamentary order to Ferdinand Bloch-Bauer into a legacy of Adele Bloch-Bauer*. However, this would have to involve a legacy that (atypically) was due not upon her death, but rather upon her husband's death, i.e. the death of the legacy debtor. We discuss this in a greater detail below. From a legal standpoint it is definitely one of the most problematic aspects of this case.

1. The *Finanzprokurator's* Arguments

According to the *Finanzprokurator*, Adele Bloch-Bauer's "request" should be considered **a legacy instruction by the testatrix**, i.e. as a legacy of Adele Bloch-Bauer herself. He argues that the paintings being the property of the sole heir, Ferdinand Bloch-Bauer, does not detract from the legacy's validity, because, pursuant to § 662 of the General Civil Code, they were not the property of another party as such. He also points out that the legacy was subject to postponement until the death of the heir Ferdinand Bloch-Bauer, i.e. was subject to a time restriction. On page 6 of his Opinion, he rejects the view of Welser (*NZ* 1994, 197), who states that a legacy that is not paid until the heir's death is ineffective because it encroaches upon testamentary freedom. Furthermore, the *Finanzprokurator* argues that the charged heir's rights were not infringed, because in any case his "approval" would be required as part of his acceptance of the legacy. He also states that it is of key significance that the Supreme Court's view, in *NZ* 1998, 146 = *SZ* 70/102, differed from that of Welser.

2. Response

To get a better understanding of this, we must first take a closer look at the contents of § 662 of the General Civil Code (bequeathing the property of another party). After that, we will examine whether, per the *Finanzprokurato*r's arguments, § 662 of the General Civil Code can really be used to "restructure" the impermissible testamentary order of the testatrix Adele Bloch-Bauer.

a) Bequest of an Item of Property of Another Party Pursuant to § 662 of the General Civil Code

Pursuant to § 662 Section 1 of the General Civil Code, a bequest of property of another party that belongs neither to the testator, nor to the heir or legatee who is to pass them to a third party, is ineffective. It is undisputed that this provision only refers to specific legacies (see only Welser in *Rummel, 3rd edition*, Section 1 regarding § 662). Nonetheless, so-called "demonstrative legacies" (§ 662, final section, General Civil Code) are effective. But in the absence of explicit

instructions, it cannot be assumed that the testator intended to charge the heir (or main legatee) with the task of procuring an item of property of another party for the legatee (sub-legatee).

Surprisingly, Austrian law treats **property that belongs to the heir** as equivalent to property of the testator. This is surprising insofar as such property is no more part of the estate than a third party's property: Surrendering it to a legatee constitutes the same sacrifice of assets for the charged party as it would be if he had to procure property. The *German Civil Code* is more logically consistent in that it considers property of the charged party "property of another party" (see Otte in *Staudinger*, *13th edition*, Section 5 regarding § 2169 of the German Civil Code. The *Swiss Civil Code* (Article 484, Section 3) takes a similar position. The fact that the Austrian General Civil Code takes the opposite view may well go back to Prussian General Common Law (Part I, 12th Main Section, § 374). Adequate reasons for this have never been given, even in the minutes of the Legislative Commission during whose sessions *Zeiller* proposed the current version of § 662 of the General Civil Code (see also Ofner, *Urentwurf und Beratungsprotokolle* [*Original Draft and Minutes of Deliberation*] I 396 f)).

At any rate, it is especially doubtful whether the bequest of an item of the heir's property is effective if the testator **erroneously believed** it was *his own property* (per page five of the Opinion). After all, a testator who believed a bequeathed item of property belonged to him would be unlikely to draw up the same legacy if he knew it belonged to his heir. Given that he was aware of the facts and the legal situation, he would probably be surprised to find his legacy was effective. In this respect the legal regulation is neither appropriate nor in accordance with the wishes of a typical testator. Nonetheless, so far the literature has not tried to "tone down" § 662 of the General Civil Code by analyzing it. In fact the prevailing opinion is that the **error** on the part of the testator is not an obstacle to the applicability of § 662 of the General Civil Code, which means the bequest of the item of the heir's property is effective if the testator believed it was his own property (Unger, *Erbrecht, 4th edition* [*Law of Inheritance*], 289; Pfaff, Hofmann, *Commentar* [*Commentary*] II/1, 435 and 397, who consider this rule "doubtful in legislative terms"; Ehrenzweig, *System*, *2nd edition,* II/2, 547 FN 9; *Rappaport* in *Klang*, *1st edition*, II/1, 662; Kralik, *Erbrecht* 223 FN 5; Welser in *Rummel, 3rd edition*, Section 2 regarding § 662; Welser, *NZ* 1994, 198).

Pursuant to § 572 of the General Civil Code the heir can **contest** an order that was drawn up based on an error of this kind (Welser in *Rummel, 3rd edition*, Section 2 regarding § 662; Kralik, *Erbrecht* 223 FN 5). The right to contest is subject to the statute of limitations; the period of limitation is three years (§ 1487 of the General Civil Code) and begins when the will is announced. The statute of limitations is not upheld ex officio (§ 1501 of the General Civil Code), but rather must be actively pleaded (in the present case by the Republic of Austria) (Koziol/Welser, *Bürgerliches Recht, 11th edition*, II, 205).

There are no particular rules regarding the **due date** of a bequest of an item of the heir's property. § 685 of the General Civil Code is applicable, pursuant to which bequests of certain items of an estate are due immediately after death, while others are not due until one year later. However, § 685 of the General Civil Code is not imperative in nature, and can be overridden if the testator intended some other arrangement (see only Welser in *Rummel, 3rd edition*, Section 1 regarding § 685). Hence the testator may specify when the legatee may demand the bequest. This does not have to be defined as a calendar date, and thus may be specified in other ways. Nevertheless, it is disputed whether the due date can be specified as the date of death of the charged heir. We discuss this below.

b) Bequest of an Item of the Heir's Property Due Upon the Heir's Death

As noted above, the *Finanzprokurator* attempts to circumvent the invalidity of the testamentary order by assuming, contrary to the clear wording of the will ("I ask... to leave"), that a **legacy of the testatrix herself** that refers to items of property of the heir is involved, **rather than an order of the testatrix to her husband Ferdinand**. He would have done better to have asked whether the testamentary order may be "converted" into a legacy of this kind.

At any rate, our immediate concern is the question of the **due date** of the legacy. The due date is not after the testatrix's death, as would normally be the case, but rather after the heir's death. The *Finanzprokurator* argues that this due date is feasible (page 7 of the Opinion) by invoking the Supreme Court in *NZ* 1998, 146 = *SZ* 70/102. We disagree with him. The legacy of a **testator** that is **not due until the death of another testator** and must be paid for from his available assets **is not a legacy of the first testator**. At best, it might be considered a legacy of

the second testator, though it would not be feasible to obligate him to implement it, as this would encroach upon his testamentary freedom. Taking the *Finanzprokurator* 's position would mean completely eliminating all testamentary freedom of a testator who was initially mentioned in the will of a first testator. If it were feasible for a testator to dispose of all his heir's property, such that upon the heir's death it passed to persons specified by the testator, *the heir would no longer be able to dispose of his assets upon death*, if the testator wished it so. That would be equivalent to making testamentary orders permissible.

If it is impermissible for a testator to draw up a legacy that refers to the heir's assets and has a due date on the date of the heir's death, then **one cannot render an explicit testamentary order effective by converting it into a legacy of the testator** himself that is due upon the heir's death. Thus both types of instruction are ineffective.

This cannot be toned down by arguing that the heir need not accept the inheritance (see Opinion, page 6 and Eccher in *Schwimann*, *2nd edition*, Section 1 regarding § 652 concerning charged legatees). After all, the goal is not to make the heir's skilful maneuvering a viable method for avoiding nonsensical results under the law; the goal is to ensure that nonsensical instructions are not incorporated into law. The conversion of a testamentary order relating to the heir's assets into a legacy of the testator having a time limit (the death of the heir) is just such a nonsensical conclusion, and must not be read into § 662 of the General Civil Code, as it would give rise to tortuous contradictions in interpretation, as Kletecka (*NZ* 1999, 66) has rightly argued. It is important to observe the distinction that it is **impermissible** (pursuant to § 609 of the General Civil Code) for the testator to instruct his heir (with regard to the latter's assets) **to designate an heir,** while supposedly it is **permitted** for the testator to obligate the heir after his death to **leave** one or more items of property – which may constitute his entire assets – to somebody **as a legacy**. Unless this distinction is observed, all that is left of testamentary freedom is a "nudum ius", i.e. the formal option of drawing up one's own will (see Kletecka, *NZ* 1999, 68).

The argument that a legacy having a time limit (the death of the heir) is unobjectionable, on the grounds that the heir has consented to it by supplying a declaration of inheritance, overlooks an important fact: One cannot even obligate oneself to dispose on death in a particular way. Therefore it is even less feasible for it to be binding if somebody "implicitly" consents to dispose in a particular way, by taking possession of the estate.

The *Finanzprokurator*'s argument that the charged party may disclaim his status as beneficiary, and thus disclaim the charge too, would be even less convincing in an instance where a main legatee charged with a legacy was, as the sub-legatee, supposed to hand over his own property. This is because there would be no formal acceptance or relinquishment regarding the legacy.

Elsewhere (Welser, *NZ* 1994, 203 ff) it has been demonstrated conclusively that an instruction to the heir to surrender an item of his property upon his death is invalid. This view has been confirmed several times in the literature (Koziol/Welser, *Bürgerliches Recht*, *11th edition*, II 464; B. Jud, Note regarding Supreme Court in *NZ* 1998, 146; Kletecka, *NZ* 1999, 66). The only opposing view in the literature is that of Eccher (in *Schwimann*, *2nd edition*, Section 4 regarding § 650).

The following aspect of the *Finanzprokurator*'s arguments is also unconvincing: He remarks that a legacy of an item of the charged party's property due upon the testator's death seems inconsistent with the principle of freedom of ownership (which is as important as testamentary freedom), yet then states that under the law this is not an obstacle to the applicability of § 662 of the General Civil Code. Our response to this is: Pursuant to § 609 of the General Civil Code, **a person may not make stipulations regarding another party's available assets at death**, even though a variety of contract law and property law charges on another party's assets (i.e. on ownership) are permitted. Under private law, there are all kinds of constraints on ownership. In fact under civil law the principle of unlimited freedom of ownership does not exist. Thus an owner can basically consent to charges on his property in the favor of a third party, but cannot commit to disposing of his estate in a specific way, even explicitly. It is even less feasible for an obligation of this kind to be incurred "tacitly" by accepting an inheritance. The fact that constraints on ownership are permitted cannot be used to argue that constraints on testamentary freedom are permitted, and § 662 of the General Civil Code must not be interpreted in that way.

The *Finanzprokurator* very misleadingly states that "none of the *current commentaries*" disputes that a legacy of an item of the heir's property having a time limit (the death of the heir) is feasible (Opinion, page 6). Of the five "current commentators" named by the *Finanzprokurator* (Weiß, Welser, Kralik, Ehrenzweig, and Koziol/Welser), **three** (Weiß, Kralik, and Ehrenzweig) make **absolutely no mention** of the issue of legacies having a time limit (the death of the heir).

Of the commentators who address this issue (Welser in *NZ* 1994, 203 ff, and Welser in *Rummel*, Koziol/Welser; Jud; Kletecka; and Eccher), only Eccher deems legacies having a time limit (the death of the heir) feasible; **none of the other commentators** deems them feasible.

The *Finanzprokurator*'s remark that court rulings have contradicted Welser's "academic opinion" is also inaccurate. He considers this to be "of decisive importance" (page 6) and tries to prove it by invoking the Supreme Court's decision in *NZ* 1998, 146 (= SZ 70/102). However, that ruling *did not reject* Welser's position, namely his essay in *NZ* 1994, 203 ff; but rather simply **overlooked** it. It is true that, in an obiter dictum, the ruling in *NZ* 1998, 146 deems it feasible to obligate a legatee to surrender an item of his own property upon his death (see B. Jud, *NZ* 1998, 146 for a critical opinion regarding this). But that completely ignores the question of encroachment upon the heir's testamentary freedom, and does not accord with the law, as we have already stated.

The *Finanzprokurator*'s argument that *NZ* 1998, 146 (= *SZ* 70/102) involves "*an instruction that is entirely comparable*" to the present subject-matter (Opinion, page 7) is inaccurate. The testatrix's instruction in that case reads: "2. I also **make the following bequests**: a) To my wife Maria A. I bequeath the half of the house in NT. that belongs to me (…), subject to the charge that a reversionary legacy for the half that belongs to her and the inherited half, i.e. the entire property (…), shall apply to our granddaughter Gerda L. with regard to said property (…)." The testatrix Adele Bloch-Bauer "**asks her husband to bequeath**" and thus issues a *testamentary order*. By contrast, the testator in *NZ* 1998, 146 **gave instructions regarding a reversionary-heir legacy** himself, insofar as it related to his own half of the property. This is clear from his use of the expression "reversionary legacy". A **reversionary legacy** is a legacy **of the testator himself** and not a legacy of a (charged) heir. Because the testator disposed of both halves of the property in the same way ("reversionary legacy"), it must be assumed that he viewed himself *as the party* who was giving instructions regarding a legacy, for his wife's half of the house too. Thus the case in *NZ* 1998, 146 (= *SZ* 70/102) involves a legacy of the testator himself, while Adele Bloch-Bauer's will involves a testamentary order of the testatrix.

The *Finanzprokurator* fails to mention another ruling, namely *NZ* 1999, 91. In that case, the later testator surrendered an item of real estate to his wife via a mixed inter vivos gift. The wife committed to *surrender* the real estate to one of the joint children of her choice either *during her*

lifetime or *as a bequeathed inheritance*. To protect the interests of the future acquirer, an agreement prohibiting sale or charges was drawn up. The testator subsequently drew up a will in which he ordered that after his wife's death a **specific daughter** should receive the real estate. However, after the testator's death, the wife gave the real estate to a different daughter. After the death of the testator's wife, the daughter named in the testator's will sued her sister for surrender of the real estate.

Initially, the Supreme Court argued that its ruling applied the regulations regarding reversionary substitutions by way of analogy to ownership succession rights established during the lifetimes of the parties in question (see Supreme Court in *NZ* 1999, 91; see also, for example, *SZ* 51/65, and further references in Welser in *Rummel, 3rd edition,* Section 5 regarding § 608). Disputably in our view, the Supreme Court also argued that *despite the binding nature of the agreement, the testator was able to eliminate his wife's right to choose* by specifying the beneficiary himself, provided the wife had not yet exercised that right (Kletecka is rightly critical of this view; see *NZ* 1999, 66 f). The Supreme Court therefore argued that the testator's legacy in favor of the plaintiff was valid. The Supreme Court then asked whether the receipt of the benefit was ineffective on grounds of encroachment upon testamentary freedom. **The Supreme Court then abstained from commenting on this issue,** according to Welser in *NZ* 1994, 197 ff. It stated that the question of whether Welser's remarks were accurate should remain unresolved, because the case had to be decided one way or another immediately. It stated that this was due to the particular nature of the subject matter, as the wife had been free to decide when she wanted to surrender the real estate. It argued that she had not been obliged to wait until her death, but rather could equally have transferred the real estate *inter vivos*. It also argued that the plaintiff's legacy had accrued upon the testator's death, with a shifted due date. Thus, the Supreme Court argued, there was no encroachment upon testamentary freedom.

Kletecka (*NZ* 1999, 66 f) was rightly critical of this decision. As he rightly pointed out, the question of encroachment upon testamentary freedom does not revolve around interpretations regarding accrual or the due date. The **decisive issue** was whether the charged party (his heirs) had to **surrender** the property **after his death**, as the legacy debtor. Kletecka also argued that the fact that the charged party was free to surrender the property earlier, i.e. inter vivos, did not preclude encroachment upon testamentary freedom (Kletecka (*NZ* 1999, 67)).

The only way to justify the aforementioned ruling is by citing other, somewhat complicated grounds. These grounds, which we also find dubious, are based on the Supreme Court's assumption that the testator was entitled to subsequently render concrete his wife's right to choose per the agreement. It is then possible to infer that the right of the sister who was the testator's beneficiary was an *ownership succession right arising from the agreement* between the testator and his wife (see Supreme Court in *NZ* 2001, 190). The resulting charge upon the wife could then be deemed to relate to property of the testator, because at the time the agreement was drawn up he was the owner of the real estate, and from the outset the wife would have acquired that charge along with the property. Then the regulations regarding reversionary substitutions could be applied by way of analogy, so that the daughter who was the beneficiary would be viewed as the reversionary legatee and recipient of an *item of the testator's property after the wife* (the primary beneficiary).

By contrast, the Supreme Court's decision in *GlUNF*[11] 1179 is completely correct. In that case, the testatrix had free ownership of two houses to the tune of a given percentage; with regard to another percentage her ownership was charged with a reversionary substitution in the favor of her two daughters; and a third percentage was co-owned by the daughters. In her will, the testatrix designated the daughters the heirs, and stated in the following words: "I also desire that *after the deaths* of my daughters houses Y and X shall pass to impoverished actors and business people of a foundation that bears our name." The Supreme Court rightly deemed that the will contained only a non-binding wish regarding the fate of the "houses as a whole"; it also noted that the testatrix "*did not have right of disposition* with regard to the shares of the houses alr*eady owned by her daughters at the time the will was drawn up*, nor with regard to shares which *were to pass to them* after their mother's death by way of substitution assets." We share this view.

To sum up: The court rulings regarding this matter are unclear and ambiguous. The Supreme Court will probably have to reassess the question of binding an heir via a testator's instructions that are to be effective upon the heir's death and relate to the heir's own assets.

[11] Translator's note: This journal (edited by Pfaff, Schey et al. under the title *Neuer Folge* [*New Series*]) is the continuation of *Civil Law Decisions of the Imperial and Royal Supreme Court*, edited by Glaser and Unger*]*.

IV. Indications in Adele Bloch-Bauer's Will Regarding Ownership; Legal Presumption in Favor of Ferdinand Bloch Bauer's Ownership

1. Indications in Adele Bloch-Bauer's Will Regarding Ownership

Ownership is an objective fact that does not depend on the opinion of the persons involved. Thus the formulations used in Adele Bloch-Bauer's will are, at best, merely a suggestion regarding the ownership status at that time.

