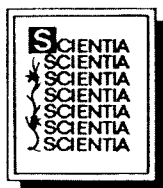


THE POST-WAR RESTITUTION OF PROPERTY RIGHTS
IN EUROPE
COMPARATIVE PERSPECTIVES

Wouter Veraart & Laurens Winkel (eds.)

with contributions by
Claire Andrieu
Georg Graf
Jürgen Lillteicher
Franz-Stefan Meissel
Herman C.F. Schoordijk
Arend Soeteman
Veerle Vanden Daelen
Wouter Veraart
Laurens Winkel



SCIENTIA VERLAG
AMSTERDAM & AALEN
2011

The Restitution of the Munch Painting *Summer Night on the Beach* under the Austrian Art Restitution Act 1998

Franz-Stefan MEISSEL (Vienna)

Introduction

The following chapter deals with the legal questions concerning the restitution of the Munch painting *Summer Night on the Beach*, which was formerly owned by Alma Mahler-Werfel and until recently could be admired by the public in the prestigious state-owned Austrian Gallery of the Belvedere in Vienna. Specific attention is paid to the provisions of the Austrian Art Restitution Act [*KunstrückgabeG*] 1998. This Federal Statute on the Restitution of Art Objects from Austrian Federal museums and collections (BGBl I No. 181/1998) was supposed to form the legal basis for the “fast and unbureaucratic restitution of unjustifiably acquired art objects to their owners or their legal successors”¹ who had been the object of persecution during the Nazi period.

The term ‘unjustifiably acquired’ in this context should be understood in a moral rather than strictly legal sense. The law authorizes the return of art objects that, in a strictly legal sense, are indisputably owned by the Federal Republic, but have been acquired in ways causing *moral or historical concern*. In other words, in the Art Restitution Act 1998 the Republic of Austria allows for a modified self-conception in restitution matters, according to which the Republic *at least morally accepts a share of the responsibility* for the injustices that occurred during the National Socialist period. This responsibility is also reflected in various new legal provisions ensuring payments to victims of National Socialism. In 1995, for instance, this led to the establishment of the Austrian National Fund in order to “express the special responsibility of Austria vis-à-vis victims of National Socialism” (section 1 *para* 2 National Fund Law [*NationalfondsG*] BGBl 432/1995) and to the express acknowledgement in the General Settlement Fund Law of the “moral responsibility for losses and damage that have been inflicted on the victims of National Socialism as a consequence of or in connection with the National Socialist regime” (section 1 *para* 2 *leg cit*). The provisions of the Art Restitution Act 1998 must be seen in the context of these novel restitution laws aimed at the overall elimination of shortcomings and gaps in restitution laws and restitution practices after 1945.

1 Member of the Austrian Parliament [*Nationalrat*] Andreas Khol in his speech in the debate on the Art Restitution Act on 5 November 1998.

The case of Alma Mahler-Werfel's Munch painting *Summer Night on the Beach* is a prominent example of a quest for restitution of art that had been unsuccessful until 2006. As the story of this case and the legal questions involved are long and rather complicated, this paper is divided into two sections.

The first section presents the circumstances of the case ('The Course of Events') by providing an account of the restitution proceedings and the attempts to reach a settlement by Alma Mahler-Werfel in the immediate post-war era as well as her granddaughter Marina's more recent attempts at restitution and the rejection by the Art Restitution Advisory Board [*Kunst-rückgabebeirat*] in 1999 of a recommendation for restitution.

The reasons behind the negative opinion expressed by the Art Restitution Advisory Board in 1999 are analyzed in the second section, with specific examination of the purpose of the Art Restitution Act 1998 and the prerequisites for restitution under section 1 clause 2 *leg cit.* Special attention will be paid to the questionable relevance of the legally binding rejection of the claim by the Upper Restitution Commission of Vienna (URC) [*Rückstellungsoberkommission Wien (ROK)*] in 1953. In this context, apart from a critical analysis of the URC's decision in 1953, attention is also given to the legal evaluations in the question of legally binding, but in particular cases extremely unjust decisions, as since established in the General Settlement Fund Law [*EntschädigungsfondsG*] 2001.

The positive impact of these arguments on the Advisory Board in its final recommendation of 2006 is discussed in the final part of the paper.

Course of Events

The historical background of the case is presented in chronological order below. This requires a distinction between events during the Nazi regime (A.), restitution procedures during the post-war era (B.) and recent attempts towards restitution following the entering into force of the Art Restitution Act 1998 (C.).

The files² stored in the Archives of Vienna (*Wiener Stadt- und Landesarchiv*), which also include the files of the pre-proceedings,³ allow reconstruction of the circumstances under which the Munch painting was sold, as well as the course of the restitution proceedings from the filing of the claim

2 Wiener Stadt- und Landesarchiv [Archives of Vienna], Regional State Court for Civil Matters, A 29 Restitution Commission Rk 216/61; the file contains the order numbers 1 – 123 in volume 1 and 124 – 163 in volume 2 and consists of a total of 556 pages.

3 The former file numbers of the proceedings Rk 216/61 are 63 Rk 364/47, 63 Rk 1372/48, 63 Rk 187/53 and 3 Rk 96/55. The two proceedings before the URC Vienna have file numbers Rkb 1116/48 and Rkb 186/53, the two revision proceedings before the SRC Rkv 219/48 and Rkv 152/53. Order numbers or file numbers cited in the following refer to the omnibus file Rk 216/61.

in 1947 until Alma Mahler-Werfel's death in 1964.⁴ The proceedings before the Art Restitution Advisory Board have been traced on the basis of correspondence and documents provided by Marina Mahler.

A. Alma's Family Background

First of all the biographical backgrounds of the people involved will be briefly recapitulated: Alma Mahler-Werfel was the daughter of Jakob Emil Schindler and his wife Anna Bergen. Schindler was a famous landscape painter and is considered by art historians to have been the most important Austrian impressionist painter of his time.

After Schindler's early death, Alma's mother married his pupil Carl Moll. Moll was not only a renowned painter, but also a skilful and influential art dealer. This second marriage of Alma's mother produced another daughter, Marie. Alma's half-sister was married to the judge Dr Richard Eberstaller, a convinced National Socialist, who became Vice President of the Regional State Court for Criminal Matters [*Landesgericht für Strafsachen*] in Vienna. Alma's mother, Anna Bergen-Moll, died in 1938.