One indication that the testatrix Adele Bloch-Bauer considered herself the owner of the paintings is that in Section III of the will, in her "request" to Ferdinand Bloch Bauer, she uses the phrase "my two portraits". But even the *Finanzprokurator* rightly considers this ambiguous (page 3 of the Opinion). As both portraits are of the testatrix herself, the phrase should probably be understood to mean "the paintings that depict me". Moreover, in Section III, Adele Bloch-Bauer speaks of "the" four landscapes by Gustav Klimt rather than of "her" four landscapes when referring to the other paintings, and in Section IV, in the instructions regarding the paintings that are applicable in the event of substitute inheritance, she uses the phrase "the two portraits and four landscapes by Gustav Klimt".

Thus it is fair to assume that in making the request to Ferdinand Bloch Bauer, Adele Bloch-Bauer wanted to ask her husband to donate the six designated paintings *from his extensive art collection* to the Austrian Gallery upon his death, e.g. because she considered these artworks so important that she wanted the general public to have access to them.

The *Finanzprokurator*'s view that Adele Bloch-Bauer believed the paintings belonged to her is primarily based on another part of the will, where she makes a **binding order to the substitute heir** to immediately surrender the paintings (Section IV of the will). This argument is based on the assumption that if Adele Bloch-Bauer had thought the paintings belonged to her husband, she could not have obligated the substitute heirs to immediately surrender the paintings to legatees. This argument is convincing if viewed in isolation, but not in light of the overall instructions. After all, Section IV would **only** be applicable **if Ferdinand Bloch Bauer were to predecease the testatrix** (see Section II: "*If my husband predeceases me, my sole heir shall be my brother-in-law Dr. Gustav Bloch-Bauer...)*". In such an instance the testatrix would be able to, and in fact would have to, assume she would be the owner of the paintings upon her own death. As the

couple had no children, either spouse could assume that they would be the heir upon the death of the other. Indeed Adele Bloch-Bauer herself made a will in favor of Ferdinand Bloch-Bauer.

Thus it cannot be inferred for certain from the will that Adele Bloch Bauer considered herself the owner of the paintings. Moreover, it is even less feasible to draw any conclusions regarding the actual ownership status.

It is worth pointing out that in the list the testatrix only speaks of the four landscapes (Section III) and of the two portraits and the four landscapes by Gustav Klimt (Section IV), while she speaks of the library "**which belongs to me**" and "**my** Vienna and Jungfer, Brezan library" (Section III and Section IV). The differences in the formulations could be an indication that the owners differed.

The clearest indication regarding the ownership status is not to be found in Adele Bloch-Bauer's will; it is to be found in Ferdinand Bloch-Bauer's clear and unambiguous **declaration to the probate court** (see C below).

2. Legal Presumption in Favor of Ferdinand Bloch Bauer's Ownership

a) § 1237 Section 2 Old Version and § 1247 of the General Civil Code

The marital property regime as set forth in the General Civil Code is based on the principle of separation of property. It is possible to depart from this principle if specific agreements are drawn up. In the absence of matrimonial agreements of this kind, pursuant to § 1237 of the General Civil Code each spouse retains ownership of the property brought by him/her to the marriage, and each spouse has no claim to what the other acquires during the marriage. Nowadays § 1237 of the General Civil Code is applicable as amended pursuant to the Federal Act Regarding the Law of Inheritance for Spouses, the Marital Property Regime and Divorce Law dated 15th June 1978 [*EheRÄG* 1978], *Federal Legal Gazette* 1978/280. But in its original version, and thus at the time of Adele Bloch-Bauer's death, the General Civil Code adhered to the principle of separation of property.

In its original form, § 1237 of the General Civil Code contained a legal presumption relating to acquisition during the marriage. Based on the Roman-law concept *praesumptio muciana,* it was presumed that **in doubtful cases an acquisition originated from the husband**. Thus in doubtful cases items of property in the marital household were considered property of the husband. This legal presumption was not eliminated until *EheRÄG* 1978. In the present case, § 1237 of the General Civil Code in its original version, and thus the aforementioned legal presumption, are applicable. This is because the Austrian Gallery's acquisition of the paintings alleged by the *Finanzprokurator* took place before 1978, and because the question of ownership is of great significance, as explained above.

The presumption set forth in § 1237 Section 2 of the General Civil Code (old version) only relates to items of property that were acquired **during the marriage** (Supreme Court in *GlU* 2254; Nippel, *Erläuterung* [*Explanation*] VII 599 f; Winiwarter, *Bürgerliches Recht* IV 445; Ogonowski, *Österreichisches Ehegüterrecht* [*Austrian Marital Property Law*] 401; Stubenrauch, *Commentar* [Commentary] *8th edition*, II 538; Weiß in *Klang*, *2nd edition*, V 823 and further references). **No distinctions are made between types of property**, and the presumption relates in particular to immovable property, though this may be refuted by land-register entries made by the wife (see Weiß in *Klang*, *2nd edition*, V 824 and further references).

Possession of the item of property has no impact on the legal presumption. Moreover, the presumption still applies if the item of property is in the possession of the wife (Ogonowski, *Österreichisches Ehegüterrecht* 401; Ehrenzweig, *System*, *2nd edition*, II/2, 146; Weiß in *Klang*, *2nd edition*, V 826 and further references; Gschnitzer, *Familienrecht* [*Family Law*] 60; Gschnitzer/Faistenberger, *Familienrecht*, *2nd edition*, 79; for a different view, see only Nippel, *Erläuterung* VII 600).

The presumption set forth in § 1237 Section 2 of the General Civil Code is effective with regard to the husband's creditors and **with regard to anybody**, i.e. basically with regard to all parties (Nippel, *Erläuterung* VII 600; Ehrenzweig, *System* II/2, 146; Weiß in *Klang*, *2nd edition*, V 826; only Anders, *Familienrecht*, *2nd edition,* 38, places constraints, and argues that it is not meant to be possible for the husband's heirs to exploit the presumption to the detriment of the wife).

The legal presumption may be refuted by **counter-proof**. In particular, proof that the husband gave the item of property to the wife as a gift may be taken into consideration. The General Civil Code takes this possibility into account in a further legal presumption set forth in § 1247 Section 1, which remains in effect today in its unchanged version: "In doubtful cases, jewelry, gemstones and other precious objects given by the husband to his wife for decorative purposes shall be deemed to have been given as gifts and not loaned." The presumption set forth in § 1247 Section 1 of the General Civil Code overrides the presumption set forth in § 1237 Section 2 (old version) of the General Civil Code. Thus if the prerequisites indicated in § 1247 Section 1 of the General Civil Code are met, the presumption set forth in § 1237 Section 2 of the General Civil Code is not applicable (see, for example, Stubenrauch, *Commentar*, 8th edition, II 538; Weiß in *Klang*, *2nd edition*, V 825).

Contemporary literature and court rulings give very few indications as to the meaning of "other precious objects for decorative purposes". According to an opinion of the Supreme Court from 1920 (*SZ* 2/147), "precious objects" means physical items that are of great value despite their small volume and low weight. This opinion constitutes all the court rulings to date. However, it discusses the term "precious objects" with reference to restauranteurs' liability (see also Supreme Court in *EvBl* 1961/336; *SZ* 56/24, in which reference is made to the aforementioned opinion) and railroad operators' liability rather than from the perspective of § 1247 of the General Civil Code. Weiß (in *Klang*, *2nd edition*, V 881) adopts the above definition with regard to § 1247 of the General Civil Code. By contrast, Lenhoff (in *Klang*, *1st edition*, III 779 f) argues that, in the case of § 1247 of the General Civil Code, the key issue is whether the items are for female use and do not constitute maintenance payments, because the latter in any case pass into the ownership of the wife (Ogonowski, *Österreichisches Ehegüterrecht* 342 takes the same view; Ehrenzweig, *System, 2nd edition,* II/2, 146 f, and Petrasch in *Rummel, 2nd edition,* § 1248 Section 1 also lean in that direction: "necessary functional items"; see also Gschnitzer, *Familienrecht*, 61; Gschnitzer/Faistenberger, *Familienrecht*, *2nd edition*, 80: "the straight line"). According to Lenhoff, the item must nonetheless be for decorative purposes, i.e. it must "decorate" the wife as an independent item. Thus even very valuable paintings or bronzes do not fall into this category (Lenhoff in *Klang*, *1st edition*, III 778). Weiß (in *Klang*, *2nd edition*, V 881) merely adds that the item has to have been given for decorative purposes and not for sale or

pledge. The relevant minutes also speak of "female items" (Ofner, *Urentwurf [Original Draft]* II 147: "not items that are used by both husband and wife").

§ 678 of the General Civil Code defines explicitly what "decorative items" means: Decorative items are items "other than jewelry and articles of clothing that are used **to decorate the person**". § 678 of the General Civil Code constitutes interpretation rules for legacies (see the margin heading for § 656 of the General Civil Code); nevertheless, one can argue that it may also be applied when interpreting § 1247 of the General Civil Code (Stubenrauch, *Commentar*, *8th edition*, II 547; Krasnopolski/Kafka, *Familienrecht* 89; Anders, *Familienrecht, 2nd edition*, 39; Lenhoff in *Klang*, *1st edition,* III 77 all take that view; Ogonowski, *Österreichisches Ehegüterrecht* 341 ff, on the other hand, takes the opposing view: He argues that the law only applies to typical cases, and that the key issue is simply that the husband has given his wife the item over and above maintenance payments, in order to fulfill a specific need).

b) Application to the Present Case

Ferdinand and Adele Bloch-Bauer married in 1899. All the paintings in question were painted by Klimt at a later date, and were thus acquired during the **Bloch-Bauer's marriage**. Thus the first prerequisite for the applicability of § 1237 Section 2 (old version) of the General Civil Code is fulfilled (the items were acquired during the marriage).

It is not possible to determine whether, upon Adele Bloch Bauer's death, the paintings were in her sole possession or in the spouses' joint possession. Even if they were in Adele Bloch-Bauer's sole possession, this would not be an obstacle to the applicability of § 1237 Section 2 (old version) of the General Civil Code.

Thus the assumption set forth in § 1237 Section 2 (old version) of the General Civil Code, according to which it must be assumed the paintings were in the ownership of the husband Ferdinand Bloch-Bauer, is basically applicable. It is effective with regard to all parties, i.e. including potential parties having a valid claim pursuant to Adele Bloch-Bauer's will. Ferdinand Bloch-Bauer's declaration in the Adele Bloch-Bauer probate proceedings, in which it is stated that the paintings were his property, lends further support to this assumption.

Anyone wishing to derive rights from the alleged ownership by Adele Bloch Bauer per would have to invalidate the assumption pursuant to § 1237 Section 2 of the General Civil Code. In the present case, it would be important to bear in mind the evidence that Ferdinand Bloch-Bauer gave the paintings to his wife. However, in light of the available documents and Ferdinand Bloch Bauer's declaration to the probate court, that evidence is not convincing.

Nevertheless, is important to check whether the assumption pursuant to § 1237 Section 2 of the General Civil Code is invalidated by the applicability of § 1247 of the General Civil Code. According to the latter provisions, it may be assumed the husband gave the item in question to his wife, provided certain prerequisites are fulfilled. For this to apply, the paintings would have to be considered precious objects which Ferdinand Bloch-Bauer gave his wife "for decorative purposes". It is doubtful whether Ferdinand Bloch Bauer gave the paintings to his wife at all; moreover, this cannot be determined from the available documents. Originally, *Adele Bloch-Bauer I* may have been intended as a gift for the portraitee's parents. At any rate, this is what the Adele Bloch-Bauer herself indicated in a letter to Julius Bauer dated 15th October 1903 ("my husband then decided to have Klimt paint my portrait…"). However, this is by no means certain, and in any case this evidence (Adele Bloch Bauer's letter) relates to just one painting.

It is quite clear that the paintings do not constitute precious objects as defined in § 1247 of the General Civil Code. Even if one assumes that the paintings should be deemed precious objects and that they were given to Adele Bloch-Bauer, they were definitely not intended "to decorate" Adele Bloch-Bauer. Moreover, even if one adopts the broad interpretation of § 1247 of the General Civil Code as defined by some parties, to the effect that necessary functional items (the "straight line") should be included, this does not alter the fact that the paintings definitely do not fulfill that requirement either.

Furthermore, even if one disregarded all these points, it would be important to remember that § 1247 of the General Civil Code merely constitutes a refutable basis for an assumption. Even if Ferdinand Bloch Bauer's statement that the paintings were his property were insufficient counter-evidence, it would still be an important indicator that Ferdinand Bloch-Bauer did not even give his wife free disposal of the paintings, let alone the ownership thereof.

Therefore the assumption pursuant to § 1237 Section 2 (old version) of the General Civil Code applies. It must be assumed that after Adele Bloch Bauer's death the paintings were the property of Ferdinand Bloch-Bauer.

V. Summary

1. If one argues that Adele Bloch-Bauer's request is a binding order, it is not a legacy instruction from the testatrix herself, but rather a *testamentary order* to her sole heir Ferdinand Bloch-Bauer. By contrast with what she says in Paragraph III of Section I of her will, the testatrix is not saying that she leaves the paintings, but rather merely **asks her husband to leave the paintings**, i.e. to dispose of them upon death in a specific way.

2. Testamentary prohibitions and testamentary orders are *invalid,* because they encroach upon testamentary freedom. Exceptions are only permitted insofar as the instruction can be converted into a reversionary substitution. However, a prerequisite for a reversionary substitution and conversion into a reversionary substitution is that the instruction must relate to *the (first) testator's* own assets or ***own property***. Conversion of Adele Bloch-Bauer's request into a reversionary substitution (reversionary-heir legacy) would be feasible if it could be shown that the paintings were her property.

3.The legal situation is much more difficult if the paintings were the property of the heir Ferdinand Bloch-Bauer (as part of his collection). Pursuant to § 662 of the General Civil Code, the bequest of an item of property that belongs[12] to the testator is feasible. However, it is *not the goal of the law to make testamentary orders to the heir permissible*; but legacy instructions which are issued by the testator himself and which refer to items of property of the heir are permissible. According to prevailing opinion (about which we have serious reservations), the legacy is supposedly valid if the testator mistakenly assumed the item of property was his own. This can be contested on grounds of an error; however, in the present case, it would be possible to argue that such action is statute-barred.

[12] Translator's note: Sic. Probably: "…an item of property that does not belong..."

4. The *Finanzprokurator* argues that one can convert the testamentary order to Ferdinand Bloch-Bauer into a valid legacy instruction of the testatrix Adele Bloch-Bauer, which would be valid pursuant to § 662 of the General Civil Code. However, one could only make that argument if the legacy was to be implemented **upon the death of the testatrix**, **rather than** (as in the present case) **upon the death of her heir**. This is because an explicit stipulation that the due date is the heir's death constitutes an impermissible encroachment upon testamentary freedom. That means it is all the more non-permissible to "convert" a testamentary order into an instruction of this kind having a due date. Indeed in most cases the literature indicates that conversions of this kind are not feasible. Court rulings are not entirely clear on the matter, but are generally cautious. We anticipate that the Supreme Court will issue further rulings on this issue.

Thus the correct view is that Adele Bloch-Bauer's request, if one assumes it was meant to be binding (see A), cannot constitute the basis for a right of the Austrian Gallery (the Republic of Austria) to the paintings if they were the property of Ferdinand Bloch-Bauer.

5. No firm conclusions regarding ownership can be drawn from the will. The words "My portraits" do not prove anything, because the portraits are portraits of the testatrix herself. The *Finanzprokurator'*s reference to the testatrix's binding instruction to immediately surrender the paintings to the substitute heirs is also unconvincing. This is because the substitute inheritance **could only have been implemented** if Ferdinand Bloch-Bauer had **predeceased the testatrix Adele Bloch-Bauer**. In that case Adele Bloch-Bauer could have been totally confident in assuming that *upon her own death she would be the owner* of the paintings. The fact that the testatrix twice mentions "belonging to me" or "my" library, yet avoids using the possessive when referring to the paintings (aside from the reproductions) could be an indication of ownership by Ferdinand Bloch-Bauer.

6. The assumption pursuant to § 1237 of the General Civil Code (old version) –this law was in force until 1978 – is another argument in favor of the paintings being the property of Ferdinand Bloch-Bauer. According to that assumption, *in doubtful cases* items of property which were acquired during a marriage and which were in the matrimonial household were the *property of the husband*. This assumption was effective with regard to all parties. To invalidate it, it would be necessary to prove that Adele Bloch-Bauer had acquired the paintings herself or that Ferdinand Bloch-Bauer had given them to her. If § 1247 Section 1 of the General Civil Code – which states

that in doubtful cases precious objects given by a husband to his wife for decorative purposes should be deemed to have been given as a gift – were applicable, there would be no need for such proof. But the paintings do **not** fulfill the prerequisite that they must be **precious objects** given to the wife for **decorative purposes**. All of this lends support to Ferdinand Bloch-Bauer's statement that the paintings were his property.

C. Ferdinand Bloch-Bauer's Declaration to the Probate Court

I. Question Presented

If one assumes the Austrian Gallery (Republic of Austria) did not derive any legal claim from Adele Bloch-Bauer's will because it did not contain a binding instruction (see A), or because, if it had contained a binding instruction, this would have encroached upon Ferdinand Bloch-Bauer's testamentary freedom (see B), it would nonetheless be conceivable for the Austrian Gallery (Republic of Austria) to derive a legal claim from Ferdinand Bloch-Bauer's conduct during the probate proceedings. We discuss this in greater detail below.

The testamentary compliance confirmation supplied by Ferdinand Bloch Bauer's brother Dr. Gustav Bloch-Bauer (as the party assigned authority to handle the estate and probate proceedings) contains, among other things, the following declaration:

In Section III, Paragraph 1, the testatrix gives instructions regarding legacies in favor of

1) the Viennese workers' association Kinderfreunde; and

2) the association Die Bereitschaft.

These associations have received notification from the court regarding the accrual of the legacy.

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.

Below, we discuss the implications of Ferdinand Bloch-Bauer's promise to "faithfully fulfill", and determine whether this has any significance with regard to any claim of the Austrian Gallery. The main question is: How should this declaration be interpreted?

II. Interpretation

1. The *Finanzprokurator*'s Arguments

In his Opinion, the *Finanzprokurator* states that the declaration in the testamentary compliance confirmation has legally effective meaning. He argues that Ferdinand Bloch Bauer thereby **acknowledged** his wife's will, to the effect that the paintings should pass to the Austrian Gallery. He also argues (Opinion, page 5 and page 8) that it would even be feasible to provide legally effective acknowledgement of a will that was invalid for formal reasons. On page 8 of the Opinion (in reference to the Supreme Court in *GlUNF* 1179) he argues that an acknowledgement of this kind can only be retracted if the declaration has not been accepted by the party at whom it is directed.

The *Finanzprokurator* also argues that it is "obvious" that Ferdinand Bloch Bauer's declaration should be considered a promise to donate as defined in § 943 of the General Civil Code. He argues that Ferdinand Bloch Bauer wanted to donate the paintings during his lifetime, because he was motivated by Adele Bloch-Bauer's will. He then argues that it is completely clear from further events that the Federal Government (the Austrian Gallery) accepted the promise to donate, even though no formal understanding was reached (Opinion, page 8 ff).

2. Response

a) Acknowledgement

1. Legally effective acknowledgements are not covered explicitly in the General Civil Code. However, as a general rule they are viewed as a sub-category of settlements. They constitute

acceptance agreements via which a dispute or doubt regarding a right can be eliminated via unilateral yielding by one party (see only Koziol/Welser, *Bürgerliches Recht, 11th edition,* II*,* 102; Ertl in *Rummel, 2nd edition*, Section 6 regarding § 1380 and further references). Court rulings stress that it is important that the acceptance agreement be accepted by the other party to the agreement, thus creating the sense of an agreement. On the other hand, according to some legal opinions unilateral promises to perform an act are also feasible (see Ertl in *Rummel, 2nd edition*, Section 6 regarding § 1380 and further references).

An acknowledgement creates new, **independent grounds for obligation** which arise regardless of whether the dubious or disputed right existed at all. Hence one speaks of the legal effectiveness of an acknowledgement agreement. It is important to distinguish between legally effective acknowledgements and declarative acknowledgements. A declarative acknowledgement is not an agreement, but rather simply an indication that the party in question is aware that a specific obligation exists. A declarative acknowledgement can be used to help prove a dubious right, but is refutable. If the right did not exist, the declarative acknowledgement does not create new grounds for obligation (Koziol/Welser, *Bürgerliches Recht, 11th edition,* II*,* 102; Ertl in *Rummel, 2nd edition*, Section 7 regarding § 1380; Supreme Court in *SZ* 51/76).

The legal efficacy of an acknowledgement of an invalid will (as proposed by the *Finanzprokurator*), in particular a will that is invalid for formal reasons, is disputed (see Welser in *Rummel*, *3rd edition*, Section 5 regarding § 601 and further references). The majority view is that the will that is invalid for formal reasons remains invalid. The acknowledgement agreement merely has contract law efficacy between the parties involved (for a more detailed analysis, see B. Jud*, Der Erbschaftskauf* [*Sale of an Accrued Inheritance*] 111 ff and further references).

2. The present case does not involve an acknowledgement of a will that is invalid for formal reasons (for a discussion of contracts of acknowledgement regarding legacies that are invalid for formal reasons, see Supreme Court in *SZ* 7/297). Instead, the question is whether a non-binding wish or an instruction of the testatrix that is invalid because it encroaches upon testamentary freedom was rendered binding by the declaration made by Gustav Bloch-Bauer (as Ferdinand Bloch Bauer's representative). From the outset, estate law grounds for obligation arising from an acknowledgement do not seem feasible. All one can do is determine whether Ferdinand Bloch Bauer created **new grounds for obligation** via a contract law agreement. For this to be the case,

there would have to have been an agreement between Ferdinand Bloch-Bauer and the Austrian Gallery (Republic of Austria).

Contrary to the *Finanzprokurator*'s arguments, Ferdinand Bloch Bauer's declaration contains **neither** a legally effective acknowledgement **nor a declarative acknowledgement**. Ferdinand Bloch-Bauer promises to faithfully fulfill the various requests and at the same time indicates that he is not legally obligated to do so: "… *though they do not have the binding nature of a testamentary disposition.*"

Thus the correct view is that Ferdinand Bloch Bauer **did not intend to establish an obligation**. As a general rule, phrases such as "*I promise to faithfully fulfill*" do not give rise to a legal obligation. At most, they hold out the prospect of fulfillment of a moral duty. Furthermore, Ferdinand Bloch-Bauer had absolutely no reason to impose a per se non-existent legal obligation upon himself (in the absence of urgent reasons). Assuming he was convinced that he was not under any legal obligation, especially with regard to his own property (indeed he explicitly states this), and wanted to fulfill his wife's intentions, **he could have done so without establishing a binding obligation**. Taking on a legal obligation would not have made any sense, as it would merely have been an obstacle to his later dispositions.

Moreover, Ferdinand Bloch-Bauer reiterates that Adele Bloch Bauer's instruction is non-binding. He would hardly have done this if he wanted to establish an obligation via his declaration.

The *non-binding nature of his promise* matches the *non-binding nature of the testatrix's* "*request*". Given that the request was non-binding, nobody would respond to it with a legally binding promise. This is because, in light of the non-binding request, the parties involved were already "in a realm not subject to law".

Thus it cannot be assumed that Ferdinand Bloch-Bauer's intention in his declaration was to establish an obligation with regard to the Gallery. Anyone who doubts this should note the regulations regarding lack of clarity set forth in **§ 915 of the General Civil Code**: As Ferdinand Bloch Bauer did not receive any quid pro quo for his declaration, it must be assumed that he wished to impose the "lesser burden" upon himself, and from that one must infer that the declaration was *non-binding*.

3. The non-binding nature of Ferdinand Bloch-Bauer's declaration arises not only from the absence of an intention to incur a binding obligation, but also from the **absence of an addressee in the form of a beneficiary**. It is important to remember that the declaration was as made part of the *testamentary compliance confirmation*. The purpose of a testamentary compliance confirmation is to inform the court that the necessary prerequisites have been met, so that the court can issue a completion of probate proceedings confirmation (cf. Weiß in *Klang*, *2nd edition*, III 1044). It is not meant to be a channel of information to outside parties or legatees. It simply demonstrates to the court that the heir has complied with or guaranteed the legacies in question, has notified the legatees, and has performed any legal duties pursuant to §§ 158 to 161a of the Non-Litigious Proceedings Act. These relate to substitutions, equivalent obligations to fulfill, or legacies. In the case of movables, at least the beneficiary must be informed.

In the present case, the testamentary compliance confirmation makes no mention of notifying the Austrian Gallery; by contrast, it does state that the financial legatees have been notified. Moreover, it emphasizes that the beneficiaries of the instructions in Section III, Paragraphs 1 and 3 have been notified. In view of the fact that, as already mentioned, Ferdinand Bloch-Bauer stresses the non-binding nature of Adele Bloch-Bauer's request (the probate court clearly had no objection to this), one must conclude that he neither intended nor wished that the Austrian Gallery be notified. The possibility that the probate court may have independently decided to notify the Austrian Gallery (as indicated in the opinion submitted to the Austrian Gallery by the *Finanzprokuratur* on 6th March 1948; that document also suggests that the notification might not have actually been sent) is of no significance. The key issue is that the declaration by Ferdinand Bloch-Bauer (via his representative Gustav Bloch-Bauer) is definitely not directed at the Austrian Gallery. It is **directed solely at the probate court,** so that the court can issue a completion of probate proceedings confirmation.

The *Finanzprokurator* sees this declaration (which was directed solely at and intended solely for the court), in particular the declaration of intent contained therein, as an offer to the Austrian Gallery to establish a legally effective acknowledgement agreement. We strongly disagree with him.

As can be seen from the following overview, our arguments are confirmed by various court rulings. These rulings indicate that a statement in a testamentary compliance confirmation does

not constitute an acknowledgement agreement. Of particular note is the Supreme Court's decision in *GIUNF* 1179. The *Finanzprokurator* invokes this when he says that that an acknowledgement of fulfillment of a mere wish can only be retracted if the declaration is not accepted by the party at whom it is directed. This quotation may have been taken from the head note in Dittrich/Tades, *MGA ABGB*, [*The General Civil Code*] E 1 regarding § 711. Upon closer analysis the Supreme Court's decision in fact **undermines rather than bolsters** the *Finanzprokurator 's* argument.

The point of departure for this judgment is the disposition on death already cited in B III 2 b ("*I also desire that* after the deaths *of my daughters houses Y and X shall pass to impoverished actors and business people of a foundation that bears our name*"), which the Supreme Court deemed a mere wish. During the probate proceedings, after the statement of inheritance had been issued, the representative of one of the legatees made the following declaration: "*1. that the testatrix had, with regard to her freely disposable real property, established a reversionary substitution, with regard to which the foundation to be set up is a substitute legatee. 2. that this reversionary substitution should only be effective after the death of both legatee daughters, and that the entire estate of the mother should therefore pass to A as heiress to her mother and sister, but should be encumbered with the substitute legacy in favor of the foundation to be set up after her death*". **The *Finanzprokuratur* was immediately supplied with a copy** of this declaration. Before the *Finanzprokuratur* could make a statement to the probate court, the heiress A stated that she did not acknowledge the declaration made by her representative, who in the meantime had been relieved of his duties, and that he had not been authorized to make it. She entered a plea with the *Finanzprokuratur* for recognition of her unrestricted position as heiress. The Supreme Court accepted the plea, not on the grounds that a declaration of this kind could be retracted up until such time as it had been accepted by the other party, but rather on the grounds that there was **no trace of an agreement** between the heiress and the *Finanzprokuratur*. The Supreme Court argued that in light of its contents as a whole, the declaration was to be deemed a request to acknowledge the substitute legacy in favor of the foundation, with the proviso that the substitution should only be effective after her death. It argued that the heiress was entitled to retract this request, because she had **not yet received notification from the *Finanzprokuratur* that it had been accepted** (it is important to note the difference relative to what was quoted in the *Finanzprokurator's* Opinion). The unilateral declaration did not in any sense give irrevocable

rights to the *Finanzprokuratur* as the authority for the foundation, especially as it was quite clear that **no agreement or settlement had been reached**.

In light of this decision and the facts of the present case, it is important to bear the following in mind: By contrast with the declaration made by the heiress in the case described above, Ferdinand Bloch-Bauer's declaration contains **no indications of an intention to establish an obligation**. Nor does it contain any indication that the Austrian Gallery was to be notified regarding his declaration, or that it was in fact notified. In actuality the probate court did not send any notification to the Austrian Gallery. Furthermore, the Austrian Gallery never issued any statement, either to the probate court or to Ferdinand Bloch-Bauer, that it would accept the (alleged) offer.

More recent court rulings are also very guarded when confronted with attempts to ascribe contract law efficacy to **declarations** made by the heir **to third parties** during probate proceedings. This is particularly clear in the case of the *property affirmation in lieu of an oath*. Rulings and commentaries stress repeatedly that the sole purpose of the property affirmation in lieu of an oath is to serve as the basis for probate proceedings (Supreme Court in *EvBl* 1974/226; *NZ* 1987, 210; *NZ* 1992, 153; *NZ* 1994, 113 and the decisions in *RIS-Justiz,* document no. RS 0007879; in the commentaries: Welser in *Rummel, 3rd edition*, Section 2 regarding § 801 and Eccher in *Schwimann*, *2nd edition*, Section 10 regarding § 801). Moreover, the rulings make it clear that one cannot ascribe contract law efficacy to the property affirmation in lieu of an oath (Supreme Court, index no. 4 Ob 598/79 in *RIS-Justiz,* document no. RS 0007879; *NZ* 1992, 153).

Below, we invoke the example of Supreme Court in *NZ* 1992, 153 (see also Welser in *Rummel, 3rd edition*, Section 2 regarding § 801 and Eccher in *Schwimann*, *2nd edition*, Section 10 regarding § 801). During probate proceedings, the City of I. asserted a claim. The sole heiress supplied an unconditional statement of inheritance and property affirmation in lieu of an oath indicating that the City of I. was **the proper party with regard to the claim**. The City of I. thereupon argued that the heiress had acknowledged the claim. The Supreme Court disagreed. It stated that **a legally effective acknowledgement** as a legal transaction required a **matching declaration of intent.** It also argued that the fact that the claim was included in the property affirmation in lieu of an oath did not constitute an acknowledgement, because the property affirmation in lieu of an oath only constituted a unilateral declaration, hence ruling out the

possibility that a contract of acceptance had been established. The fact that the heiress had not expressed any doubts about the substance of the claim did not alter the situation in any way. The Supreme Court also argued that she would only have been compelled to dispute this if the City of I. had brought legal action against her. It also stated that neglecting to dispute could only be interpreted as tacit acknowledgement if for special reasons the defendant had been under an obligation to make a good-faith declaration.

To sum up: In light of the wording of the declaration, the circumstances in which it was made, and its role in the proceedings, the *Finanzprokurator's* assumption that Ferdinand Bloch-Bauer intended to establish an obligation via his declaration to the probate court is **without any legal basis.**

4. These theoretical grounds rule out the possibility that Ferdinand Bloch Bauer's declaration imposed any legal obligation upon him. Below, we address a further issue that also rules out the possibility that his declaration imposed any legal obligation upon him, namely the question of the **legal admissibility** of the alleged acknowledgement. If one were to accept the *Finanzprokurator*'s argument that Ferdinand Bloch-Bauer intended to establish an obligation and that the Austrian Gallery accepted it, the contents of an acknowledgement agreement of this kind would have to have been the contents of Adele Bloch Bauer's will, namely **an obligation** on the part of Ferdinand Bloch-Bauer to **leave** the paintings to the Austrian Gallery upon death. However, as already explained in detail in B., under Austrian law an agreement-based self-obligation by Ferdinand Bloch-Bauer (as testator) would be legally inadmissible. At best it would be feasible in the form of a "contract of legacy". However, as already explained, by analogy with a contract of inheritance a contract of legacy is only permitted between spouses, and the formal requirements have to be observed.

b) Promise to Donate

As an alternative to the assumption that there was an acknowledgement, the *Finanzprokurator* proposes that there was an agreement------- regarding an inter vivos gift.

The counter-arguments to this are our points made so far – namely Ferdinand Bloch-Bauer's lack of an intention to establish an obligation, and the fact that his declaration was not addressed to the Austrian Gallery – and the fact that **in the content of his declaration he did not in any way hold out the prospect of a gift of this kind**. He declared that he would faithfully fulfill his wife's request, according to which the Austrian Gallery was to receive the paintings after his death. We cannot see how one can conclude from this declaration that the paintings should be donated to the Gallery "immediately", **during his lifetime**.

The only feasible argument is that Ferdinand Bloch-Bauer's declaration, in conjunction with Adele Bloch-Bauer's request (assuming there was an intention to donate), involves a promise that the Austrian Gallery should receive the paintings **after his death**. But then the regulations concerning **donations due upon death** would have to have been observed. According to those regulations, there would have to have been a notarial act, an acceptance by the beneficiary, and an explicit renunciation of revocation by the donator (§ 956 Section 2 of the General Civil Code, § 1, Section 1 lit d of the Law Regarding Notarial Acts). In actuality, none of these prerequisites for validity was met. The donation would therefore have been invalid for formal reasons. At best, one could argue that it was a legacy per § 956 Section 1 of the General Civil Code. But that would have had to have been in testamentary form, which was not so in the present case. Aside from that, a legacy of that kind would have been revoked by Ferdinand Bloch-Bauer's 1945 will (for a discussion of the influence of a will on a previous codicil, see Rabl, *Altes Testament – Neues Testament* 44 ff and further references).

In his Opinion, the *Finanzprokurator* sidesteps these compelling arguments by asserting that there was an **inter vivos gift**. That is not a viable assumption, because Ferdinand Bloch-Bauer had no intention of establishing an obligation, and because none of the declarations required to establish an agreement (an offer to the *Finanzprokuratur* containing the appropriate content, and a declaration of acceptance by the *Finanzprokuratur*) was made. Even if one disregarded the fact that these prerequisites were not met, the "agreement to donate" would be **invalid in terms of form**, because it does not meet the prerequisites set forth in § 943 of the General Civil Code. We discuss this in greater detail below.

III. Inter Vivos Gift and Agreement Regarding Constructive Possession as Actual Surrender as Defined in § 943 of the General Civil Code

1. The *Finanzprokurator*'s Arguments

As already stated, the wording of Ferdinand Bloch-Bauer's declaration rules out the possibility of an inter vivos gift. Even if one were to disregard that, it would be important to remember that the notarial act required for a gift without actual surrender (per § 943 of the General Civil Code in conjunction with § 1 Section 1 lit d of the Law Regarding Notarial Acts) was not carried out.

The *Finanzprokurator* argues that an actual surrender as defined in § 943 of the General Civil Code took place, and that therefore a notarial act was not needed for the gift to be effective. He argues that the actual surrender did not have to take place at the same time the agreement was established, and that it was thus permissible for it to follow later. He sees the actual surrender in terms of an agreement regarding constructive possession, namely in Ferdinand Bloch-Bauer's request that "he be allowed to keep the paintings in the room of his deceased wife". He argues that one can "infer" this request from two documents, namely the letter to Robert Bentley dated 6th December 1947, and Dr.Garzarolli's letter to the Federal Monument Office dated 24th March 1948. He maintains that it is sufficient for the actual surrender that "as far as can be seen" Ferdinand Bloch-Bauer **never disputed** an intention to donate, and that "**one can deduce for certain**" from his surrender of *Kammer Castle on Lake Attersee III* that he wished to adhere to the donation (Opinion, page 9).

The *Finanzprokurator* maintains that as a general rule constructive possession is not an "actual surrender" as defined in § 943 of the General Civil Code, but that in special circumstances exceptions can be made. He invokes a court ruling according to which, if a donation is contested by a third party (e.g. the donor's heir), it is sufficient for acquisition of ownership if the donor subsequently adheres to his intention to donate and thereby indicates that he does not require protection against haste (see Supreme Court in *JBl* (*Juristische Blätter* [*Journal of Law*] 1992, 791; *JBl* 1992, 792 and the decision 4i regarding § 943 in Dittrich/Tades, *MGA ABGB*).