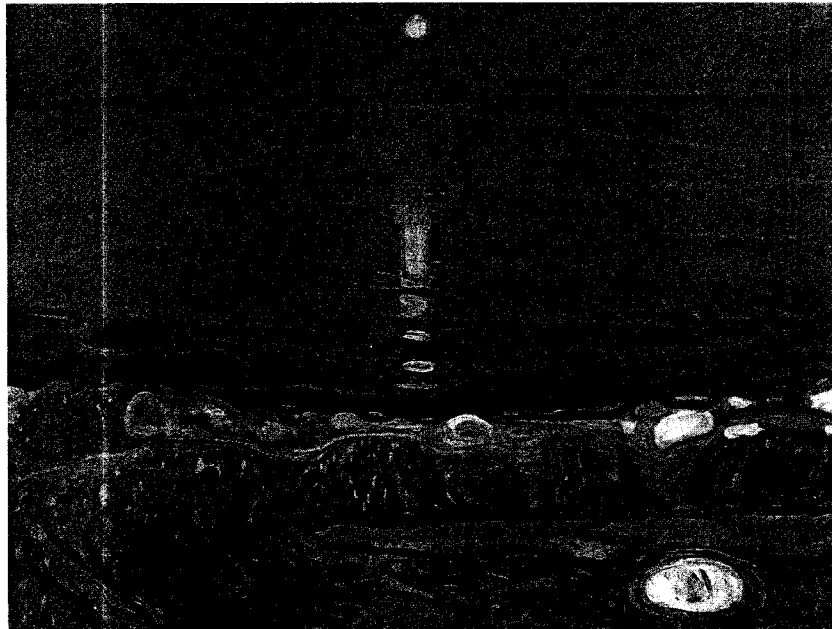
Alma was a talented musician and even composed a number of songs herself. In 1901 she married Gustav Mahler, who was then the director of the Royal Opera House in Vienna. After Mahler's death she married Walter Gropius, the architect and founder of the Bauhaus school of design. Her third husband was the bestselling author Franz Werfel. In the 1930s Alma and Franz Werfel openly sympathized with the 'corporatist state' in Austria, an authoritarian regime that oppressed left-wing parties on the one hand and also the pro-German national socialist movement on the other hand.

B. The Munch Painting and Events during the Nazi Regime

The Munch painting *Summer Night on the Beach* was given to Alma in 1916 as a present on the occasion of the birth of her beloved daughter

4 The facts of the case have been studied by a number of authors in recent years. See for instance: Hubertus Czernin, 'Gewissenlose Räuber', *Der Standard* (2 April 1999); Hubertus Czernin, 'Einfach nur Pech gehabt', *Der Standard* (17 August 1999); Hubertus Czernin, 'Der Triumph der Bürokratie', *Der Standard* (4 November 1999); Franz-Stefan Meissel, 'Edvard Munchs "Sommernacht am Strand" und das Restitutionsverfahren Alma Mahler-Werfels gegen die Republik Österreich', in: M. Luminati et al. (eds.), *Mit den Augen der Rechtsgeschichte: Rechtsfälle - selbstkritisch kommentiert* (Berlin/ Münster/ Wien/ Zürich/ London 2007); Sophie Lillie, *Was einmal war. Handbuch der enteigneten Kunstsammlungen Wiens* (Wien 2003), p. 735 ff.; Michael Wladika, "'Ersuche ich daher ... in keiner Weise Frau Alma Mahler-Werfel entgegenzukommen'", in: V. Pawlowski & H. Wendelin (eds.), *Enteignete Kunst. Raub und Rückgabe - Österreich von 1938 bis heute* (Wien 2006) p. 79 ff.; Franz-Stefan Meissel & Julia Jungwirth, 'Moralisch verständlich, aber rechtlich nichts zu machen?', in: Pawlowski & Wendelin (eds.), *Enteignete Kunst*, p. 104 ff.

Manon (who died in 1935).⁵ Alma later claimed that the Munch painting meant more to her than any other painting. In 1937 Alma gave five paintings on a two-year loan to the Austrian Gallery at the Belvedere,⁶ among them *Summer night on the Beach* by Edvard Munch.



Edvard Munch, Summer Night on the Beach

(Oil on canvas, 103 x 120 cm, Private Collection)

Immediately after the *Anschluss* (the annexation of Austria by the German Reich), Alma hastily left Austria (13 March 1938). Alma Mahler-Werfel's villa at Hohe Warte, Steinfeldgasse 2, a luxurious estate designed by Josef Hoffmann, was confiscated by the Gestapo. The Werfels first went to

- 5 Compare Mahler-Werfel, *Mein Leben* (Frankfurt am Main 1960), p. 82 ff [translation]: "Gropius, an incredibly noble person, had the intense wish to make me a grand present after the birth of the child. So he wrote to Karl Reininghaus, who from time to time sold one of the paintings from his ample collection, and asked him to sell the *Midnight Sun* by Edvard Munch. On the same day two servants arrived with the painting and a moving letter from Karl Reininghaus. He wrote that the painting had belonged to me for many years because I loved it so much. Only he had not found the right occasion for sending it to me. I would have obtained it with my smile! Now I could sink into this oily calm and still so vivid sea for days. No painting has ever touched me the way this one has."
- 6 The other paintings lent to the Gallery were *Rocky Coast near Ragusa*, *Forest Road near St. Gilgen* and *Forest Path* by Jakob Emil Schindler and a portrait of Alma by Oskar Kokoschka. The acceptance of the paintings was confirmed in a written document of 2 August 1937 by Dr Heinrich Schwarz on behalf of the Austrian Gallery.

France, until they had to flee again; in a strenuous journey they eventually reached New York.

During the Nazi period Professor Carl Moll, together with his daughter and son-in-law, resided at Wollergasse 10,⁷ directly opposite Alma's confiscated villa, and temporarily at Villa Mahler in Breitenstein on the Semmering.⁸ This villa in the countryside had been given as a gift to her half-sister, Marie Eberstaller, by Alma Mahler-Werfel in June 1939, obviously in order to prevent the villa from being confiscated like Alma's Viennese mansion.

On 18 March 1938 (shortly after the Werfels' escape) Carl Moll, allegedly at Alma's request, achieved the return of the borrowed paintings from the Austrian Gallery (renamed 'Gallery of the 19th Century' during the Nazi period). At the same time he was already negotiating with Professor Bruno Grimschitz, the director of the Gallery, on the sale of the Munch painting. Alma Mahler-Werfel tried to find a buyer in France and was thinking about bringing the painting abroad with the help of a friend working as a diplomat.

Finally the Munch painting was sold in 1940 to the Gallery of the 19th Century by Marie Eberstaller (in her own name) for 7,000 RM. The written confirmation of the sales contract by Professor Grimschitz contains no reference to Alma Mahler-Werfel nor to any authorization from her. Grimschitz, however, according to his own account in the following trials, assumed that the proceeds were to be used to repair the roof of the villa in Breitenstein/Semmering; indeed such a repair was actually carried out.⁹ At the end of the war (in the night of 12 - 13 April 1945), Moll and the Eberstallers all committed suicide.¹⁰

7 In the lawsuit *Alma Mahler-Werfel v. Anton Klement* (21 Cg 294/47), among others regarding the right of succession, the Regional State Court for Civil Matters stated: "On the bases of the witness reports of Arch. Willi Legler, Anna Murauer, Therese Görtz and Ida Wagner-Gebauer, as well as Stefan and Katharina Wallner, it has been established that the married couple Eberstaller had various moveable assets [note: namely numerous carpets, silver dishes, paintings] transported from the plaintiff's villa [in Döbling] to the [neighbouring] villa Moll after the plaintiff's departure in 1938, that these were property of the plaintiff and that Dr Eberstaller had disposed of such objects in his last will of 11 April 1945... ." (Judgement of 22 March 1948, p. 89 of the file).