2. Response

The *Finanzprokurator*'s arguments relating to "actual surrender" are very weak in two respects. First, it is inaccurate to argue that an agreement regarding surrender (disposal transaction) was ever made. Second, the agreement he presupposes would not constitute an "actual surrender" as defined in § 943 of the General Civil Code.

The main purpose of the special formal requirements set forth in § 943 of the General Civil Code is to protect persons against promises to donate that have not been thought through ("made too hastily") . An "actual surrender" takes place when the agreement to donate is followed by another, different act which can be recognized as a surrender and which indicates the donor's intention to **immediately** surrender the object of the donation **from his safekeeping into the possession of the beneficiary** (cf. only Schubert in *Rummel*, *3rd edition*, Section 1 regarding § 943 and further references). It is true that the agreement to give and the surrender do not have to coincide chronologically, i.e. the actual surrender can follow later (Supreme Court in *JBl* 1980, 264; *EvBl* 1985/117).

An agreement regarding constructive possession, i.e. an agreement between the parties to transfer ownership, while the object remains with the donor, is not sufficient for actual surrender as defined in § 943 of the General Civil Code (Supreme Court in *ZBl* (*Österreichisches Zentralblatt für die juristische Praxis* [*Austrian Central Journal of Legal Practice*]) 1934/306; *ZBl* 1935/197; *SZ* 38/227; *JBl* 1967, 623; *NZ* 1973, 103; *SZ* 45/35; *RZ* 1979/17; ÖBA 1991, 594; Stanzl in *Klang*, *2nd edition*, IV/1, 612 and further references; Schubert in Rummel, *3rd edition*, Section 1 regarding § 943).

The court rulings cited in the Opinion allow an **exception to this** (a **single case**, addressed by the Supreme Court in two separate legal procedures (2 Ob 587/91 in *JBl* 1992, 791 = *NZ* 1992, 230 with notes by Hofmeister = *ecolex* 1992, 161 with notes by Puck; and 3 Ob 575/91 in *JBl* 1992 with notes by Schwimann). The discussion in Dittrich/Tades, *MGA ABGB* cited in the Opinion mentions these two decisions only.

In the case in question, the plaintiff and the defendant were half-sister and brother respectively. Their mother owned considerable property during her lifetime, including a castle, where the plaintiff regularly spent the summer months, and a large number of artworks. In 1984

the mother gave the daughter (now the plaintiff) a Chinese corner cabinet that was in the castle, and stated that the plaintiff *could immediately take it* to London (her main residence). In fact the cabinet remained in the castle, in a room used solely by the mother. A year later the mother gave the castle to the defendant, initially without the contents; subsequently they too were transferred to him. After that the mother told the plaintiff that *the cabinet did in fact already belong to her*, and the plaintiff's legal representative recorded this statement in writing. Later the mother, urged by the defendant, signed a declaration that the castle and its contents had been given to him in 1985. The cabinet was *not* mentioned in the list of *excepted items.* A year later the mother confirmed in a notarial act that she had given the cabinet to the plaintiff in 1984. However, at this point she was already legally incapable of entering into transactions. After her death the plaintiff invoked her ownership and asked the defendant to surrender the cabinet. The defendant claimed that the gift was invalid for formal reasons.

In the Supreme Court's view, by way of an exception the agreement regarding constructive possession was sufficient to constitute "actual surrender", because the mother had subsequently confirmed the gift in writing. It maintained that the agreement regarding constructive possession was sufficient to constitute protection because, although the donor did not immediately and obviously feel the consequence of her gift in terms of a loss of property, **she subsequently adhered to her intention to give and indicated that she did not require protection against haste**. The Supreme Court felt that the case was also exceptional because the gift was disputed not by the parties to the agreement, but by the beneficiary and a third party.

The Supreme Court reconfirmed the basic thinking behind this decision in *NZ* 1993, 240 (which contains a critical comment by Hofmeister (= *SZ* 65/137) in a sub-section). It argued that the **donor's subsequent adherence to his intention to give** provided **indications of an actual surrender** insofar as it was evidence that the decision had been thought through. However, this was only an obiter dictum, because in the case in question an actual surrender took place (mixed donation of a property).

We reject with these rulings. Hofmeister (note regarding *NZ* 1992, 230) also rejects them, and has presented compelling counter-arguments. Puck has doubts regarding the issue (in *ecolex* 1992,131). Schwimann (in *JBl* 1992, 791) sides with the Supreme Court, but does not discuss the problematic aspects. Binder (in *Schwimann*, *2nd edition*, Section 13 regarding § 943) takes a

neutral stance. Schubert (in *Rummel*, *3rd edition*, Section 1 regarding § 943) accepts the rulings. If, as per current opinion, an agreement regarding constructive possession made immediately does not constitute a warning, then that is even less true of a mere (subsequent) declaration which (as in the case described) was obviously made at the request of the recipient of the gift and was drawn up by her legal representative. That is a procedure that cannot be equated with a notarial act or an actual surrender, especially if it is based on the erroneous assumption that the transfer of ownership of the objects has already taken place. The fact that the donor, *even before she confirmed her intention to donate to the plaintiff*, relinquished the inventory (including the cabinet) to the defendant and then subsequently (after issuing the confirmation to the plaintiff) reconfirmed that she had given the castle and its contents to the defendant seems especially problematical, and casts doubt on the "unambiguous adherence to the prior intention to give".

Anyway, we can disregard the problematic issues involved in that ruling, as they are not applicable to the present case:

a) In the case described above, it was quite clear that an agreement regarding constructive possession was established. The donor gave the object to the beneficiary, who could have immediately taken it with her. **Ferdinand Bloch-Bauer** did no such thing. He held out the prospect of (voluntarily) fulfilling his wife's will, but **had no intention of transferring ownership of the paintings**.

As a counter-argument to this, the *Finanzprokurator* reminds us that Ferdinand Bloch-Bauer **asked** (the Austrian Gallery) **to be allowed to keep the paintings,** and maintains that this gave rise to an agreement regarding constructive possession. It is **doubtful** that Ferdinand Bloch-Bauer ever made such a declaration. There is no evidence to that effect in the documents from the period before Ferdinand Bloch-Bauer's death in 1945. Of the two quotations cited by the *Finanzprokurator,* the first (the letter dated 6th December 1947 from Dr. Rinesch to Robert Bentley) definitely does not constitute a compelling argument: It contains **absolutely no evidence** to support the assumption that Ferdinand Bloch-Bauer had asked the Austrian Gallery for temporary possession of the paintings. It merely contains Dr. Rinesch's explanation to Robert Bentley that during his lifetime Ferdinand Bloch-Bauer had the right to hold onto the pictures. Obviously Dr. Rinesch's assumption was that the Austrian Gallery had a claim to the paintings *upon Ferdinand Bloch-Bauer's death*. It contains no evidence of an agreement regarding

constructive possession during Ferdinand Bloch-Bauer's lifetime, nor of a request by Ferdinand Bloch-Bauer to be allowed to continue to keep the paintings.

The *Finzanzprokurator*'s second quotation relates to Dr. Garzarolli's letter to the Ministry of Education dated 24th March 1948, in which he remarks that Ferdinand Bloch-Bauer had, after his wife's death, asked the then director of the Austrian State Gallery Dr. Grimschitz that he might be allowed to hold onto the pictures. Dr. Garzarolli's remark stems from a written statement about the history of the pictures, which Dr. Grimschitz had sent to Dr. Garzarolli a few days earlier (on 1st March 1948) and which contains the following passage: "Mrs. Bloch-Bauer and, after her death, her husband Mr. Ferdinand Bloch-Bauer, stated orally on many occasions that the six Klimt paintings would be given to the Modern Gallery in Vienna as a bequest from their owner Mrs. Bloch-Bauer. After his wife died, Mr. Bloch-Bauer asked me several times if he could be allowed to keep the paintings in the room of his deceased wife, which had been left unchanged, until the directors of the Gallery required the paintings for exhibition."

When evaluating the evidence, the court will have to decide whether these statements are credible. Nevertheless, a few aspects demand initial consideration in this connection. It is hard to imagine that Ferdinand Bloch-Bauer would have asked to retain the pictures, given that according to his wife's wish he was entitled to keep them *until his own death* and had himself merely "promised to faithfully fulfill" his wife's wish to surrender the pictures *upon his death*. Moreover, as far as is known, the **files contain absolutely no indication** of ownership of the pictures by the Austrian Gallery, which might have been based on an agreement with Ferdinand Bloch-Bauer to donate them. The documented **behavior** of Dr.Grimschitz is in **complete contradiction** to his claim that in principle the pictures had remained with Ferdinand Bloch-Bauer as "an act of grace". If Dr.Grimschitz had, during Ferdinand Bloch-Bauer's lifetime, really believed that the Austrian Gallery had left the pictures in the latter's keeping only temporarily and for personally motivated use, then he would have had to reclaim them for the Gallery immediately upon Ferdinand Bloch-Bauer's flight. In fact only three pictures went to the Austrian Gallery, which provided **considerations** for them. One could perhaps explain the purchase of *Adele Bloch-Bauer II* for 7,500 Reichsmark as the liquidation of Ferdinand Bloch Bauer's "tax obligation". But the acquisition of *Adele Bloch-Bauer I* and *Apple Tree II* in exchange for *Kammer Castle on Lake Attersee III* is completely incomprehensible if Dr.Grimschitz assumed that the exchanged pictures were in any case the Gallery's property.

Even if one were to accept that Ferdinand Bloch-Bauer had really asked the Austrian Gallery to be allowed to keep the pictures for the time being, then that request would **not** have had the necessary **declaratory value** (required per **§ 863 of the General Civil Code**) to transfer ownership of the pictures to the Austrian Gallery. The request could have arisen from so many other motives that it lacks unambiguous declaratory value. It could be that Ferdinand Bloch-Bauer was courteously putting off the Austrian Gallery because he was still thinking over the fate of the pictures or because he was in fact no longer prepared to leave the pictures to the Austrian Gallery in the prevailing circumstances.

(b) According to the *Finanzprokurator,* the fact that Ferdinand Bloch-Bauer "as far as can be seen" **never denied** his intention to make the donation is sufficient to validate the actual surrender. The *Finanzprokurator* also argues that it is to be **inferred without doubt** from the hand-over of the picture *Kammer Castle on Lake Attersee III* in 1936 that he wanted to abide by the donation (Opinion, page 9). But Ferdinand Bloch-Bauer in fact **never provided any confirmation** of a donation pursuant to an agreement regarding constructive possession. Obviously he had no need to deny later an intention to donate that he never expressed. To deduce judicial consequences from silence runs counter to accepted jurisprudential rules (Koziol/Welser, *Bürgerliches Recht , 11th edition,* I 92 f and further references). Even less can silence be seen as the acknowledgment of an act never envisaged.

Moreover, we reject the *Finanzprokurator*'s statement that the **later donation that was actually carried out** (*Kammer Castle on Lake Attersee*) constitutes a reaffirmation of an (imaginary) "**overall donation**". In fact Ferdinand Bloch-Bauer gave *Kammer Castle on Lake Attersee* to the Austrian Gallery in 1936 entirely of his own free will, which clearly emerges from the Gallery's letter of thanks, which *in no way* gives the impression of confirming the *fulfillment of a legal obligation*. It is pure fantasy to infer from the handing over of this painting an "intention" on the part of Ferdinand Bloch-Bauer "to reaffirm" the fact that he had already years previously donated all the pictures, and that this hand-over was merely the "partial fulfillment" of a long-established obligation. Someone who gives just one picture does not signal thereby that he has already given (all) other pictures and intends to abide by that situation.

The "constructive possession and affirmation" theory proposed in the Opinion is not at all well-founded. In fact it is fair to call it wishful thinking.

IV. Summary

1. With the words "I promise to faithfully fulfill …" one does not normally incur a legal obligation; one holds out the prospect of *the fulfillment of a moral duty*. Ferdinand Bloch-Bauer had no reason to establish a legal obligation. If he had wanted to meet his wife's wishes, he could have done so without binding himself. *It would have made no sense to impose a binding obligation upon himself*, because it would have hindered his ability to make his own dispositions. In addition Ferdinand Bloch-Bauer *specifically stressed* the non-binding nature of Adele Bloch-Bauer's wish.

Thus no intention to incur a binding obligation can be deduced from Ferdinand Bloch-Bauer's declaration. Anyone who doubts this should bear in mind the rules regarding lack of clarity pursuant to § 915 of the General Civil Code. Since Ferdinand Bloch-Bauer obtained no quid pro quo for his declaration, the legal rules concerning doubt would lead one to assume that it is non-binding, as the "lesser burden".

2. The declaration was not directed towards the Austrian Gallery. It was made as part of the testamentary compliance confirmation. It is directed solely towards the court, and informs the court that the necessary prerequisites have been met, so that it can issue a completion of probate proceedings confirmation. No notification was sent to the Austrian Gallery as part of testamentary compliance confirmation; by contrast, the other legatees indicated in the will were in fact notified.

3. If one were to accept the *Finanzprokurator*'s view that Ferdinand Bloch-Bauer wanted to establish an obligation via his declaration and that the Austrian Gallery accepted this offer, then *the contents* of an acknowledgement agreement of this kind would have had to have been *the contents of Adele Bloch-Bauer's instructions*, i.e. an obligation on the part of Ferdinand Bloch-Bauer to donate the pictures to the Austrian Gallery upon his own death. Under Austrian law it would be *legally impossible* for Ferdinand Bloch-Bauer (as testator) to establish an agreement-based obligation of this kind. At best it would have been feasible as a "contract of legacy". These are only permitted between spouses and require that the necessary formalities be observed.

4. The *Finanzprokurator*'s alternative assumption concerning an *agreement regarding an inter vivos* gift can be refuted by our arguments so far and by the contents of the declaration. One cannot conclude from Ferdinand Bloch-Bauer's declaration to faithfully fulfill Adele Bloch-Bauer's request that the paintings be left to the Austrian Gallery *after his death* that they were to be donated to the Austrian Gallery "immediately", i.e. *in the lifetime* of Ferdinand Bloch-Bauer. If one were to assume there was an intention to donate, the only relevant content would be a promise to donate the paintings to the Gallery after his death. But then the formal requirements regarding a donation due upon death would have had to have been observed (§ 956 Section 2 of the General Civil Code; § 1 Section 1 lit d of the Law Regarding Notarial Acts), and in the present case none of those requirements was fulfilled.

5. Even if one were to assume that in making the declaration Ferdinand Bloch-Bauer's intention was to give the paintings to the Gallery immediately, i.e. during his lifetime, the declaration regarding the obligation would be void pursuant to § 943 of the General Civil Code, because the *formal requirements regarding a notarial act were not observed*. These formal requirements could only have been waived if the promise to donate had been followed by an actual surrender. But Ferdinand Bloch-Bauer *did not* carry out an actual surrender. The agreement regarding constructive possession postulated by the *Finanzprokurator* does not meet the prerequisites of an actual surrender as defined in § 943 of the General Civil Code. We reject the Supreme Court's two decisions, in which by way of an exception it accepted an agreement regarding constructive possession as an actual surrender if the donor subsequently adhered to his intention to give and thereby indicated that he did not require protection against excessive haste. Furthermore, they are not applicable to the present case.

6. The *Finanzprokurator* points out that Ferdinand Bloch-Bauer asked the Gallery to be allowed to retain the pictures, and considers this an agreement regarding constructive possession. But it is doubtful whether Ferdinand Bloch-Bauer ever made such a statement. There is no indication thereof in the available documents from the period leading up to Ferdinand Bloch-Bauer's death in 1945. In arguing against this, the *Finanzprokurator* cites two documents from the ensuing period, one of which (letter of the lawyer Dr. Rinesch to Robert Bentley dated 6th December 1947) by no means supports his view. That means the only source is the account provided by Dr. Grimschitz, whose credibility is, for various reasons, doubtful. But even if one assumed that Ferdinand Bloch-Bauer did make such a declaration, his request would not have the

necessary declaratory value as defined in § 863 of the General Civil Code to transfer ownership of the paintings to the Gallery.

7. We do not accept the *Finanzprokurator*'s view that it is sufficient for the actual surrender that Ferdinand Bloch-Bauer never denied his intention to make the donation and that it can be deduced without doubt from the surrender of *Kammer Castle on Lake Attersee* that he intended to abide by the donation. In reality Ferdinand Bloch-Bauer *never confirmed an earlier donation*. To infer legal consequences from silence runs counter to the general principles of jurisprudence. It is not now possible to assume that the actual and executed donation of *Kammer Castle on Lake Attersee* implies an intention to abide by an imaginary previous "overall donation". *Someone who gives just one picture does not thereby declare that he has already given other pictures and intends to abide by that situation*. Thus the letter of thanks to the Gallery in 1936 does not even mention the other paintings.

Thus, up to **1938, no valid title** arose from which the Austrian Gallery could have inferred rights to or rights regarding the paintings in question. The Austrian Gallery did not obtain an estate law or contract law claim to a transfer of ownership. Even less did it become owner of the paintings. The only exception was *Kammer Castle on Lake Attersee*, which Ferdinand Bloch-Bauer donated to the Austrian Gallery in 1936 of **his own free will**. It became the Gallery's property as a donation rather than on the basis of Adele Bloch-Bauer's will.

D. Dr. Führer's Transactions Between 1938 and 1945

I. Dr. Führer's Actions

In the years 1938 to 1945 ***Adele Bloch-Bauer I*** and ***II***, ***Apple Tree I*** and ***Beech Forest (Birch Forest)*** were the subject of various transactions by the lawyer Dr. Führer. The formal background to these events was a tax penalty imposed upon Ferdinand Bloch-Bauer by the Nazis,

which Dr. Führer, as the officially appointed property administrator, had to "expunge" by "liquidating" the Bloch-Bauer art collection.

Dr. Führer handed over ***Adele Bloch-Bauer I*** and ***Apple Tree I*** to the Austrian Gallery in 1941. In doing so he invoked Adele Bloch-Bauer's will, saying that he had thereby complied with it, but obviously there were probably **other motives**. In return, the Gallery surrendered ***Kammer Castle on Lake Attersee III***, which Ferdinand Bloch-Bauer donated to it in 1936. Dr. Führer sold *Kammer Castle on Lake Attersee III* to Gustav Ucicky. Since this picture is not in contention, we will not be looking any further into its legal fate.