8 EZ 429 Breitenstein cadastral register. For the purpose of a gift Alma Mahler-Werfel, who had fled abroad, gives special authority to the lawyer Dr Otto Hein, who would later represent her in the restitution proceedings.

9 The repair of the roof costed approximately 1,500 RM. Some plumbing was also done in the house (the construction of a wooden fence and the installation of a water closet) for about 400 RM (this was the result of the investigation of the circumstances in the decision 63 Rk 1372/48 = order number 91, p. 4 ff).

10 According to one version Soviet soldiers supposedly entered the house beforehand and wounded Carl Moll when he was attempting to protect his daughter from being raped (according to Menges, *Carl Moll, Neue Deutsche Biographie*, volume 17 (Berlin 1994)).

C. Restitution Procedures under the Third Restitution Act

After the defeat of the Nazi Regime, the Austrian Annulment Act of 1946 [*NichtigkeitsG*, BGBl Nr 106/1946] declared all transfers of property to be null and void that had “occurred during the German occupation of Austria in the course of its political and economical penetration by the German Reich.” The enforcement of this provision was reserved for subsequent legislation, which followed in the form of seven Restitution Acts in 1946 – 1949. These provided for restitution in kind of property which was “wrongfully withdrawn” (“*entzogen*”) from people who were victims of the Nazi regime or in cases in which the transfer of property would not have taken place without the National Socialist takeover.

Alma Mahler-Werfel now tried to recover her assets in Austria. She got back the ownership of her villa in the countryside¹¹ and also her mansion in Vienna. The tricky part was restitution of the paintings from the Austrian Gallery.

1. First Ruling of the Restitution Commission in 1948

In her restitution claim filed on 14 August 1947 at the Restitution Commission of Vienna (RC Vienna), Alma requested restitution of two paintings: *Summer Night on the Beach* by Edvard Munch and *Rocky Coast near Ragusa* by Jakob Emil Schindler pursuant to the Third Restitution Act 1947. The disputed amount indicated in the restitution claim drafted by the lawyer Dr Otto Hein in Alma’s name amounted to 15,000 Austrian Schillings. The Federal Republic of Austria as defendant was represented in the trial by the Federal Law Office [*Finanzprokuratur*].

The proceedings before the RC Vienna chaired by Dr Adolf Ehrenzweig (a well-known expert in private law, who was later promoted to the position of professor at the University of Vienna) ended with the ruling of 24 September 1948 that dismissed the suit owing to the Federal Republic of Austria’s lack of capacity as a defendant, given that the property concerned was

p. 737). Sure enough the file contains the copy of a letter dated 10 April 1945 by Carl Moll to Drl. Ottmann, the Secretary of the Society of Museum Friends [*Gesellschaft der Museumsfreunde*], in which he announces the suicide beforehand: “We three have decided to go to sleep together and not to wake up again ... My son in law, however, as director, president of the Criminal Court will be arrested immediately and has the worst to fear as soon as the Bolsheviks take Vienna into their possession ... I myself fall asleep without remorse and have had all the beautiful things life has to offer”.

11 With regard to the villa in Breitenstein Alma Mahler-Werfel’s ownership was again registered in the cadastral register as a result of a legally binding decision of the Regional State Court for Civil Matters [*Landesgericht für Zivilrechtssachen*] Vienna from 17 January 1947; File number 25 Cg 39/47.

“German property.”^{12/13} The RC thus followed the argument of the *Finanzprokuratur*, which claimed that the Republic of Austria was not the right defendant since the paintings held by the Austrian Gallery were not considered Austrian but German property. Quite astonishingly the two lay judges overruled the professional judge on this point in the Court of First Instance. The Chairman, Dr Ehrenzweig, who certainly regarded the paintings as Austrian property since they had been acquired in the context of the Gallery’s museum administration and had thus become part of an entirety of objects (namely the Austrian Gallery) that was to be considered Austrian property, had not been able to convince the two lay judges of his legal view. Nevertheless, he immediately expressed his contrary opinion in a legal essay, from which Mahler-Werfel’s lawyer could – successfully, as we will see – cite the corresponding passages in his appeal.¹⁴

The reasoning of the ruling also contains an extensive analysis indicating that, in the opinion of the RC Vienna, the restitution claim would have been admitted on its merits and was merely unenforceable because of lacking a tangible defendant. In other words, the political persecution of Mahler-Werfel was accepted, as was the existence of an invalid withdrawal of property, while the independence of the purchase from the National Socialists’ takeover of power was expressly negated. The free evaluation of evidence largely followed the statements given by Mahler-Werfel and her witnesses Wilhelm Legler¹⁵ and Ida Wagner-Gebauer.¹⁶

2. The First Ruling of the Upper Restitution Commission (URC) in 1948

As a result of Mahler-Werfel’s administrative appeal of 28 October 1948, a ruling of the URC Vienna (Rkb 1116/48) was issued on 23 Novem-

12 As a result of Austria’s status as an occupied state the RC was prevented from ruling on “German property” (which the Soviet Union wanted to confiscate as war reparation payments).

13 63 Rk 364/47 = order number 19, file p. 73 - 77; chaired by Dr Adolf Ehrenzweig.

14 Adolf Ehrenzweig, ‘Das Deutsche Eigentum’, *Juristische Blätter* (1948), p. 472 ff. There it states (p. 473): “One could assume more generally that the Republic of Austria has the position as a party to the dispute in all legal disputes concerning parts of an Austrian entirety of objects. If, for example, an Authority Court in the *Ostmark* has bought a chair and somebody assumes to have a claim to it, he or she should not have to wait for the State Treaty, but should be able to sue the Republic of Austria for its return now.”

15 The architect Wilhelm Legler was Alma Mahler-Werfel’s nephew and Carl Moll’s step-grandson. During the trial he was subsequently nominated as a witness by Alma Mahler-Werfel, quite often in order to testify on internal family matters. The opposing party tried to undermine Legler’s credibility by insinuating that he was disappointed not to have received anything from Moll’s estate.

16 Ida Wagner-Gebauer had worked as a nanny in the Mahler-Werfel household for many years.

ber 1948, by which the RC's decision was remanded and the matter was referred back to the Court of First Instance.

The URC agreed with the claimant's view regarding the capacity of the Republic of Austria to be a defendant and qualified the adverse argument put by the *Finanzprokuratur* and the RC as "surprising" and "unfounded". The URC emphasized that the Federal Law regarding the "Reunification of Austria with the German Reich" [*Bundesgesetz über die Wiedervereinigung Österreichs mit dem Deutschen Reich*], (BGBl [*Federal Law Gazette*] No. 75/1939) resulted in the former property of the Republic of Austria becoming property of the German Reich but that, on the other hand, the proclamation of independence on 27 April 1945 (StGBI [*State Law Gazette*] No. 1/1945) meant that "the German Reich's property on the national territory of the Republic of Austria became property of the Republic of Austria." On the subject of the Austrian Gallery, it is stated that "none of the occupying powers had stretched out their hands at these treasures, however disputed the concept of the so-called German property might otherwise be."