Dr. Führer sold ***Beech Forest (Birch Forest)*** to the Vienna City Collection in 1942, and sold ***Adele Bloch-Bauer II*** to the Austrian Gallery in 1943.

Houses in Unterach am Attersee remained with Dr. Führer until 1945. It is assumed the painting was given to him by the Nazi authorities as a "reward".

II. The Finanzprokurator's Arguments

With the exception of *Beech Forest (Birch Forest)*, the *Finanzprokurator* considers all cases in which Dr. Führer "handed over" or sold pictures as compliance with Ferdinand Bloch-Bauer's private-law obligation (assumed by the *Finanzprokurator*) to hand over the pictures to the Austrian Gallery. The *Finanzprokurator* argues that even if Ferdinand Bloch-Bauer did not authorize Dr. Führer to do so, Dr. Führer's handover with express reference to the will should be viewed as "a physical surrender, at least in factual terms, and thus as the fulfillment of the testamentary instruction or promise of donation" (Opinion, p.10). The *Finanzprokurator* sees the fact that after the war Ferdinand Bloch-Bauer's heirs did not, within the period allowed by law, submit a request for restitution of the paintings as conclusive consent to Dr. Führer's legal transactions.

III. Response

The *Finanzprokurator*'s arguments are **without any legal basis** and to some extent border on cynicism. As Ferdinand Bloch Bauer did not grant Dr. Führer any kind of authorization, Dr. Führer's disposals cannot be attributed to Ferdinand Bloch-Bauer. Without a power of attorney, it was not possible for **legal changes** attributable to Ferdinand Bloch-Bauer to take place. It is obvious that Ferdinand Bloch-Bauer never granted a power of attorney. Dr. Führer's actions therefore had no consequence other than that in purely factual terms ***Adele Bloch-Bauer I***, ***Apple Tree I*** and ***Adele Bloch-Bauer II*** came into the Austrian Gallery's possession, ***Beech Forest (Birch Forest)*** into the City Collections' possession, and ***Houses in Unterach am Attersee*** into Dr. Führer's possession.

The fact that Dr. Führer cited compliance with Adele Bloch Bauer's will when handing over *Adele Bloch-Bauer I* and *Apple Tree I* to the Austrian Gallery is of no significance. First, **there was no such obligation** (see A and B); second, even if one presupposes there was a binding testamentary obligation, he was **not authorized** to fulfill it and was therefore not in a position to carry out a legally effective surrender (modus). In any case the reference to the will was obviously just a "cover-up" for a misappropriation of Ferdinand Bloch-Bauer's property, particularly as according to the files Dr. Führer was not accurately acquainted with the will and was merely alerted to the "obligation" by the director of the Austrian Gallery. Furthermore, all Dr. Führer's actions with regard to the paintings contradict the theory of testamentary compliance: the "quid pro quo" in the form of *Kammer Castle on Lake Attersee III* and the subsequent sale thereof, the sale of *Beech Forest* and *Adele Bloch-Bauer I*, and his holding onto *Houses in Unterach on Lake Attersee*, all of which he should have given to the Austrian Gallery if had wanted to fulfill the alleged will. In light of this, it hardly matters that the alleged last will would have been due for fulfillment only upon the **death of Ferdinand Bloch-Bauer,** so that prior to that event Dr. Führer could not even have given the appearance of fulfilling it.

Moreover, we do not agree with the *Finanzprokurator* that the failure to enter, within the permitted term, a claim for restitution pursuant to the Annulment Act [*NichtigkeitsG*] 1946 Regarding the Nullity of Proceedings and Other Legal Acts which Occurred during the German Occupation of Austria[13], in combination with the post-war restitution laws (see below, E. III 1),

[13] Translator's note: Referred to below as the Annulment Act 1946.

can be seen as **conclusive consent** by Ferdinand Bloch-Bauer's heirs to Dr. Führer's transactions. Aside from the fact that the *Finanzprokurator* has not even bothered to try to provide a theoretically valid explanatory reason for such a consent (in light of § 863 of the General Civil Code such an attempt would fail), the assumption of silent consent is simply absurd, given the concrete circumstances. Dr. Rinesch, as representative of Ferdinand Bloch-Bauer's heirs, did not start restitution proceedings within the permitted time, not because he intended to consent to Dr. Führer's transactions, but because he came to an express agreement with the Austrian Gallery to relinquish the paintings (even the *Finanzprokurator* points this out, on page 13 of the Opinion).

IV. Summary

1. The *Finanzprokurator* 's assertion that by handing over *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II* and *Apple Tree II* Dr. Führer had effectively carried out Adele Bloch-Bauer's testamentary instructions or Ferdinand Bloch-Bauer's promise of donation is without any basis in law.

2. Without power of attorney from Ferdinand Bloch-Bauer, Dr. Führer was not in a position to fulfill such an obligation. It is obvious that Ferdinand Bloch-Bauer did not grant an authorization of this kind.

3. The fact that in handing over *Adele Bloch-Bauer I* and *Apple Tree I* Dr. Führer invoked Adele Bloch-Bauer's will is irrelevant, because the will did not establish any obligation on the part of Ferdinand Bloch-Bauer, and he did not authorize Dr. Führer to fulfill it. Dr. Führer obviously invoked the will in order to cover up his own transactions, which in substance run counter to the testamentary-compliance theory, as he did not give the Austrian Gallery a single picture without material reciprocation. In view of this it hardly matters that Ferdinand Bloch-Bauer's alleged obligation was not yet due at that time.

4. Contrary to the *Finanzprokurator's* view on page 13 of the Opinion, the fact that the Ferdinand Bloch-Bauer's heirs (represented by Dr. Rinesch) did not enter a restitution claim after 1945 **does not constitute conclusive consent** to Dr. Führer's actions. A restitution claim was not

made because an explicit agreement was made with the Austrian Gallery to relinquish the paintings to it .

Thus, in the period between 1938 and 1945, no basis was laid either for a claim by the Austrian Republic against Ferdinand Bloch-Bauer for transfer of ownership of the paintings, nor was an existing title effectively asserted.

E. Applicability of the Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections dated 4th December 1998, Federal Legal Gazette I 1998/181

I. The Federal Law of 4th December 1998, Federal Legal Gazette I 1998/181

1. Basic Principles

The Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections dated 4th December 1998, *Federal Legal Gazette* I 1998/181, referred to below as the Restitution Act 1998, empowers Austria's Minister of Finance, Minister of Education, Science & Culture, Minister for Economic Affairs and Minister of Defense to return artworks from Austrian museums and collections, including the Federal Movables Agency [*Bundesmobilienverwaltung]*, **to their original owners** or legal successors upon death **without remuneration.**

Pursuant to § 2 Section 2 of the Restitution Act 1998, prior to transfer of ownership these federal ministers are obligated to consult the Advisory Council established pursuant to § 3. This federal law **does not establish a claim** to transfer of ownership.

Pursuant to §1 of the Restitution Act 1998, authorization hinges upon meeting one of three conditions defined in § 1 Paragraphs 1 to 3.

§ 1 Paragraph 1 covers artworks "which were the subject of restitution to their original owners or legal successors upon death and which after 8th May 1945 in the course of proceedings arising therefrom pursuant to the federal Law Regarding the Ban on the Export of Objects of Historical, Artistic or Cultural Significance[14] (*State Law Gazette* [*StGBl*] No. 90/1918) passed into the ownership of the Federal Government without remuneration and are still in the ownership of the Federal Government."

§ 1 Paragraph 2 assumes that the artworks passed into the ownership of the Federal Government lawfully, but had previously been the subject of legal transactions as defined in § 1 of the Annulment Act 1946.

§ 1 Paragraph 3 concerns artworks which, following restitution proceedings, could not be returned to their original owners or legal successors upon death, passed into the ownership of the Federal Government without remuneration as ownerless assets, and are still in the ownership of the Federal Government.

2. The Intentions of the Legislator

The Restitution Act 1998 is based on a government bill dated 25th September 1998 (1390 of Beil St Prot XX. GP). Per the commentary regarding the government bill, the following "problem" must be addressed: Artworks which in the course of or as a consequence of the Nazi regime became the property of the Federal Government are currently in Austrian museums. The problem must be solved by returning the artworks to their original owners or legal successors upon death (1390 of Beil St Prot XX. GP, page 3). Thus the basic goal is as follows: **Artworks which in the course or in consequence of the Nazi terror regime became the property of the Federal Government and are still in its ownership should be returned.**

The legislator's approach is explained in greater detail in the commentary (1390 of Beil St Prot XX. GP, page 4): According to the commentary, in the course of restitution legislation after World War Two, the Republic returned artworks that had been illegally taken from their former owners; **often,** in unambiguous cases, **a formal restitution procedure was not required**. In the

[14] Translator's note: Referred to below as the Law Regarding the Ban on Exports of Significant Artworks.

1990s the historical provenance of the artworks in Austrian collections was elucidated. The **Commission for Research on Provenance** was established to clarify the ownership situation during the Nazi regime and immediate post-war period. The Commission's **initial results** became available, and pertained to three categories of artwork :

1. Artworks and cultural objects which **in the course of proceedings pursuant to the Law Regarding the Ban on Exports of Significant Artworks had been retained** and had passed into the possession of Austrian museums and collections as "donations" or "dedications". All the artworks in this category had already been the subject of restitution and had been returned to the owners, and thus were well documented. In return for the grant of export permits pursuant to the Law Regarding the Ban on Exports of Significant Artworks, agreements had been made with those seeking export permits that certain specific artworks should go to the Austrian museums. The Commission argued that from today's standpoint, and given that, in the case of both laws regarding adjustments pertaining to artworks and cultural objects, certain specific artworks had been exempted, the procedure adopted at that time was **unjustifiable**.

2. Artworks and cultural objects that had come into the possession of the Federal Government lawfully but had previously been the subject of **legal transactions** that were null and void pursuant to the Annulment Act 1946. In the post-war period some museum directors acquired art objects in good faith from authorized art dealers, but subsequently doubts had arisen about their possibly suspicious provenance. The research into provenance revealed cases of this kind.

3. Artworks and cultural objects which in spite of restitution proceedings could not be returned to the original owners or their legal successors upon death and as ownerless assets passed into the ownership of the Federal Government.

If one looks at the commentary regarding the government bill and the wording of the three elements in § 1, one can see that the legislator essentially **adopted the Commission for Research into Provenance's categories**. According to the commentary (1390 of Beil St Prot XX. GP, page 5), § 1 was basically meant to be a general legal provision. This was because investigations had not been completed, and the specific art objects to be covered by the authorization had not yet been identified.

Below, we discuss whether the Klimt paintings in question fit into any of these categories. In his Opinion, the *Finanzprokurator* denies this; we address his argumentation below. For purposes of clarity, we will consider the categories covered by § 1 Paragraphs 1 to 3 of the Restitution Act 1998 in reverse order.

II. Applicability of § 1 Paragraph 3 of the Restitution Act 1998

§ 1 Paragraph 3 of the Restitution Act 1998 clearly does not apply. It requires that the work of art should have passed as an ownerless asset into the possession of the Federal Government without remuneration. In the case of the Klimt paintings this was obviously not so (the *Finanzprokurator* reaches the same conclusion on page 13 of his Opinion).

III. Applicability of § 1 Paragraph 2 of the Restitution Act 1998

1. Analysis of the Legal Elements

§ 1 Paragraph 2 of the Restitution Act 1998 is applicable if the artworks passed into the possession of the Federal Government lawfully but prior to this were the subject of a **legal transaction as defined in § 1 of the Annulment Act 1946**. The additional sentence "passed into the possession of the Republic of Austria" is clearly superfluous (cf. also page 12 of the *Finanzprokurator's* Opinion). It should be considered an editorial error and ignored.

Pursuant to § 1 of the Annulment Act 1946, legal transactions with or without remuneration were deemed null and void if they were carried out during the German occupation of Austria and in conjunction with **political or economic persecution** by the German Reich and resulted in natural or legal persons being deprived of property or property rights that was theirs on 13th March 1938.

This **annulment was**, however, **not absolute**, as enforcement of § 2 of the Annulment Act 1946 was subject to special implementation laws. Based on this, a total of seven post-war **restitution laws** that set a time limit for restitution claims were enacted. These time limits were

extended repeatedly; the last time limit for restitution claims ran out in 1956 (see Oberhammer, "The legal treatment of property without heirs or known provenance belonging to Jewish victims of National Socialism," *NZ* 2001, 40 FN 6).

This aspect of Austrian restitution legislation, which is problematic from a legal policy point of view (cf. Wilhelm, "The Narrow Path of Justice", *ecolex*, 1998, 898) is of no consequence to the present case. The second element of § 1 Paragraph 2 of the Restitution Act 1998 makes it a prerequisite that the Republic became **the lawful owner of the work of art after 1945**. The Restitution Act 1998 does not as it were "reverse" the nullifying action of the Annulment Act 1946, the direct applicability of which came to an end when the time limits defined in the post-war restitution laws were reached. Instead, the elements of § 1 of the Annulment Act 1946 are an independent prerequisite for the applicability of § 1 Paragraph 2 of the Restitution Act 1998. The applicability of the post-war restitution laws is not relevant.

2. Application to the Present Case

The first question is whether the Klimt paintings were the subject of legal acts or legal transactions as defined in § 1 of the Annulment Act 1946.

Adele Bloch-Bauer I, ***Adele Bloch-Bauer II, Apple Tree I*** and ***Beech Forest (Birch Forest)*** were the subject of various transactions by the lawyer Dr. Führer (see D). The background to these events was the **tax penalty** imposed on Ferdinand Bloch-Bauer during the Nazi period, which Dr. Führer, as the officially appointed administrator, had to "expunge" through the "liquidation" of the art collection.

Dr. Führer handed over ***Adele Bloch-Bauer I*** and ***Apple Tree I*** to the Austrian Gallery in 1941. In doing so he invoked Adele Bloch-Bauer's will. As pointed out above (D), this was merely a cover-up for his real intentions, because in return the Gallery gave him *Kammer Castle on Lake Attersee*. Even if Dr. Führer had truly wanted to fulfill the will, it would have been **"an act of fulfillment" permeated by National Socialism**, for which Dr. Führer was, from the perspective of the Annulment Act 1946, neither legally mandated nor authorized by Ferdinand Bloch-Bauer.

Dr. Führer sold ***Beech Forest (Birch Forest)*** to the Vienna City Collections in 1942, and sold ***Adele Bloch-Bauer II*** to the Austrian Gallery in 1943. Dr. Führer's conduct with regard to ***Houses in Unterach am Attersee*** is not entirely clear. We must assume that with the consent of the authorities he kept it as a "reward" for liquidating Ferdinand-Bloch Bauer's art collection.

In view of the facts of the case, there is no doubt that the nullity clause of § 1 of the Annulment Act 1946 is applicable to **all the "transactions"** carried out by **Dr. Führer**. This is because all the legal transactions and legal acts were carried out as part of the political and economic persecution by the German Reich, in order to deprive Ferdinand Bloch-Bauer of his property. Thus the first condition for the applicability of § 1 Paragraph 2 of the Restitution Act 1998 is fulfilled for all the paintings.

The second prerequisite indicated in Paragraph 2 is that the Federal Government must have become the **lawful owner** of the pictures after 1945. This prerequisite is met, due to the agreement with the Austrian Gallery made by the lawyer Dr. Rinesch, on behalf of Ferdinand Bloch-Bauer's heirs. In the agreement, the heirs acknowledge Adele Bloch-Bauer's will, and acknowledge that through his statement to the probate court Ferdinand Bloch-Bauer committed to transfer ownership of the pictures to the Austrian Gallery after his death. In light of the actual legal situation, he was not under any obligation of this kind. Nonetheless, the goal of the heirs' acknowledgment was to bring about a legal situation in which the Gallery would become the owner of the paintings. It is important to note that the heirs' acknowledgment was **directly connected** with their wish to obtain **export permits** for the other pictures. That will be of considerable importance to the applicability of § 1 Paragraph 1 of the Restitution Act 1998 (see IV). In connection with Paragraph 2, it is also important to ask whether the connection between the acknowledgement and the offer of support for the granting of export permits threatens the acknowledgement's validity with regard to the legal situation at that time. That would mean the Republic did not become the "lawful" owner of the artworks as defined in § 1 Paragraph 2 of the Restitution Act 1998. However, in our opinion the validity of the acknowledgement is not threatened.

In light of the **wording** of § 1 Paragraph 2 of the Restitution Act 1998, its prerequisites **are fulfilled** for *Adele Bloch Bauer I*, *Adele Bloch-Bauer II, Apple Tree I, Beech Forest (Birch Forest)* and *Houses in Unterach am Attersee.*

However, there is another **obstacle** to the applicability of § 1 Paragraph 2 of the Restitution Act 1998: The legislator had a **special purpose** in mind with § 1 Paragraph 2 of the Restitution Act 1998 (see above, I.2). He had in mind pictures which after the war were acquired for Austrian museums in good faith at auctions and from authorized dealers, but which had been taken from their former owners due to persecution during the Third Reich as defined in the Annulment Act 1946. The goal was to single out instances of **acquisition from third parties**, as opposed to acquisitions **from parties with a valid claim,** as in the present case.

This is confirmed by a **systematic interpretation** of Paragraph 2 in conjunction with Paragraph 1 of § 1 of the Restitution Act 1998. Artworks that had been the subject of restitution after the war (first prerequisite indicated in Paragraph 1) were usually to be found in Austrian museums because they had been taken from their owners via legal transactions as defined in Paragraph 1 of the Annulment Act 1946; otherwise they would not have been returned or their return asked for. From the perspective of that time, the relinquishment to the Federal Government without remuneration as defined in Paragraph 1 (second prerequisite indicated in Paragraph 1) constituted a lawful acquisition. If Paragraph 2 referred to lawful acquisition from parties with a valid claim, Paragraph 1 and the additional prerequisite of a connection between the acquisition by the Republic and export permits for other artworks would have no sphere of applicability. Paragraph 2 would make Paragraph 1 redundant, which is not permissible, and has to be avoided through **limiting interpretation**. Therefore the wording of Paragraph 2, which is excessively broad in light of the legislative history, must be limited, to the effect that lawful acquisitions by the Republic does not refer to acquisitions from parties with a valid claim who were deprived of the paintings at an earlier time.