Less favourable for Alma Mahler-Werfel was the subsequent analysis put forward by the URC Vienna. The obiter admittance of the claim on its merits by the RC Vienna was put into doubt by the URC. In its remission the appellate body gave various instructions for the further proceedings, boiling down to an anticipated evaluation of evidence with a strong bias against Alma Mahler-Werfel's claim.

Regarding *Rocky coast near Ragusa*, the URC stated that this painting had been acquired by the Austrian Gallery as a result of a last will, made on 13 April 1945.¹⁷ "The acquisition therefore in any case takes place at a time when the Republic of Austria was already re-established and is in connection with the destruction, but not the takeover of power by National Socialism, nor the fact, that the applicant was married to a Jew." The URC then reminded the RC that in restitution proceedings "the facts of the case essential for the decision shall be established *ex officio*" and urged the RC to

17 The URC thereby followed the Austrian Gallery's argumentation (contested by Mahler-Werfel), which was based on an acquisition from a legacy of Carl Moll or his son-in-law, Dr Eberstaller.

Dr Eberstaller's last will from 11 April 1945, also signed by his wife, was the matter of a lawsuit between Alma Mahler-Werfel and Anton Klement, Rosa Tamassy, Josef Reiner and Karl Sieber, the persons considered in the last will, in which Mahler-Werfel claimed the nullity of the will (21 Cg 294/47). This dispute supposedly ended on 16 October 1951 (after the Upper Regional State Court Vienna had decided in favour of Alma Mahler-Werfel) with a settlement, according to which the four defendants were to be considered only as legatees. Finally the property was transferred to Alma Mahler-Werfel and Wilhelm Legler as the heirs of Carl Moll (document confirming the transfer [*Einantwortungsurkunde*] dating 24 April 1954) and Marie Eberstaller's (document confirming the transfer dating 23 June 1954). Dr Theodor Eberstaller was the heir of his brother, Dr Richard Eberstaller (document confirming the transfer dating 23 June 1954).

consult the applicant's mother's estate files, "which may show that the painting, irrespective of the dedication as a loan by the applicant [Mahler-Werfel], was actually in the ownership of Jakob Emil Schindler's widow [Anna Moll]." ¹⁸

With respect to the Munch painting, the URC did not regard the matter as ready for decision either:

"In the ruling [of the RC] it is not regarded as evident that the sale of this painting would have taken place irrespective of the National Socialist takeover of power. The Restitution Commission, however, owes a justification for this assumption.... It has not come to the fore that the claimant being of Jewish kin [sic] at the time of the painting's sale had been exposed to persecution of any kind, particularly concerning her property."

In the following the RC's appraisal of evidence is harshly criticized, revealing the personal views of the judges at the URC. "It is improper – merely based on the testimony of the witness Legler – to accuse of plundering the claimant highly respected personalities such as the painter and outstanding art expert Professor Carl Moll, a man generally held in high esteem and respectable into old age, or the Vice President of the Regional State Court for Criminal Matters, Dr Eberstaller, and his wife, who have departed life voluntarily merely because of the collapse of their political ideals."

The procurement of the estate files of Dr. Eberstaller and his wife was encouraged, and the presumption was that these would show that the villa in Breitenstein, the repair of which was funded by the sales proceeds of the Munch painting, was merely given in trust. On this point the URC added a further speculation: "If the house was transferred to the Eberstaller couple as trustees, the allegation that the claimant had equally entrusted them with custody of her remaining property becomes highly probable." Conclusion by the URC Vienna: "The facts on the request of restitution should undergo legal evaluation according to section 4 *para* 1 of the Third Restitution Act and section 367 Austrian General Civil Code [*Allgemeines Bürgerliches Gesetzbuch, ABGB*]."

In retrospect, this already definitively decided the matter regarding the Munch painting. The case continued for years, but with respect to the Munch painting it eventually ended in 1953 in exactly the same way as the URC had indicated in its 1948 ruling. The URC again conducted an evaluation of the evidence in a very favourable manner for the Republic and

18 Anna Moll, *née* Bergen, widow of Schindler, died in 1938; as later became clear, the estate proceedings were discontinued due to a lack of funds, although, according to Alma Mahler-Werfel, there existed "valuable jewellery and securities worth RM 100,000." (63 RK 1372/48 - 86, p. 3 = Rk 216/61, AS 323).

affirmed the acquisition of the Munch painting in good faith “in terms of section 4” of the Third Restitution Act.

3. First Ruling of the Supreme Restitution Commission in 1949 (dismissed)

The revision appeal by the *Finanzprokuratur* (which had not succeeded in its argumentation regarding German property) was rejected by the *Oberste Rückstellungskommission* (Supreme Restitution Commission) on 8 January 1949 because the amount in dispute did not exceed ATS 15,000.¹⁹

4. Second Ruling of the RC in 1953

With a written submission on 7 April 1950, the continued proceedings at the RC Vienna were extended to the request for restitution of five further paintings by Schindler, namely *Forest Road in the Salzkammergut*, *Moonrise in the Prater*, *Hacking Meadow*, *Cottonwood Alley* and *From Corfu*.²⁰

The trial before the RC Vienna – after extensive preliminary proceedings, including the questioning of numerous witnesses – finally ended on 9 April 1953 with a ruling fully recognizing Mahler-Werfel’s claim.²¹ The Federal Republic of Austria was ordered to restitute to Alma Mahler-Werfel the paintings *Summer Night on the Beach* by Edvard Munch as well as *Rocky Coast near Ragusa*, *Moonrise in the Prater*, *Hacking Meadow*, *Cottonwood Alley* and *From Corfu* by Jakob Emil Schindler.

In the description of the facts of the case it is assumed that all the paintings were owned by the claimant. Professor Grimschitz’ statement, according to which *Moonrise in the Prater* and *Hacking Meadow* were Moll’s property, was not followed, “since this witness was no closer to the family background than the witness Legler,” whose claim that these paintings all belonged to the claimant was thus preferred.²²

19 Decision Rkv 219/48. According to section 21 *para* 2 Third Restitution Act a (revision) appeal to the SRC against a URC ruling because of incorrect legal assessment is only admissible if the amount in dispute exceeds ATS 15,000. An appeal against an affirming ruling of the URC is furthermore only admissible if the URC regards the appeal to the SRC as admissible.

20 Motion to take evidence, order number 31 AS 116.

21 63 RK 1372/48, order number 91.

22 The art historian Bruno Grimschitz was a multi-functionary in the art and museums field during National Socialism: he was not only the director of the Modern Gallery and the Gallery of the 19th Century (today Austrian Gallery in the Belvedere), but also head of the painting gallery of the Art Historical Museum and the Prince-Eugene-Museum, professor of art history and museums as well as head of the Gaumuseum in Salzburg (towards the end of the war). In this latter capacity he was also involved in opaque dealings with the art dealer Friedrich Welz in Salzburg; cf Gert Kerschbaumer, *Meister des Verwirrens. Die Geschäfte des Kunsthändlers Friedrich Welz* (Wien 2000) p. 43 ff, as well as Monika Mayer, ‘Bruno Grimschitz und die Österreichische Galerie

The legal assessment described the fact that the claimant, as the wife of Franz Werfel, who was a Jew according to the National Socialist Nuremberg Laws, was subject to political persecution as “self-evident”. Express or tacit authorization of Eberstaller or another person to sell the paintings was not taken as proved, neither was an entrusting of the objects.

The sale of the paintings through the claimant was deemed a withdrawal in terms of the Third Restitution Act. It was added that, “The use of the sales revenue for the repair of the house is irrelevant for this question. It might only serve as the basis for claims of an agent of necessity (*negotiorum gestor*), but the fact that Eberstaller used the house together with his family, that he received the rent payments for the house and that the costs of the repair were comparatively insignificant are arguments against this possibility.”²³ Apart from that, a testament (of Eberstaller or the Molls) would, as a transaction concerning somebody else’s assets, be irrelevant.

The ruling, which in the light of the extensive preliminary proceedings is rather short in its evaluation of evidence, would have meant a total victory for Alma Mahler-Werfel. Sure enough, however, it did not become legally binding since the *Finanzprokuratur* appealed and won in the next instance, at least regarding the Munch painting.

5. Second Ruling of the URC in 1953

In its ruling of 16 June 1953 (Rkb 186/53), the URC at the Upper Regional State Court in Vienna rejected the restitution claim for the Munch painting following the Republic of Austria’s appeal, but did not deem the matter ready for a decision with respect to the Schindler paintings, thus referring the case back to the Court of First Instance for further proceedings.

First of all the ruling dealt with the evaluation of evidence in great detail, highlighting those aspects of the witnesses’ testimonies that were favourable to Moll and the Eberstallers. Emphasis was placed on the statements by painting colleagues and friends of Moll and his business partners in the Gallery of the 19th Century; of the claimant’s witnesses only those passages in their statements speaking against the possibility of fraudulent behaviour by Moll and the Eberstallers were cited. All in all, the alleged harmony between Alma Mahler-Werfel and the three people who committed suicide was emphasized.²⁴

1938 – 1945’, in: G. Anderl & A. Caruso (eds.), *NS-Kunstraub in Österreich und die Folgen* (Innsbruck 2005), p. 59 ff.

23 63 Rk 1372/48 - 91, p. 5.

24 In her statement before the RC Vienna as well as in her autobiography (*Mein Leben*, p. 275) Mahler-Werfel says about Moll: “He had always been my archenemy.”

The fact that the URC would pay particular attention to the reputation of Moll and the Eberstallers had already become clear in its first ruling²⁵ and was now reconfirmed. Furthermore the legal view already outlined in the first URC ruling regarding the Gallery of the 19th Century's acquisition of the Munch painting in good faith was readopted.

As the result of its own evaluation, the URC assumed that "Professor Moll or Mrs Eberstaller or the two of them together [sic] were authorized to dispose of the painting in question since it had been entrusted to them."²⁶ The URC considered it to be in accordance with "logical thinking" that Alma Mahler-Werfel not only entrusted the house in Breitenstein [note: including the fixtures] to her half-sister, but also the "disposal over the [note: what was obviously meant was 'other'] moveable assets".

However, the idea that "Moll or Mrs Eberstaller or the two of them together" actually had authorization (a fact that had been contested by the claimant throughout the trial) did not seem to be assumed by the URC Vienna since it subsumed the acquisition of the Munch painting under section 4 of the Third Restitution Act, which, in comparison to section 367 of the Austrian General Civil Code, was a slightly modified provision regarding the acquisition of moveable assets in good faith. It thus took the Munch painting to be a withdrawn object in terms of the Third Restitution Act, which did not, however, have to be restituted since the Gallery had acquired the painting in good faith (i.e. was unaware that it had been withdrawn).

As far as the good faith of the Gallery is concerned, the following remarks by the URC can be found: "As the Austrian Gallery then [i.e. 18 March 1938 – date of the handing over of the painting to Moll] trusted him [i.e. Moll] without any proof of authorization to receive five paintings from the claimant [i.e. the loan by Mahler-Werfel], they could arguably equally trust him when he subsequently sold one of these paintings in order to repair the roof of the house, which, despite the donation in the form of a trust, still belonged to the claimant."²⁷ In other words, since the Gallery gave the entrusted paintings to a member of the family of the owner, who had fled abroad, without authorization by the owner, the good faith of the Gallery is accepted when the daughter of this family member later sold one of these paintings – again without any proof of authorization.

The URC concluded that, with regard to the Munch paintings, there was no obligation of restitution in accordance with section 4 Third Restitution Act: "The representatives of the Austrian Gallery were well aware that they were dealing with assets of a victim of political persecution, but they could not detect an act of withdrawal, but a transaction to which this person – the

25 As to Moll's general esteem, it should be noted that he had been an honorary citizen of the City of Vienna since 1931.

26 Rkb 186/53 = Rk 216/61, file p. 380.

27 Rkb 186/53 = Rk 216/61, file p. 380.

seller – was entitled. Therefore, the restitution claim with regard to the painting by Edvard Munch is rejected.”²⁸ Nevertheless, the URC Vienna added that “due to the above mentioned correspondence between Professor Moll and Dr Schwarz²⁹ (an employee of the Gallery of the 19th century) ... it [can] quite safely be assumed to be evident that the sale of the painting would also have taken place irrespective of the takeover of power.”³⁰

6. Second Ruling of the SRC in 1953 (dismissed)

Alma Mahler-Werfel’s appeal for revision was again rejected by the SRC on formal grounds since the amount in dispute did not exceed ATS 15,000. Thus the ruling of the URC became legally binding in respect of the Munch painting.

7. Further Proceedings

In the course of the further proceedings, oral hearings before the RC took place only sporadically. Alma Mahler-Werfel and her representatives remained, however, in contact with the Austrian authorities in order to try to achieve the restitution of the Munch painting by extrajudicial means.³¹ Through such out-of-court negotiations Mahler-Werfel achieved the restitution of *Rocky Coast near Ragusa* and *Cottonwood Alley*.³²

On the occasion of an enquiry by the RC Vienna on 31 March 1961, Alma Mahler-Werfel declared to “maintain the asserted claims since a settlement had not been reached despite certain approximations.”³³ A request for judicial assistance was made to the Austrian Consulate General on 18 September 1964 for a hearing of Alma Mahler-Werfel in New York (her

28 Rkb 186/53 = Rk 216/61, file p. 381.

29 The URC hereby refers to letters from 1 March and 4 March 1938 (annexes H and G), in which Moll negotiated the sale of the Munch paintings in Alma Mahler-Werfel’s name. The authorization claimed by Moll in the letter dating 4 March 1938 was denied by Alma Mahler-Werfel in the restitution proceedings.

30 Rkb 186/53 = Rk 216/61, file p. 381. Regarding the Schindler paintings the matter was remanded to the RC for a new trial by the URC.