Thus the conditions for an authorization pursuant to § 1 Paragraph 2 of the Restitution Act 1998 are not fulfilled.

IV. Applicability of § 1 Paragraph 1 of the Restitution Act 1998

1. Legal Elements

§ 1 Paragraph 1 of the Restitution Act 1998 deals with artworks "which were the subject of restitution to their original owners or legal successors upon death and which after 8th May 1945 in the course of proceedings arising therefrom pursuant to the federal Law Regarding the Ban on the Export of Significant Artworks (*State Law Gazette* [*StGBl*] No. 90/1918) passed into the ownership of the Federal Government without remuneration and are still in the ownership of the Federal Government."

With § 1 Paragraph 1 of the Restitution Act 1998 , the legislator rejects certain **conduct by the authorities** in the past which per se was in accordance with the legal situation at that time. The intention is to reverse the consequences of that conduct, namely the Federal Government's ownership of the artworks in question. Thus the legislator rejects "**counter-trades**" in which export permits for artworks were granted in exchange for relinquishment of other artworks. Nevertheless, this deprecation by the legislator does involve a **historical component**. Artworks that initially were taken from their owners by and as a result of the **Nazi regime** have to be involved. Generally this involved persons who were exposed to personal and material persecution under the Nazi regime, emigrated as a result, and after the liberation of Austria made efforts to have their property restituted, so that they could bring it (including artworks) to their new place of residence abroad. This is only expressed indirectly in the legislation, in that it is geared towards **restitution** and **export proceedings arising therefrom.** Thus it is clear that it does not relate to any later export proceedings.

The wording of the law links restitution to the following conditions:

1.The artwork has to have been the **subject of a restitution** to the **original owner** or his legal successors upon death;

2. in the course **of proceedings arising therefrom** pursuant to the provisions of the Law Regarding the Ban on Exports of Significant Artworks the artwork has to have passed **into the ownership of the Federal Government** after 8th May 1945 **without remuneration**;

3. and **it must still be in the ownership of the Federal Government**.

2. The *Finanzprokurator*'s Arguments

First, we address the *Finanzprokurator*'s argument (Opinion, page 12). He argues that § 1 Paragraph 1 of the Restitution Act 1998 is not applicable, because the prerequisite of **original ownership by** Ferdinand Bloch-Bauer (and therefore his heirs) as defined in the Restitution Act 1998 is not met. He argues that the ownership by the Federal Government arises from legal acts before 1938. This view is **wrong** and has been rebutted in A, B, and C. Ferdinand Bloch-Bauer and his heirs should be deemed the original owners as defined in § 1 Paragraph 1 of the Restitution Act 1998.

The *Finanzprokurator* also argues that only *Houses in Unterach am Attersee* and *Beech Forest (Birch Forest)* passed into the ownership of the Federal Government **after 8th May 1945**, and that of these two paintings only *Houses in Unterach am Attersee* passed into the ownership of the Federal Government **without remuneration** as defined in § 1 Paragraph 1 of the Restitution Act 1998 (*Kammer Castle on Lake Attersee III*, also mentioned, is not in dispute, so we will not discuss it here). However, in our opinion it is not possible to differentiate between *Houses in Unterach am Attersee* and *Beech Forest (Birch Forest)*. Dr. Rinesch, as the heirs' representative, made the agreement with the Austrian Gallery that *Houses in Unterach am Attersee* would be handed over to the Gallery, and that the heirs would, in favor of the Austrian Gallery, give up their claim to restitution of *Beech Forest (Birch Forest)* by the intermediate (unlawful) acquirer, the Vienna City Collections. **In both cases** the heirs transferred their right to the paintings (in one instance their actual ownership; in the other, their claim to restitution from the City Collection) to the Austrian Gallery. This transaction was either in both instances without remuneration as defined in § 1 Paragraph 1 of the Restitution Act 1998, or in neither of the two instances. We discuss whether § 1 Paragraph 1 is applicable to these paintings below.

The *Finanzprokurator* also points out that none of the pictures was the subject of **export proceedings**. This is true, but on closer inspection § 1 Paragraph 1 of the Restitution Act 1998 does not make this a prerequisite. It merely says that the "restitution" has to have given rise to export proceedings in the course of which the work of art was relinquished to the Republic. In light of the rationale behind this provision, relinquishment of the restituted work of art to the

Republic so as to obtain an export permit for other artworks must be deemed sufficient. It would be unreasonable to argue that the relinquishment had to have been preceded by a formal request for an export permit (even) in the case of the artworks subsequently relinquished.

Thus the *Finanzprokurator*'s arguments do not seem sound.

3. Application of § 1 Paragraph 1 of the Restitution Act 1998 to the Present Case

As already stated, for authorization pursuant to § 1 Paragraph 1 to apply, the following conditions must be met: The paintings have to have been the subject of a restitution to the original owner or legal successors upon death (see below, *a*); in the course of proceedings arising therefrom pursuant to the Law Regarding the Ban on Exports of Significant Artworks they have to have passed into the possession of the Federal Government after 8th May 1945 without remuneration (see below, *b*); and they must still be in the possession of the Federal Government (see below, *c*).

In formulating this law, the legislator had a certain **typical case** in mind: Artworks that have been taken from their owner are returned to their rightful owner (or his heirs) after 1945; the owner wants to export them; and in order to obtain an export permit he relinquishes one or more artworks to the Republic.

a) Subject of a Restitution

It is not clear from the wording of the law whether the restitution has to be based on **formal proceedings** under one of the post-war restitution laws (see above, III.1). There are no indications regarding a more precise definition of "restitution". Nevertheless, the commentaries regarding the Restitution Act 1998 do provide some help. Thus the general commentary regarding the government bill (Beil St Prot XX. GP, page 4) contains the note that after the war artworks were often returned informally, i.e. there were no formal restitution proceedings. Nowhere is it suggested that in such instances the law should not be applicable. It is therefore

reasonable to argue that "restitution" also means **the informal return** of artworks that had been taken from the victim during the Nazi period.

Below, we first address the question of applicability to *Adele Bloch-Bauer I, Adele Bloch-Bauer II,* and *Apple Tree I*. These paintings are certainly not a "typical case" of the kind on which the law is based. None of these pictures was returned by the Republic of Austria to Ferdinand Bloch-Bauer's heirs and then surrendered back to the Republic. Dr. Rinesch, as the heirs' representative, came to an agreement with the Austrian Gallery that the paintings **already in the possession** of the Gallery (*Adele Bloch-Bauer I, Adele Bloch-Bauer II* and *Apple Tree I*) should **pass** into its ownership.

In formal terms, the parties based these donations on acknowledgment of a right of the Gallery pursuant to Adele Bloch-Bauer's will and Ferdinand Bloch-Bauer's declaration. In fact, however, the agreement was (also) a prerequisite for the granting of an **export permit** for the remaining pictures in the Ferdinand Bloch-Bauer collection. Assuming one does not take into account the reference to Adele Bloch-Bauer's will and Ferdinand Bloch-Bauer's declaration (we will discuss their relevance later), then the reason a restitution did not take place is simply that Ferdinand Bloch-Bauer's heirs had already reached a "**short-cut**" agreement with the Gallery: Instead of asking for restitution of the paintings so that they could then be given back to the Republic, it was agreed that they should be relinquished to the Republic via **renunciation of restitution**.

It is important to ask whether authorization pursuant to § 1 Paragraph 1 of the Restitution Act 1998 is not applicable simply because there was **a short-cut** to relinquishment instead of an actual restitution.

An interpretation that ruled out authorization pursuant to § 1 Paragraph 1 of the Restitution Act 1998 in cases of short-cuts would make no sense. Provided the other prerequisites indicated in § 1 Paragraph 1 of the Restitution Act 1998 are met, a "shortening" of the restitution and relinquishment process should not be a obstacle to its applicability. Why should an authorization pursuant to § 1 Paragraph 1 be valid for artworks that were first returned by the Republic and then surrendered back to it again by the owner so as to allow him to export other artworks, yet be invalid if the party with a valid claim agreed in advance with the Republic to renounce a request for restitution so as to be able to export other artworks? The absence of a "to-and-fro movement"

("restitution followed by surrender back to the Republic"), in favor of a shortened procedure, should be of **no significance**. After all, the authorities' conduct, which is rejected by the legislator per the elements of Paragraph 1, occurred to an equal extent in both cases. The only difference is in the formalities of the procedure.

An interpretation to this effect (or at any rate application by analogy) of § 1 Paragraph 1 of the Restitution Act 1998 (for a discussion of application by analogy in administrative law, see Antoniolli/Koja, *Allgemeine Verwaltungsrecht 3rd edition* [*General Administrative Law*], 103f; Raschauer, *Allgemeine Verwaltungsrecht* [*General Administrative Law*], Section 570 f) would only encounter objections if the legislator wished to restrictively define the conditions for authority to restitute. This is unlikely, in light of the commentary regarding the government bill concerning the Restitution Act 1998 (see Beil St Prot XX. GP, page 4). It is evident from that part of the commentary that in drawing up Paragraph 1 the legislator adopted the Commission for Research into Provenance's **findings up until then**, and used them as the basis for that Paragraph. Elsewhere in the commentary it is made clear that the Commission's findings were only **interim results,** as the research had not been completed (in his parliamentary speech of 5th November 1998 the Deputy Kohl mentioned that only 30% of the art objects had been inspected so far). According to the commentary, the legal authorization was therefore couched in general form, and the specific art objects were not listed. There are no plans for a further law based on further findings by the Commission. If one views the formulation of § 1 Paragraph 1 of the Restitution Act 1998 in light of the legislator's intentions, one can see that its rather literal wording is somewhat too narrow, given its goal and purpose. After all, the key issue is whether a "disreputable exchange" as defined above took place.

It therefore seems correct to apply § 1 Paragraph 1 of the Restitution Act 1998 by way of analogy to surrender of artworks to the Republic via a **short-cut**. The fact that in the present case a "relinquishment" took place, rather than a restitution followed by surrender back to the Republic, does not preclude the applicability of § 1 Paragraph 1 to *Adele Bloch Bauer I*, *Adele Bloch Bauer II*, and *Apple Tree I*.

Different issues arise with regard to the applicability of § 1 Paragraph 1 of the Restitution Act 1998 to *Houses in Unterach am Attersee* and *Beech Forest (Birch Forest)*. *Houses im Unterach am Attersee* was in the possession of Dr. Führer, who was assigned the task of "liquidating"

Ferdinand Bloch-Bauer's art collection to "expunge" the tax penalty imposed on him. We must assume that with the consent of the Nazi authorities Dr. Führer was meant to hold onto the painting as a "reward" for his activities. After the war it passed into the possession of Karl Bloch-Bauer, who held it in safekeeping for Ferdinand Bloch-Bauer's heirs. It was probably given to him in the course of Dr. Führer's arrest by the Allies. It was surrendered to the Austrian Gallery pursuant to the agreement that Dr. Rinesch made with the Gallery in the heirs' name. In that agreement, Ferdinand Bloch-Blauer's heirs also agreed that the Austrian Gallery should ask for the return of *Beech Forest (Birch Forest)* from the Vienna City Collections, which was the interim (unlawful) acquirer. If one assumes these agreements were made in order to obtain an export permit for the other pictures (we discuss this assumption below), it is fair to argue in favor of authority for restitution pursuant to § 1 Paragraph 1 of the Restitution Act 1998 for both these paintings.

The key issue is whether the prerequisite for fulfillment of the legal element "subject of a restitution" as set forth in § 1 Paragraph 1 of the Restitution Act 1998 is that the artworks were first restituted by **the Republic**. After 1945 *Houses in Unterach am Attersee* and *Beech Forest (Birch Forest)* were not in the possession of the Republic, but rather in possession of Dr. Führer and the City of Vienna (City Collections). If it is irrelevant *who* returned the artworks to their rightful owners, then the legal element "subject of a restitution" is fulfilled in the case of *Houses in Unterach am Attersee*: The painting was purloined by Dr. Führer, and was returned to the heirs via an informal route (handover to Karl Bloch-Bauer as the heirs' representative). The situation regarding *Beech Forest (Birch Forest)* is similar to the situation regarding *Adele Bloch-Bauer I, Adele Bloch-Bauer II* and *Apple Tree I*: The heirs renounced a request for restitution simply because they had reached a short-cut agreement with the Austrian Gallery, to the effect that the Austrian Gallery should ask for the return of the painting from the City Collections. In place of a relinquishment of possession order ("to-and-fro movement"), the procedure was shortened via a kind of assignment.

Thus the key issue is whether a prerequisite for the applicability of § 1 Paragraph 1 of the Restitution Act 1998 is that the artworks were in the possession of the Republic, or whether it is sufficient that during the Nazi period they were taken by whomsoever from the parties with a valid claim. The commentary regarding the Restitution Act 1998 (1390 Beil XX. page 4) does contain one passage that assumes possession by the Republic: "As part of restitution legislation

after the Second World War, **the Republic of Austria** returned, among other things, artworks unlawfully purloined from their then owners to their original owners or legal successors upon death; often, in unambiguous cases, formal restitution proceedings were unnecessary." However, we doubt whether clear conclusions can be drawn from this text. It is worth noting the wording of the law, which hints at a close link between "restitution" and "counter-trades" ("subject of a restitution…in the course of proceedings arising therefrom…"), which would only have been possible in the case of a restitution by the Republic. On the other hand, one could also argue that it is immaterial whether the restitution was carried out by the Republic itself. If, when interpreting the concept "restitution", one orients oneself to the post-war restitution laws, at least by way of analogy, then restitutions by **private persons** are included. This is covered by the 3rd Restitution Law (Federal Law of 6th February 1947, *Federal Legal Gazette* 54/1947). Moreover, it is important to remember that the main rationale for restitution pursuant to § 1 Paragraph 1 of the Restitution Act 1998 is that the authorities' earlier practice of making the granting of export permits dependent on the surrender of specific artworks purloined during the Nazi period is rejected. So for the purposes of the legislation it should be immaterial who took the artworks from the parties with a valid claim.

It is also important to take into account the actions of the Advisory Council set up pursuant to § 3 of the Restitution Act 1998. Its actions do not appear to be oriented to whether the artworks were first returned by the Republic. Thus 16 Klimt drawings were returned to Ferdinand Bloch-Bauer's heirs pursuant to § 1 Paragraph 1 of the Restitution Act 1998; after 1945 these were initially not in the possession of the Republic. Karl Bloch-Bauer "held onto" these drawings until, in return for an export permit, they were relinquished to the Albertina Museum without remuneration as defined in § 1 Paragraph 1 of the Restitution Act 1998.

To sum up: No conclusive decision can be reached as to whether restitution as defined in § 1 Paragraph 1 of the Restitution Act 1998 is restricted to return by the Republic. If that is what the law requires, then *Houses in Unterach am Attersee* and *Beech Forest (Birch Forest)* do not fall within the authorization to restitute. But if it is sufficient that the pictures were taken by whomsoever during the Nazi period, then the prerequisite "subject of a restitution" is fulfilled for these two paintings as well.

b) Transfer of Ownership to the Federal Government after 8th May 1945 Without Remuneration in the Course of Export Ban Proceedings Arising from the Restitution

Below, we investigate whether the pictures were surrendered "without remuneration" to the Republic after 8th May 1945 "in the course of" export proceedings arising from restitution. Thus the issue is whether, as required, there is a **connection** between the **granting of export permits** and the **relinquishment** of the artworks, and whether surrender "**without remuneration**" as defined in § 1 Paragraph 1 of the Restitution Act 1998 took place. It is certain that the Republic acquired ownership of all the paintings **after 8th May 1945**. The *Finanzprokurator*'s view to the contrary (see above, 2) is based on a legal interpretation of the events up to 1945 that has already been rebutted in A to C.

First, we investigate whether there is a **sufficient connection** between the relinquishment of the paintings and the granting of export permits for other artworks.

It is clear from the documents that Dr. Rinesch, as the representative of Ferdinand Bloch-Bauer's heirs, **initially was also trying to have the Klimt paintings returned**, and brought the heirs' intentions in this respect to the attention of the Austrian Gallery's representatives (see Dr. Rinesch's letter to Dr. Garzarolli dated 19th January 1948): "*I would be grateful if you would inform me how you would respond to my clients' restitution claims*." After this, negotiations were held, during which Dr. Rinesch inquired about the whereabouts of the remaining pictures from the Ferdinand Bloch-Bauer collection. Then the question of Austrian Gallery's possible estate law claim to the Klimt paintings was raised. According to the available documents, neither Ferdinand Bloch-Bauer's heirs and Dr. Rinesch on the one hand, nor Dr. Garzarolli as the Austrian Gallery's representative on the other, acknowledged that the Austrian Gallery had an unambiguous claim (despite the opinion sent by the *Finanzprokurator* to Dr. Garzarolli on 6th March 1948, the contents of which are inaccurate). It seems that Dr. Rinesch, as representative of the heirs, had not by any means decided to unreservedly acknowledge a right of the Austrian Gallery to the pictures. In his **request to export** various pictures from the Bloch-Bauer collection dated 13th April 1948, he states that it would have been perfectly feasible to contest the validity of the legacy and of Ferdinand Bloch-Bauer's declaration, but that in order to obtain the export permits he and the heirs were refraining from doing so: "*Nevertheless, understandably they* [Ferdinand

Bloch Bauer's heirs] *wish to bring the testator's remaining assets to their place of residence. It is also important to note that much of the art collection and formerly substantial assets have been irrevocably lost due to Nazi appropriation methods.*

Nonetheless, the heirs whom I represent have spontaneously issued a declaration stating that Klimt paintings from the Bloch-Bauer collection, including several top-quality works, should be passed to the Austrian Gallery pursuant to the last wills of Ferdinand and Adele Bloch-Bauer. In light of the Bloch-Bauer family's completely changed situation with regard to assets, this declaration is specifically intended to demonstrate the Bloch-Bauer heirs' interest in Austrian art and Austrian museum holdings. I hope that ***in return*** *the Federal Monument Office and the public collections involved will apply the* ***provisions of the Memorial Protection Act*** *in an* ***accommodating*** *manner that takes into account the special circumstances surrounding the case*[15].