31 Oral proceedings were held on 20 January 1954, 21 September 1961 and 6 March 1964.

32 The restitution of the paintings *Rocky Coast near Ragusa* and *Cottonwood Alley* was effected as a result of a regulation of the Federal Ministry of Education Zl.28.989.II/6/54 on 19 February 1954.

Regarding the *Forest Road in Scharfling*, restitution had already taken place on 4 August 1948 (according to order number 96 file p. 384 in the context of the proceedings 63 Rk 30/50), and so the claim in this regard was withdrawn.

33 Statement from 2.5.1961, Rk 216/61 order number 126 volume II file number 5.

last visit to Austria was in 1947). Alma Mahler-Werfel died on 11 December 1964 before being interrogated.³⁴

D. Restitution Request by Marina Mahler in 1999

The Commission of Provenance Research in Austrian Federal Museums [*Kommission zur Erforschung der Provenienzen in den Österreichischen Bundesmuseen*] was established by the Federal Ministry of Education and Culture in early 1998 with the assignment “to systematically file the art objects acquired in the period in question to resolve all questions regarding the ownership during the National Socialist period and the immediate post-war era.”

In March 1999 Marina Mahler received a dossier from this commission on the acquisition of Munch’s *Summer Night on the Beach* prepared by the art historian Monika Mayer. Marina Mahler consequently requested restitution of the Munch painting, but abstained from claiming restitution of the Schindler paintings as ownership by Alma Mahler-Werfel could not be proved.

In April 1999 the final 37-page report of the Commission of Provenance Research was presented to the Art Restitution Advisory Board. The report chronologically listed the events, starting with Alma Mahler-Werfel’s lending of the painting to the Austrian Gallery on 2 August 1937 up to Alma’s death in New York on 11 December 1964. In her résumé³⁵ Monika Mayer pointed out that the allegedly ‘bona fide’ purchase of the painting from Marie Eberstaller (Alma’s half-sister) in 1940 should be viewed in the context that “the ownership right of Alma Mahler-Werfel was known to the Austrian Gallery,” and referred to the witness statement of former director Bruno Grimschitz³⁶ in the restitution proceedings. Furthermore, as to any possible intentions to sell before 1938, she records the fact that there was no proof of authorization or written authorization by Mahler-Werfel to sell the Munch painting; not even an agreement to interrupt the loan had been received – the painting, after all, had been taken back in 1938 by Carl Moll, Marie Eberstaller’s father and Alma’s stepfather.

However in its session on 27 October 1999 the Advisory Board “owing to a clear and unambiguous legal situation” saw itself unable to recommend a transfer of ownership of the Munch painting to Alma Mahler-Werfel’s legal successor.

The basis for the Advisory Board’s legal assessment was first and foremost the file of the *Finanzprokuratur* regarding the proceedings under the

34 The last document in the proceedings is a decision by the judge to wait for the result of the testamentary proceedings.

35 Dossier of the Commission of Provenance Research in the Austrian Federal Museums by Monika Mayer (1999) pp. 35 - 36.

36 For Grimschitz see footnote 22 above.

Third Restitution Act in the post-war period that Alma Mahler-Werfel, who had suffered losses as the owner, had instigated.³⁷

The decisions made by the authorities during the post-war era were subject to evaluation by the Advisory Board: The ruling of the Restitution Commission at the Regional Court for Civil Matters Vienna of 9 April 1953,³⁸ which obliged the Republic of Austria to restitute the painting, was only briefly mentioned and the “extremely cursory evaluation of evidence by the first instance” criticized. According to the Advisory Board’s opinion the decision in first instance “almost completely” lacked “a legal assessment of the stated facts of the case.”

The Upper Restitution Commission at the Upper Regional Court Vienna, in its ruling of 16 June 1953,³⁹ as the second instance, had by contrast complied with the complaint of the *Finanzprokuratur* and dismissed Alma Mahler-Werfel’s request for restitution “because of a detailed evaluation of evidence” – this being the Advisory Board’s evaluation. The Advisory Board cites from the decision:

“After all the house in Breitenstein had equally been given to Maria Eberstaller as a gift only in the form of a trust – it has now already been restituted – and the consequence, that the applicant [Alma] had not only entrusted her [Marie Eberstaller] with the real estate, but also with the disposal over the moveable assets, corresponds to logical thinking ... Therefore the Restitution Commission, despite the contrary statement of witness Arch. Legler, takes as granted that the paintings can be considered entrusted to Prof. Moll or Maria Eberstaller. In the sense of the provision section 4 of the Third Restitution Act there is no obligation to restitution in this case ... The representatives of the Austrian Gallery were well aware that they were dealing with the property of a political refugee, however they could not view this as an act of expropriation, but as the legitimate disposal by the seller ... As a result of the above mentioned correspondence between Prof. Moll and Dr. Schwarz it can unobjectionably be taken for granted that it would have come to the selling of the painting irrespective of the takeover of power”.

As a result of these elaborations of the Upper Restitution Commission Vienna, the Art Restitution Advisory Board came to the conclusions formulated in point 3: In other words, the dismissal of the request for restitu-

37 For the decision on the restitution claims according to the Third, Fifth and Sixth Restitution Act, restitution commissions set up at each regional court [*Landesgericht*] were assigned with carrying out jurisdiction in civil law matters. Altogether three stages of appeal were envisaged. In the second instance, upper restitution commissions decided. The third and last instance was the Supreme Restitution Commission set up at the Supreme Court [*OGH*]. For details of the practice of these commissions see Franz-Stefan Meissel, Thomas Olechowski & Christoph Gnant, *Untersuchungen zur Praxis der Verfahren vor den Rückstellungskommissionen* (Wien-München 2004).

38 File number 63 RK 1373/48-91.

39 File number Rkb 186/53-95.

tion by Alma Mahler-Werfel was legally binding (*res iudicata*) and every court was consequently bound by the ruling of the Upper Restitution Commission, which had stated “the legally effective non-appealability of the acquisition of property by the Federation.” An elimination of the formal and material legal effects of the ruling could only be considered if there were causes for a retrial in the sense of section 530 ff ZPO [*Code of Civil Procedure*]. It could not be the Advisory Board’s task to give a recommendation contradicting a legally binding ruling. The requirements of section 1 clause 2 Art Restitution Act, which would allow for a restitution recommendation, were not fulfilled since, regarding the Munch painting, it had been “stated with legal effect that the requirements for the restitution provision were not met and that therefore there was no incriminated legal act according to the Annulment Act.”

Second Section: Legal Analysis

The following section is an analysis of the Art Restitution Act 1998 (A.) and the proceedings regarding the Munch painting submitted to the Art Restitution Advisory Board on the basis of this Act (B.). The reasons behind the Advisory Board’s decision will be subjected to a legal evaluation, with particular attention being paid to the interpretation of section 1 clause 2 Art Restitution Act 1998.⁴⁰ An assessment of the case, however, also requires a critical analysis of the 1953 decision of the URC Vienna (C.) and consideration of the legal evaluations regarding the nullity of extremely unjust decisions. These considerations have since become part of the General Settlement Fund Law [*EntschädigungsfondsG*] 2001 (D.), in the light of which a re-evaluation of the case is advisable.

A) Art Restitution Act 1998

Based on the Commission for Provenance Research’s results the Art Restitution Act 1998 provides for three categories of restitution authorizations for art objects that passed into the ownership of Federal museums and collections during the Nazi regime or the post-war era.⁴¹

a. Section 1 clause 1 Art Restitution Act 1998 covers art objects that were withheld in the course of proceedings under the Export Ban Act [*AusfuhrverbotsG*] (StGBI No. 18/1918) and passed into the possession of Austrian museums and collections as ‘gifts’ or ‘dedications’. This provision refers to art objects that were gratuitously transferred to an Austrian museum as a countermove to export approval after 8 May 1945. From

40 The following parts are largely based on the legal opinion that I gave in December 2005 at the request of Marina Mahler, granddaughter and legal successor of Alma Mahler-Werfel.

41 Parliamentary Materials (1464 Blg NR XX.GP 1).

today's point of view – in the opinion of the legislative body – “the then chosen procedure is unjustifiable”⁴² and the competent Federal Minister is appropriately authorized to transfer property to the original owner.

b. Section 1 clause 2 Art Restitution Act 1998 concerns art objects that “rightfully passed into the ownership of the Federation” but were the object of a legal transaction that is void according to the Annulment Act [*NichtigkeitsG*] 1946. Acquisitions of art works that had been the object of a void withdrawal of property during the Nazi régime, i.e. specifically all cases of ‘aryanization’, are subject to this regulation.

c. Section 1 clause 3 Art Restitution Act 1998 in contrast covers art objects that, despite a restitution procedure, could not be returned to the original owners or their heirs and have passed into the ownership of the Federation as ownerless objects.⁴³

According to section 2 *para* 2 Art Restitution Act the Federal Ministers in the cases covered by section 1 Art Restitution Act are authorized to make a transfer to the original owner or their legal successor after hearing the advice of the Art Restitution Advisory Board set up by the Federal Ministry of Education and Culture (now: Federal Ministry of Education, Science and Culture).

No request is needed for an art work to be examined by the Advisory Board; the procedure is governed by the official ‘inquisitorial’ system. The General Administrative Procedure Act [*Allgemeines VerwaltungsverfahrenG (AVG)*] is not applicable as its applicability was not provided for in the Art Restitution Act.⁴⁴ As a consequence there is no provision for the procedural rights of the parties.⁴⁵ Moreover section 2 *para* 2 Art Restitution Act expressly excludes any entitlement to claim transfer of property, although there is no doubt that the authorities are bound to the principle of objectivity under constitutional law and that, in the case of unequal treatment, a claim can be filed with the competent court.⁴⁶

42 Parliamentary Materials (1464 Blg NR XX.GP 1).

43 According to section 2 *para* 1 clause 2 Art Restitution Act 1998 art objects of this kind may be transferred to the National Fund of the Republic of Austria for Victims of National Socialism [*Nationalfonds der Republik Österreich für Opfer des Nationalsozialismus*] for use by the Fund. As the restitution reports published by the Federal Ministry of Education and Culture show, this authorization has never been used.

44 The catalogue of Art II *para* 2 EGVG does not mention the Art Restitution Act. See also Noll, *Juridikum* 1 (2003), p. 33. The Green Party [*Grüne*] had demanded a corresponding amendment during their coalition talks with the Austrian People's Party [*ÖVP*], which – like the coalition talks as a whole – failed.

45 The Supreme Administrative Court [*VwGH*] accordingly decided (rejection decision B 422/00-4 of 30 June 2000) that the letter by Federal Minister Elisabeth Gehrler, in which Marina Mahler was denied restitution, constituted official notification.

46 In this connection the Supreme Court's *Bundesbetreuungserkenntnisse* (1 Ob 272/02 k and 9 Ob 71/03 m) should be remembered, in which the existence of actionable civil claims is derived from the principle of objectivity even in cases of voluntary benefits

B) The Munch Painting in the light of section 1 clause 2 Art Restitution Act

1. The elements of section 1 clause 2 Art Restitution Act 1998

In the question of the restitution of *Summer Night on the Beach* the Advisory Board mainly focused on clause 2 of section 1 Art Restitution Act, which is examined in detail below. According to the Board, a gratuitous retransfer of property is possible for those art objects in Austrian Federal museums and collections “that have rightly passed into the ownership of the Federation, but were beforehand the object of a legal transaction according to section 1 of the Federal Law of 15 May 1946 on the nullity of legal transactions and other legal acts that happened during the German occupation of Austria, *passed into the ownership of the Republic of Austria* (note: not in italics in the original) BGBl No. 106/1946 and are still in the ownership of the Federation.”

The wording of section 1 clause 2 Art Restitution Act 1998 is undoubtedly misconceived. The additional subordinate clause “passed into the ownership of the Republic of Austria” (in italics above), for instance, is nonsensical and should be ignored as an editing mistake.⁴⁷ Beyond that the provision is generally too comprehensive as, according to the text, it must be applied to all art objects that were subject to expropriation during National Socialism and then became Federal property. This would also cover all cases specifically governed by section 1 clause 1 Art Restitution Act (i.e. acquisitions of restituted art objects from their owners in the context of export authorizations). In order not to make section 1 clause 1 Art Restitution Act redundant, a systematic interpretation requires the provisions of clause 2 of section 1 Art Restitution Act to be applied to withdrawn art objects acquired from third persons (and not from the *in rem* authorized person as in clause 1).⁴⁸

Nevertheless it must be stated that section 1 clause 2 Art Restitution Act is to be understood as a general clause allowing for the restitution of art works owned by the Federation and that had been the object of a void legal

granted by the Federation within the framework of the Commitment Act [*SelbstbindungsG*].

47 R. Welser & Chr. Rabl, *Der Fall Klimt* (Wien 2005), p. 98 footnote 105; cf. on the internet under www.adele.at; see also the legal opinion of the *Finanzprokurator* (Vice president Manfred Kremser) on the restitution matter of Adele Bloch-Bauer, which can also be downloaded from www.adele.at.

48 Welser & Rabl, *Der Fall Klimt*, p. 103.

transaction in the sense of the Annulment Act 1946 and were not restituted.⁴⁹

It follows from the preparatory legislative documents [*Gesetzesmaterialien*] of the Art Restitution Act 1998 that clause 2 is aimed at cases in which the Federation has in good faith acquired art objects that had been withdrawn from victims of National Socialism. This includes cases in which the Federation had acquired aryanized art objects at auctions or bought them in the market and only later learned that they were loot. In such situations, Austrian civil law allows the acquisition of property in good faith according to section 367 Austrian General Civil Code or section 4 of the Third Restitution Act 1947, so that an acquisition of rights to the disadvantage of victims of National Socialism was possible.