Dr. Garzarolli, as director of the Austrian Gallery, clearly offered his personal support for the granting of export permits, and kept his promise, via the **position he took regarding the request for export permits** for the remaining pictures (see Dr. Garzarolli's letter to the Federal Monument Office dated 21st July 1949). In that letter he expressly draws attention to the heirs' readiness to recognize the legacy, and makes it clear he believes that a difficult situation has thereby been resolved. Thus he advises that the request for export permits should **be supported "by way of an exception"**:

"*The Austrian Gallery has now reassessed the issues. In light of the reasons indicated below, we now recommend to the Federal Monument Office (dI) that export permits for the two paintings be granted, by way of an exception.*

Despite various transactions which were carried out during the Nazi period by Mr. Bloch-Bauer's legal representative and which significantly worsened the Austrian Gallery's position, Mr. Ferdinand Bloch-Bauer's heirs immediately acknowledged his declaration – supplied to the District Court of Vienna I for the event of his death – indicating his intention to uphold the desire of his deceased wife to donate five Klimt paintings to the Austrian Gallery. As a result, they have created a situation in which the Austrian Gallery can actually receive this legacy."

[15] Authors' note: i.e. the application for export permits.

Thus there is **no doubt that there is a connection between the acknowledgement of the legacy and the granting of export permits** for other artworks from Ferdinand Bloch-Bauer's collection. The current Minister of Education, Science & Culture shares this view. In her reply to the written parliamentary questions from the Deputy Mag. Terezija Stoisits and friends concerning artworks in the possession of the Republic of Austria (No. 4024-4263/J – NR/1998) she made the following remarks (5184/AB XX.GP) regarding B*eech Forest (Birch Forest), Adele Bloch-Bauer I, Adele Bloch-Bauer II*, *Kammer Castle on Lake Attersee III* and *Apple Tree I*:

"The connection between the relinquishment of the Klimt pictures to the Austrian Gallery and the granting of export permits is evident: In their arguments, Dr. Rinesch and the director of the Austrian Gallery Dr. Garzarolli both unambiguously refer to the heirs' request for export permits. Thus in July 1949 Garzarolli recommends that export permits be granted for two previously barred pictures, by referring to the Klimt legacy."

It makes no difference that the acknowledgement was given before the formal request for export permits was submitted. "**In the course of proceedings**" pursuant to the Law Regarding the Ban on Exports of Significant Artworks as defined in § 1 Paragraph 1 of the Restitution Act 1998 should not be interpreted as "relating to a sequence in time"; it merely expresses that there has to be a **connection** between the surrender of the artworks and the granting of export permits for other artworks. The question of whether artworks were surrendered because export permits were promised, or because they were granted simultaneously or later, is immaterial.

Below, we investigate whether the pictures were left to the Austrian Gallery "**without remuneration**" as defined in § 1 Paragraph 1 of the Restitution Act 1998.

The absence of remuneration as defined in § 1 Paragraph 1 should not be understood in the civil-law sense. In the civil-law sense, "without remuneration" means a service rendered without a quid pro quo, i.e. rendered out of generosity (cf only Koziol/Welser*, Bürgerliches Recht, 11th edition,* I, 104). The legislator who drew up the Restitution Act 1998 **did not have a voluntary donation in mind**; he had in mind formal "donations" or "dedications" in a non-technical sense, which were made to the Republic in order to obtain export permits. If this were viewed in purely civil-law terms, there would be no absence of remuneration: Transfer of ownership of the artwork in question was not carried out out of generosity and without a quid pro quo, but rather solely to

obtain an export permit. Indeed if one were to disregard the fact that the granting of an export permit is an official act, then one would argue that under civil law a counter-trade was involved (or, if the export ban was doubtful, an arrangement).

However, in the Restitution Act 1998 the meaning of "without remuneration" is quite specific: The situation has to involve **artworks** for which the owner **transferred ownership** to the Republic and for which he was **forced to transfer ownership**, in order to exports permits for other artworks, without the Republic in return providing a consideration in an amount corresponding to the artworks' value on the open market. Thus the connection between the transfer of ownership and the granting of export permits for other art works is mentioned separately in the law (see above); and it is of decisive importance to an **understanding of transfer of ownership "without remuneration"** as defined in § 1 Paragraph 1 of the Restitution Act 1998. The two elements cannot be separated; together, they constitute the legal element "transfer of ownership without remuneration in the course of export ban proceedings arising from restitution".

Nevertheless, as the present case is atypical, we must also discuss the question of "without remuneration" separately. The special circumstances are that Ferdinand Bloch-Bauer's heirs did not surrender ownership of the paintings to the Austrian Gallery in the formal guise of a "donation", but rather acknowledged "without remuneration" the Republic's right to ownership of the paintings, by invoking Adele Bloch-Bauer's will and Ferdinand Bloch-Bauer's declaration to the probate court. Nonetheless, this is not an obstacle to the applicability of § 1 Paragraph 1 of the Restitution Act 1998, for the following reasons:

As explained in A, B, and C, in view of the legal circumstances the Austrian Gallery in actuality had **no legal claim** to ownership arising from a title of this kind. From a substantive-law standpoint, the Klimt paintings were the **property of Ferdinand Bloch-Bauer's heirs**. The heirs would of course have been able to demand that the paintings be handed over by the Austrian Gallery and the City Collections, and to refuse to surrender the painting in the possession of Karl Bloch-Bauer. However, this would have led to a legal battle lasting perhaps several years, and made the Gallery less willing to help search for the other pictures, and would have made the Federal Monument Office less willing to grant an export permit. The parties with a valid claim therefore preferred to relinquish certain pictures to the Republic.

The **relinquishment** or surrender of the paintings to the Austrian Gallery was designed to facilitate the **export** of the remaining artworks, and did indeed make this possible. It must have been clear to all those involved that without the indirect **pressure of a refusal of an export permit** for the remaining pictures, the "**acknowledgement**" would not have been made. Even if one leaves aside our legal analysis (see A, B, and C), the Austrian Gallery faced a legally unfavorable situation. Ferdinand Bloch-Bauer had held out the prospect of compliance with his wife's wishes, but had not followed through (he did not leave the paintings to the Austrian Gallery in his will). Some of the paintings were in the Austrian Gallery's possession, but had been **acquired in a manner** (counter-trade between Dr. Führer and the Austrian Gallery; Dr. Führer sold one painting to the Austrian Gallery) that was definitely not in accordance with Adele Bloch-Bauer's intentions, let alone Ferdinand Bloch-Bauer's. Dr. Garzarolli rightly noted in various letters that the manner in which the paintings were acquired up to 1945 constituted "a rather dangerous situation" for the Gallery. In addition, he was keen to acquire the Klimt paintings that were not yet in the Gallery's possession. For this reason, and to clear up the circumstances surrounding the paintings acquired from Dr. Führer, he needed Ferdinand Bloch-Bauer's heirs to acknowledge a legal claim of the Gallery. To obtain this acknowledgement, he (probably with the approval of Dr. Demus of the Federal Monument Office) linked the question of the granting of an export permit for the remaining pictures to the surrender of the Klimt paintings. In light of this, it is not surprising that, as mentioned above, the **Federal Minister** responsible has acknowledged an **"evident" connection** between the relinquishment of the Klimt paintings and the granting of an export permit.

To sum up: In light of the circumstances, it is fair to argue that a transfer of ownership without remuneration as defined in § 1 Paragraph 1 of the Restitution Act 1998 was involved. The director of the Austrian Gallery, Dr. Garzarolli, was aware that Ferdinand Bloch-Bauer's heirs were only relinquishing the paintings to the Gallery so that they could obtain export permits for the remaining artworks. Instead of a formal donation, the transfer of ownership was based on the acknowledgement of the Austrian Gallery's claims pursuant to Adele Bloch-Bauer's will and Ferdinand Bloch-Bauer's declaration to the probate court. Thus paintings to which, in light of the legal circumstances, the Republic had no claim passed into the ownership of the Republic based on the owners' consent. The transfer of ownership through acknowledgement was made "without

remuneration " as defined in § 1 Paragraph 1 of the Restitution Act 1998, because the only quid pro quo was the granting of export permits for other expropriated artworks.

c) Property of the Republic

The final prerequisite for authorization pursuant to § 1 Paragraph 1 of the Restitution Act 1998 is not problematic. The paintings are currently in the **ownership of the Republic**.

d) Result

Thus § 1 Paragraph 1 of the Restitution Act 1998 is **applicable** to *Adele Bloch Bauer I, Adele Bloch Bauer II* and *Apple Tree I* at least **by way of analogy**. Whether the same is true of *Houses in Unterach am Attersee* and *Beech Forest (Birch Forest)* depends on whether the applicability of § 1 Paragraph 1 is contingent on the paintings being in the possession of the Republic after 1945. In light of the practices of the Advisory Council established pursuant to § 3 of the Restitution Act 1998 (the Advisory Council's actions do not seem to be oriented to this), on balance it is fair to say that § 1 Paragraph 1 is probably applicable to those two paintings as well.

V. Summary

1. The Restitution Act 1998 empowers Austria's Minister of Finance, Minister of Education, Science & Culture, Minister for Economic Affairs and Minister of Defense to return artworks from Austrian museums and collections, including the Federal Movables Agency, **to their original owners** or legal successors upon death **without remuneration,** provided one of the three legal elements set forth in § 1 Paragraphs 1 to 3 is applicable.

2. The **legal element set forth in Paragraph 3** concerns artworks which, following restitution proceedings, could not be returned to their original owners or legal successors upon death, passed into the ownership of the Federal Government without remuneration as ownerless

assets and are still in the ownership of the Federal Government. This was obviously not so in the present case.

3. The prerequisite for authorization pursuant to **§ 1 Paragraph 2** of the Restitution Act 1998 is that the artworks passed into the ownership of the Federal Government lawfully, but had previously been the subject of legal acts as defined in § 1 of the Annulment Act. After 1945 the paintings passed lawfully into the ownership of the Federal Government pursuant to an agreement between Ferdinand Bloch-Bauer's heirs and the Austrian Gallery. Between 1938 and 1945 all the paintings were the subject of legal transactions or legal acts covered by § 1 of the Annulment Act 1946. In light of the wording of § 1 Paragraph 2 of the Restitution Act 1998, an authorization to restitute the paintings would basically be applicable. However, in light of the legislator's intentions, § 1 Paragraph 2 must be interpreted restrictively. Lawful acquisition by the Republic is meant to apply only to acquisition from third parties – in particular authorized dealers or at auctions – and **not to acquisition from parties with a valid claim**. If the latter type of acquisition were covered by § 1 Paragraph 2, Paragraph 1 would lose almost all of its sphere of applicability, because acquisition without remuneration as defined in Paragraph 1 was also lawful, and the pictures in question were usually also the subject of legal transactions as defined in the Annulment Act 1946. Thus § 1 Paragraph 2 is not applicable to the present case.

4. The prerequisite set forth in § 1 Paragraph 1 of the Restitution Act 1998 is that the artworks were the **subject of restitution** to their original owners or legal successors upon death and after 8th May 1945 **in the course of proceedings** arising therefrom pursuant to the federal Law Regarding the Ban on the Export of Objects of Historical, Artistic or Cultural Significance passed into the **ownership of the Federal Government** without remuneration. The legislator's intention was to reverse conduct by the authorities that had been lawful in the past, namely the granting of export permits for artworks in exchange for artworks expropriated by the Nazi regime. The legislator's approach was based on the findings of the Commission for Research into Provenance, and § 1 Paragraph 1 presupposed a specific course of events: After the war expropriated art objects were restituted; the owner wanted to export them; but could only obtain an export permit by relinquishing various pieces to the Republic.

5. In the present case, *Adele Bloch Bauer I, Adele Bloch Bauer II*, and *Apple Tree I* were **not restituted;** instead, Ferdinand Bloch-Bauer's heirs came to an agreement with the Austrian

Gallery that the pictures should **remain** with the Gallery permanently, and that the heirs would not demand that they be restituted. The fact that there was no restitution in the literal sense of § 1 Paragraph 1 is not a obstacle to its applicability. It makes **no difference** whether the paintings were first returned by the Republic and then surrendered back into its ownership in connection with export proceedings, or whether the party entitled to restitution agreed to a **short-cut procedure** and waived a restitution demand in order to obtain export permits for other pictures. Thus § 1 Paragraph 1 is applicable by way of analogy, especially as the legislator based his wording on the findings of the Commission for Research into Provenance, which at that time had examined only a small number of the artworks in the collections, with the result that the law makes no mention of short-cut procedures.

6. After the war *Houses in Unterach am Attersee* and *Beech Forest (Birch Forest)* were initially not in the possession of the Republic of Austria; they were in the possession of Dr. Führer and the Vienna City Collections respectively. The key issue is whether the prerequisite for fulfillment of the legal element "subject of a restitution" as set forth in § 1 Paragraph 1 of the Restitution Act 1998 is that the artworks were first restituted by **the Republic.** If initial restitution by the Republic is not a prerequisite, then *Houses in Unterach am Attersee* does fulfill this legal element, because the painting was (informally) returned to Ferdinand Bloch-Bauer's heirs (handed over to their representative Karl Bloch-Bauer). The situation regarding *Beech Forest (Birch Forest)* is similar to the situation regarding *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II* and *Apple Tree I*: The heirs only waived a restitution demand because they had reached a short-cut agreement with the Austrian Gallery that it should ask for the return of the painting from the City Collections. In place of a relinquishment of possession order ("to-and-fro movement"), the procedure was shortened via a kind of assignment.

The actions of the Advisory Council set up pursuant to § 3 of the Restitution Act 1998 do not appear to be oriented to whether the artworks were first returned by the Republic. If it is sufficient that the pictures were taken by whomsoever during the Nazi period, then the prerequisite "subject of a restitution" is fulfilled for *Houses in Unterach am Attersee* and *Beech Forest (Birch Forest)* as well.

7. A further prerequisite for the applicability of § 1 Paragraph 1 is that the paintings were surrendered to the Republic without remuneration and in the course of export permit proceedings.

The transfer of ownership to the Republic was not carried out "voluntarily" as defined in the laws regarding donations; it was carried out in order to obtain an export permit. Therefore relinquishment "without remuneration" as required by § 1 Paragraph 1 should not be understood in the technical civil-law sense. The key point is that the Federal Government gave no material quid pro quo to the parties having a valid claim to the artworks; it merely granted export permits for other artworks. One possible counter-argument to the argument that there was no remuneration is as follows: The relinquishment of the artworks was based on the acknowledgement of the Gallery's claim to the paintings pursuant to Adele Bloch-Bauer's will and Ferdinand Bloch-Bauer's declaration to the probate court. However, in light of the actual legal situation, the Gallery **did not have a valid claim;** moreover, the claim appeared doubtful to Ferdinand Bloch-Bauer's heirs as well as to the authorities. The acknowledgement was made merely with a view to **facilitating the granting of export permits** for the remaining artworks. The Austrian Gallery's "consideration" was that Dr. Garzarolli agreed to intercede on the heirs' behalf with regard to the granting of export permits, and then in fact did so. In light of the direct connection between the acknowledgement of the Gallery's claim and the agreement to grant export permits for the remaining artworks, it is fair to argue that **the relinquishment was "without remuneration"** as defined in § 1 Paragraph 1.

8. The fact that transfer of ownership without remuneration as defined in § 1 Paragraph 1 of the Restitution Act 1998 preceded the granting of an export permit is not an obstacle to the applicability of an authorization pursuant to § 1 Paragraph 1 of the Restitution Act 1998. The transfer of ownership was a **prerequisite for the granting of the export permit**. Indeed in her reply to a written parliamentary question about artworks in the possession of the Republic of Austria, **the current Minister of Education, Science & Culture** stated that there was an evident connection between the relinquishment of the paintings and the granting of an export permit.

To sum up: § 1 Paragraph 1 of the Restitution Act 1998 is applicable at least to *Adele Bloch Bauer I, Adele Bloch Bauer II* and *Apple Tree I*. Whether the same is true of *Houses in Unterach am Attersee* and *Beech Forest (Birch Forest)* depends on whether it is irrelevant that after 1945 the paintings were in the possession of Dr. Führer and the City of Vienna respectively rather than the Republic. In light of the practices of the Advisory Council established pursuant to § 3 of the Restitution Act 1998, on balance it is fair to say that § 1 Paragraph 1 is probably applicable to those two paintings as well.

F. Summary

I. Adele Bloch Bauer's Instructions

1. In situations involving *ordinary use of language*, the word "ask" constitutes a *non-binding request*. This should be the meaning ascribed to it, unless it can be convincingly demonstrated that the testator's intention was to give a binding order. That cannot be proven in the present case.

2. There are several indications that the meaning of the terms used in the instructions was quite clear to the testatrix. It is true that she intended her request to cover the library as well as the Klimt paintings, and that she left it up to the beneficiary of the books – the Vienna People's and Workers' Library – to keep them or sell them and accept the proceeds "as a legacy". However, one cannot in any way infer that the "request" was of a binding nature, because her granting permission for selling and designating the proceeds a "legacy" could ipso jure *only apply if Ferdinand Bloch-Bauer were to meet the non-binding request to arrange the legacy*, or if the substitute inheritance were to apply.

3. If it is argued that there is still doubt as to whether the "request" is binding or non-binding, § 614 of the General Civil Code can be applied by way of analogy. According to this provision, if, in a doubtful case, it cannot be assumed that the testator intended to obligate the heir to pass on the bequeathed assets, then in doubtful cases it is even less reasonable to assume that the testator intended to bindingly obligate the heir to pass on items of his own (the heir's) property to a third party (upon his death). Therefore in doubtful cases it must be assumed that the testator simply expressed a wish, regardless of whom the disputed items belonged to when the will was drawn up.

Adele Bloch-Bauer's "request" is therefore non-binding.

4. If one argues that Adele Bloch-Bauer's request is a binding order, it is not a legacy instruction by the testatrix herself, but rather a *testamentary order* to her sole heir Ferdinand Bloch-Bauer. By contrast with what she says in Paragraph III of Section I of her will, the testatrix is not saying that she leaves the paintings, but rather merely asks her husband to leave the paintings, i.e. to dispose of them upon death in a specific way.

5. Testamentary prohibitions and testamentary orders are *invalid,* because they encroach upon testamentary freedom. Exceptions are only permitted insofar as the instruction can be converted into a reversionary substitution. However, a prerequisite for a reversionary-heir substitution and conversion into a reversionary-heir substitution is that the instruction must relate to *the (first) testator's* own assets or *own property*. Conversion of Adele Bloch-Bauer's request into a reversionary substitution (reversionary-heir legacy) would be feasible if it could be shown that the paintings were her property.

6. The legal situation is much more difficult if the paintings were the property of the heir Ferdinand Bloch-Bauer (as part of his collection). Pursuant to § 662 of the General Civil Code, the bequest of an item of property that belongs[16] to the testator is feasible. However, it is *not the goal of the law to make testamentary orders to the heir permissible*; but legacy instructions which are issued by the testator himself and which refer to items of property of the heir are permissible. According to prevailing opinion (about which we have serious reservations), the legacy is supposedly valid if the testator mistakenly assumed the item of property was his own. This can be contested on grounds of an error; however, in the present case, it would be possible to argue that such action is statute-barred.

7. The *Finanzprokurator* argues that one can convert the testamentary order to Ferdinand Bloch-Bauer into a valid legacy instruction of the testatrix Adele Bloch-Bauer, which would be valid pursuant to § 662 of the General Civil Code. However, one could only make that argument if the legacy was to be implemented upon the death of the testatrix, rather than (as in the present case) upon the death of her heir. This is because an explicit stipulation that the due date is the heir's death constitutes an impermissible encroachment upon testamentary freedom. That means it is all the more impermissible to "convert" a testamentary order into an instruction of this kind having a due date. Indeed in most cases the literature indicates that conversions of this kind are not feasible. Court rulings are not entirely clear on the matter, but are generally cautious. We anticipate that the Supreme Court will issue further rulings on this issue.

Thus the correct view is that Adele Bloch-Bauer's request, if one assumes it was meant to be binding (see A), cannot constitute the basis for a right of the Austrian Gallery (the Republic of Austria) to the paintings if they were the property of Ferdinand Bloch-Bauer.

[16] Translator's note: Sic. Probably: "…an item of property that does not belong..."

8. No firm conclusions regarding ownership can be drawn from the will. The words "My portraits" do not prove anything, because the portraits are portraits of the testatrix herself. The *Finanzprokurator'*s reference to the testatrix's binding instruction to immediately surrender the paintings to the substitute heirs is also unconvincing. This is because the substitute inheritance could only have been implemented if Ferdinand Bloch-Bauer had predeceased the testatrix Adele Bloch-Bauer. In that case Adele Bloch-Bauer could have been totally confident in assuming that *upon her own death she would be the owner* of the paintings. The fact that the testatrix twice mentions "belonging to me" or "my" library, yet avoids using the possessive when referring to the paintings (aside from the reproductions) could be an indication of ownership by Ferdinand Bloch-Bauer.

9. The assumption pursuant to § 1237 of the General Civil Code (old version) –this law was in force until 1978 – is another argument in favor of the paintings being the property of Ferdinand Bloch-Bauer. According to that assumption, *in doubtful cases* items of property which were acquired during a marriage and which were in the matrimonial household were the *property of the husband*. This assumption was effective with regard to all parties. To invalidate it, it would be necessary to prove that Adele Bloch-Bauer had acquired the paintings herself or that Ferdinand Bloch-Bauer had given them to her. If § 1247 Section 1 of the General Civil Code – which states that in doubtful cases precious objects given by a husband to his wife for decorative purposes should be deemed to have been given as a gift – were applicable, there would be no need for such proof. But the paintings do **not** fulfill the prerequisite that they must be **precious objects** given to the wife for **decorative purposes**. All of this lends support to Ferdinand Bloch-Bauer's statement that the paintings were his property.

II. Ferdinand Bloch-Bauer's Declaration to the Probate Court

1. With the words "I promise to faithfully fulfill …" one does not normally incur a legal obligation; one holds out the prospect of *the fulfillment of a moral duty*. Ferdinand Bloch-Bauer had no reason to establish a legal obligation. If he had wanted to meet his wife's wishes, he could have done so without binding himself. *It would have made no sense to impose a binding obligation upon himself*, because it would have hindered his ability to make his own dispositions.

In addition Ferdinand Bloch-Bauer *specifically stressed* the non-binding nature of Adele Bloch-Bauer's wish.

Thus no intention to incur a binding obligation can be deduced from Ferdinand Bloch-Bauer's declaration. Anyone who doubts this should bear in mind the rules regarding lack of clarity pursuant to § 915 of the General Civil Code. Since Ferdinand Bloch-Bauer obtained no quid pro quo for his declaration, the legal rules concerning doubt would lead one to assume that it is non-binding, as the "lesser burden".

2. The declaration was not directed towards the Austrian Gallery. It was made as part of the testamentary compliance confirmation. It is directed solely towards the court, and informs the court that the necessary prerequisites have been met, so that it can issue a completion of probate proceedings confirmation. No notification was sent to the Austrian Gallery as part of testamentary compliance confirmation; by contrast, the other legatees indicated in the will were in fact notified.

3. If one were to accept the *Finanzprokurator*'s view that Ferdinand Bloch-Bauer wanted to establish an obligation via his declaration and that the Austrian Gallery accepted this offer, then *the contents* of an acknowledgement agreement of this kind would have had to have been *the contents of Adele Bloch-Bauer's instructions*, i.e. an obligation on the part of Ferdinand Bloch-Bauer to donate the pictures to the Austrian Gallery upon his own death. Under Austrian law it would be *legally impossible* for Ferdinand Bloch-Bauer (as testator) to establish an agreement-based obligation of this kind. At best it would have been feasible as a "contract of legacy". These are only permitted between spouses and require that the necessary forms be observed.

4. The *Finanzprokurator*'s alternative assumption concerning an *agreement regarding an inter vivos gift* can be refuted by our arguments so far and by the contents of the declaration. One cannot conclude from Ferdinand Bloch-Bauer's declaration to faithfully fulfill Adele Bloch-Bauer's request that the paintings be left to the Austrian Gallery *after his death* that they were to be donated to the Austrian Gallery "immediately", i.e. *in the lifetime* of Ferdinand Bloch-Bauer. If one were to assume there was an intention to donate, the only relevant content would be a promise to donate the paintings to the Gallery after his death. But then the form requirements regarding a donation due upon death would have had to have been observed (§ 956 Section 2 of

the General Civil Code; § 1 Section 1 lit d of the Law Regarding Notarial Acts), and in the present case none of those requirements was fulfilled.

5. Even if one were to assume that in making the declaration Ferdinand Bloch-Bauer's intention was to give the paintings to the Gallery immediately, i.e. during his lifetime, the declaration regarding the obligation would be void pursuant to § 943 of the General Civil Code, because the *formal requirements regarding a notarial act were not observed*. These formal requirements could only have been waived if the promise to donate had been followed by an actual surrender. But Ferdinand Bloch-Bauer *did not* carry out an actual surrender. The agreement regarding constructive possession postulated by the *Finanzprokurator* does not meet the prerequisites of an actual surrender as defined in § 943 of the General Civil Code. We reject the Supreme Court's two decisions, in which by way of an exception it accepted an agreement regarding constructive possession as an actual surrender if the donor subsequently adhered to his intention to give and thereby indicated that he did not require protection against excessive haste. Furthermore, they are not applicable to the present case.

6. The *Finanzprokurator* points out that Ferdinand Bloch-Bauer asked the Gallery to be allowed to retain the pictures, and considers this an agreement regarding constructive possession. But it is doubtful whether Ferdinand Bloch-Bauer ever made such a statement. There is no indication thereof in the available documents from the period leading up to Ferdinand Bloch-Bauer's death in 1945. In arguing against this, the *Finanzprokurator* cites two documents from the ensuing period, one of which (letter of the lawyer Dr. Rinesch to Robert Bentley dated 6th December 1947) by no means supports his view. That means the only source is the account provided by Dr. Grimschitz, whose credibility is, for various reasons, doubtful. But even if one assumed that Ferdinand Bloch-Bauer did make such a declaration, his request would not have the necessary declaratory value as defined in § 863 of the General Civil Code to transfer ownership of the paintings to the Gallery.

7. We do not accept the *Finanzprokurator*'s view that it is sufficient for the actual surrender that Ferdinand Bloch-Bauer never denied his intention to make the donation and that it can be deduced without doubt from the surrender of *Kammer Castle on Lake Attersee* that he intended to abide by the donation. In reality Ferdinand Bloch-Bauer *never confirmed an earlier donation*. To infer legal consequences from silence runs counter to the general principles of jurisprudence. It is

not now possible to assume that the actual and executed donation of *Kammer Castle on Lake Attersee* implies an intention to abide by an imaginary previous "overall donation". *Someone who gives just one picture does not thereby declare that he has already given other pictures and intends to abide by that situation*. Thus the letter of thanks to the Gallery in 1936 does not even mention the other paintings.

Thus, up to 1938, no valid title arose from which the Austrian Gallery could have inferred rights in or to the paintings in question. The Austrian Gallery did not obtain a estate law or contract law claim to a transfer of ownership. Even less did it become owner of the paintings. The only exception was *Kammer Castle on Lake Attersee*, which Ferdinand Bloch-Bauer donated to the Austrian Gallery in 1936 of his own free will. It became the Gallery's property as a donation rather than on the basis of Adele Bloch-Bauer's will.

8. The *Finanzprokurator* 's assertion that by handing over *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II* and *Apple Tree II* Dr. Führer had effectively carried out Adele Bloch-Bauer's testamentary instructions or Ferdinand Bloch-Bauer's promise of donation is without any basis in law. Without power of attorney from Ferdinand Bloch-Bauer, Dr. Führer was not in a position to fulfill such an obligation. It is obvious that Ferdinand Bloch-Bauer did not grant an authorization of this kind. The fact that in handing over *Adele Bloch-Bauer I* and *Apple Tree I* Dr. Führer invoked Adele Bloch-Bauer's will is irrelevant, because the will did not establish any obligation on the part of Ferdinand Bloch-Bauer, and he did not authorize Dr. Führer to fulfill it. Dr. Führer obviously invoked the will in order to cover up his own transactions, which in substance run counter to the testamentary-compliance theory, as he did not give the Austrian Gallery a single picture without material reciprocation. In view of this it hardly matters that Ferdinand Bloch-Bauer's alleged obligation was not yet due at that time.

9. Contrary to the *Finanzprokurator's* view, the fact that the Ferdinand Bloch-Bauer's heirs (represented by Dr. Rinesch) did not enter a restitution claim after 1945 does not constitute conclusive consent to Dr. Führer's actions. A restitution claim was not made because an explicit agreement was made with the Austrian Gallery to relinquish the paintings to it.

Thus, in the period between 1938 and 1945, no basis was laid either for a claim by the Austrian Republic against Ferdinand Bloch-Bauer for transfer of ownership of the paintings, nor was an existing title effectively asserted.

III. Applicability of the Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections dated 4th December 1998, Federal Legal Gazette I 1998/181

1. The Restitution Act 1998 empowers Austria's Minister of Finance, Minister of Education, Science & Culture, Minister for Economic Affairs and Minister of Defense to return artworks from Austrian museums and collections, including the Federal Movables Agency, *to their original owners* or legal successors upon death *without remuneration***,** provided one of the three legal elements set forth in § 1 Paragraphs 1 to 3 is applicable.

2. The *legal element set forth in Paragraph 3* concerns artworks which, following restitution proceedings, could not be returned to their original owners or legal successors upon death, passed into the ownership of the Federal Government without remuneration as ownerless assets and are still in the ownership of the Federal Government. This was obviously not so in the present case.

3. The prerequisite for authorization pursuant to *§ 1 Paragraph 2* of the Restitution Act 1998 is that the artworks passed into the ownership of the Federal Government lawfully, but had previously been the subject of legal acts as defined in § 1 of the Annulment Act. After 1945 the paintings passed lawfully into the ownership of the Federal Government pursuant to an agreement between Ferdinand Bloch-Bauer's heirs and the Austrian Gallery. Between 1938 and 1945 all the paintings were the subject of legal transactions or legal acts covered by § 1 of the Annulment Act 1946. In light of the wording of § 1 Paragraph 2 of the Restitution Act 1998, an authorization to restitute the paintings would basically be applicable. However, in light of the legislator's intentions, § 1 Paragraph 2 must be interpreted restrictively. Lawful acquisition by the Republic is meant to apply only to acquisition from third parties – in particular authorized dealers or at auctions – and *not to acquisition from parties with a valid claim*. If the latter type of acquisition were covered by § 1 Paragraph 2, Paragraph 1 would lose almost all of its sphere of applicability, because acquisition without remuneration as defined in Paragraph 1 was also lawful, and the pictures in question were usually also the subject of legal transactions as defined in the Annulment Act 1946. Thus § 1 Paragraph 2 is not applicable to the present case.

4. The prerequisite set forth in § 1 Paragraph 1 of the Restitution Act 1998 is that the artworks were the *subject of restitution* to their original owners or legal successors upon death and after 8th

May 1945 *in the course of proceedings* arising therefrom pursuant to the federal Law Regarding the Ban on the Export of Objects of Historical, Artistic or Cultural Significance passed into the *ownership of the Federal Government* without remuneration. The legislator's intention was to reverse conduct by the authorities that had been lawful in the past, namely the granting of export permits for artworks in exchange for artworks expropriated by the Nazi regime. The legislator's approach was based on the findings of the Commission for Research into Provenance, and § 1 Paragraph 1 presupposed a specific course of events: After the war expropriated art objects were restituted; the owner wanted to export them; but could only obtain an export permit by relinquishing various pieces to the Republic.

5. In the present case, *Adele Bloch Bauer I, Adele Bloch Bauer II*, and *Apple Tree I* were *not restituted***;** instead, Ferdinand Bloch-Bauer's heirs came to an agreement with the Austrian Gallery that the pictures should *remain* with the Gallery permanently, and that the heirs would not demand that they be restituted. The fact that there was no restitution in the literal sense of § 1 Paragraph 1 is not an obstacle to its applicability. It makes *no difference* whether the paintings were first returned by the Republic and then surrendered back into its ownership in connection with export proceedings, or whether the party entitled to restitution agreed to a *short-cut procedure* and waived a restitution demand in order to obtain export permits for other pictures. Thus § 1 Paragraph 1 is applicable by way of analogy, especially as the legislator based his wording on the findings of the Commission for Research into Provenance, which at that time had examined only a small number of the artworks in the collections, with the result that the law makes no mention of short-cut procedures.

6. After the war *Houses in Unterach am Attersee* and *Beech Forest (Birch Forest)* were initially not in the possession of the Republic of Austria; they were in the possession of Dr. Führer and the Vienna City Collections respectively. The key issue is whether the prerequisite for fulfillment of the legal element "subject of a restitution" as set forth in § 1 Paragraph 1 of the Restitution Act 1998 is that the artworks were first restituted by *the Republic***.** If initial restitution by the Republic is not a prerequisite, then *Houses in Unterach am Attersee* does fulfill this legal element, because the painting was (informally) returned to Ferdinand Bloch-Bauer's heirs (handed over to their representative Karl Bloch-Bauer). The situation regarding *Beech Forest (Birch Forest)* is similar to the situation regarding *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II* and *Apple Tree I*: The heirs only waived a restitution demand because they had reached a short-cut

agreement with the Austrian Gallery that it should ask for the return of the painting from the City Collections. In place of a relinquishment of possession order ("to-and-fro movement"), the procedure was shortened via a kind of assignment.

The actions of the Advisory Council set up pursuant to § 3 of the Restitution Act 1998 do not appear to be oriented to whether the artworks were first returned by the Republic. If it is sufficient that the pictures were taken by whomsoever during the Nazi period, then the prerequisite "subject of a restitution" is fulfilled for *Houses in Unterach am Attersee* and *Beech Forest (Birch Forest)* as well.

7. A further prerequisite for the applicability of § 1 Paragraph 1 is that the paintings were surrendered to the Republic without remuneration and in the course of export permit proceedings. The transfer of ownership to the Republic was not carried out "voluntarily" as defined in the laws regarding donations; it was carried out in order to obtain an export permit. Therefore relinquishment "without remuneration" as required by § 1 Paragraph 1 should not be understood in the technical civil-law sense. The key point is that the Federal Government gave no material quid pro quo to the parties having a valid claim to the artworks; it merely granted export permits for other artworks. One possible counter-argument to the argument that there was no remuneration is as follows: The relinquishment of the artworks was based on the acknowledgement of the Gallery's claim to the paintings pursuant to Adele Bloch-Bauer's will and Ferdinand Bloch-Bauer's declaration to the probate court. However, in light of the actual legal situation, the Gallery **did not have a valid claim;** moreover, the claim appeared doubtful to Ferdinand Bloch-Bauer's heirs as well as to the authorities. The acknowledgement was made merely with a view to **facilitating the granting of export permits** for the remaining artworks. The Austrian Gallery's "consideration" was that Dr. Garzarolli agreed to intercede on the heirs' behalf with regard to the granting of export permits, and then in fact did so. In light of the direct connection between the acknowledgement of the Gallery's claim and the agreement to grant export permits for the remaining artworks, it is fair to argue that **the relinquishment was "without remuneration"** as defined in § 1 Paragraph 1.

8. The fact that transfer of ownership without remuneration as defined in § 1 Paragraph 1 of the Restitution Act 1998 preceded the granting of an export permit is not an obstacle to the applicability of an authorization pursuant to § 1 Paragraph 1 of the Restitution Act 1998. The

transfer of ownership was a *prerequisite for the granting of the export permit*. Indeed in her reply to a written parliamentary question about artworks in the possession of the Republic of Austria, *the current Minister of Education, Science & Culture* stated that there was an evident connection between the relinquishment of the paintings and the granting of an export permit.

To sum up: § 1 Paragraph 1 of the Restitution Act 1998 is applicable at least to *Adele Bloch Bauer I, Adele Bloch Bauer II* and *Apple Tree I*. Whether the same is true of *Houses in Unterach am Attersee* and *Beech Forest (Birch Forest)* depends on whether it is irrelevant that after 1945 the paintings were in the possession of Dr. Führer and the City of Vienna respectively rather than the Republic. In light of the practices of the Advisory Council established pursuant to § 3 of the Restitution Act 1998, on balance it is fair to say that § 1 Paragraph 1 is probably applicable to those two paintings as well.