The illustrating documents [*Erläuterungen*] comment on this matter as follows:

“Some museum directors had acquired art objects in good faith from authorized dealers in the art market (in the post-war era) and doubts regarding their provenance had only arisen at a later date.”⁵⁰

Such acquisitions, which are incontestable under current law, but are nevertheless tainted with the odour of profiting from the expropriation of victims of National Socialism, were intended to be cancelled by section 1 clause 2 Art Restitution Act 1998.

The text of Section 1 clause 2 Art Restitution Act 1998 takes up the elements of section 1 Annulment Act 1946. As a consequence the art object must have been “the object of a legal transaction during the German occupation of Austria, effected in connection with the economic or political penetration, designed to withdraw property or property rights from natural or legal persons who were entitled to these rights on 13 March 1938.”⁵¹

The fact that the Annulment Act 1946 itself did not lead to any legal consequences at the time, since its section 2 expressly stated that the form, assertion and extent of claims arising from section 1 would be governed by another Federal law, is in this context irrelevant. Section 1 clause 2 Art Restitution Act 1998 takes up the elements of the general provision of section 1 Annulment Act 1946 and cannot be viewed as a reference to legal

49 Georg Graf, ‘Überlegungen zum Anwendungsbereich des § 1 Z 2 KunstrückgabeG’, *Notariatszeitung* (2005), p. 323, who rightly draws attention to the fact that section 1 clause 2 must be seen as a general clause with a conceivably wide scope of application.

50 Parliamentary Materials (1390 Blg NR XX.GP 4).

51 Federal Law from 15 May 1946, BGBl No. 106, on the declaration of nullity of legal transactions and other legal actions effected during the German occupation of Austria (Annulment Act); printed and commented in: Ludwig Viktor Heller, Wilhelm Rauscher & Rudolf St. Baumann, *Gesetz über die Erfassung arisierter und anderer entzogener Vermögensschaften, Vermögensentziehungsanmeldeverordnung, Nichtigkeitsgesetz, Erstes Rückstellungsgesetz*, 2nd edition (Wien 1947), p. 40 ff.

consequences. The fact that the legal consequences of nullity were postponed through the reservation of particular provisions, and the fact that the nullity of the legal transaction in the sense of the Annulment Act was merely relative⁵² and had to be asserted by the damaged owner, must not be considered in the legal evaluation of whether a matter was the object of a legal transaction in the sense of section 1 Annulment Act 1946.⁵³

In the post-war era, the respective provisions of the Restitution Acts, substantiated by the Annulment Act, obviously had to be consulted to decide on the question of a particular restitution obligation. The term of a void legal transaction (section 1 Annulment Act 1946) was defined more clearly for the purposes of restituting withdrawn property under the Third Restitution Act 1947. According to section 1 *para* 1 of the Third Restitution Act, the property had to be withdrawn from the owner (authorized person) during the German occupation of Austria, either by an unauthorized action or based on laws or other orders, in particular also by legal transactions or other legal acts connected to the National Socialists' takeover of power. A withdrawal of property had to be assumed if the owner was subject to political persecution by the National Socialists and the purchaser of the property was unable to convince a court that the transfer of property would equally have taken place irrespective of the takeover by National Socialists.

In the case of such a withdrawal of property in the sense of the Third Restitution Act the damaged person could request the Restitution Commission to order restitution of the withdrawn property, unless the other party could prove that the object had been acquired in good faith according to section 4 *para* 1 of the Third Restitution Act. In this way the legislative body of the post-war era sought to protect the interests of transaction security and the acquisition in good faith in specific cases.

2. Munch's *Summer Night on the Beach* and section 1 clause 2 Art Restitution Act 1998

Regarding *Summer Night on the Beach* the question arises as to whether the negative decision on a restitution claim under the Third Restitution Act, resulting from the assumption of an acquisition in good faith under section 4 *para* 1 Third Restitution Act, means that the act of acquisition could not be regarded as an action of withdrawal. The Advisory Board and, following its opinion, the Federal Ministry of Education and Culture started from this assumption, given that the restitution report 2000/2001 refers to the state-

52 Compare in detail G. Graf, *Die österreichische Rückstellungsgesetzgebung* (Wien-München 2003), p. 41.

53 According to the opinion of Welser & Rabl, *Der Fall Klimt*, p. 101, section 1 Annulment Act 1946 represents "an independent condition for the applicability of section 1 clause 2 Restitution Act 1998, so that the applicability of one of the former Restitution Acts is not necessary."

ment by the Restitution Commission in the restitution procedure at that time “that the acquisition of property by the Austrian Gallery had not been the result of an act of withdrawal.” This means that it was stated, with legal effect, that the elements of an act of withdrawal, and thus of an incriminated legal action according to the Annulment Act, were not fulfilled.

a. In this context some general remarks concerning the nature and effects of being legally binding (*Bindungswirkung*) are necessary. It is undisputed that the 1953 decision in which the URC Vienna dismissed the claim was legally binding. Consequently a claim for restitution of the painting based on the Third Restitution Act – not taking into account the theoretical⁵⁴ possibility of a retrial under section 530 Code of Civil Procedure – was no longer possible. In no way, however, do the legal effects with regard to this basis for a claim pursuant to the Third Restitution Act exclude a possible obligation to restitute the Munch painting *as a result of another basis for a claim*, particularly the Art Restitution Act 1998, which was enacted several decades later. The fact that a legally binding decision ascertaining the acquisition of property never excludes voluntary restitution is equally clear.⁵⁵

In other words: a legally binding decision based on pre-war law cannot be used as a basis for excluding restitution under the law in force today if a new base for claims by victims of National Socialism has been created – specifically the Art Restitution Act 1998. It is therefore inexplicable that the Advisory Board, which expressed full moral understanding for Marina Mahler’s restitution request, regarded the same request as impossible with respect to a decision based on the legal situation in 1953. Since today’s

54 Under jurisdiction in the post-war era, the applicability of section 530 Code of Civil Procedure to proceedings under the Third Restitution Act had of course been denied since these were non-dispute proceedings [*Außerstreitverfahren*]. Although a retrial would certainly be accepted by jurisdiction (JBl 1998, p. 731 *Klicka* = *ecolx* 1998, p. 833 *Oberhammer*), the absolute time limits set in section 530 Code of Civil Procedure have usually already expired for proceedings under the Third Restitution Act.

55 Cf. Graf, ‘Überlegungen zum Anwendungsbereich des § 1 Z 2 KunstrückgabeG’, *NZ* (2005), p. 330 sq Fn 38 [*translation*]: “If in a proceeding the plaintiff is granted property in an object with legally binding effects, these material legal effects of the judgement do not bar him or her from nevertheless leaving the object with the defendant or giving it to him or her after a certain period of time. The material legal effects do not hinder the person benefiting from the decision in question to show behaviour corresponding to the legal point of view of the opposite side. If, therefore, new facts have come to the fore since the taking of the decision by the Restitution Commission, nothing – and particularly not the material legal effects – would bar the Republic from behaving according to the new standard of knowledge and giving back the painting. Neither does the Art Restitution Act prohibit such a restitution.”

It should be noted that not only new facts, but also a *new legal position* has to be taken into account and that if the prerequisites of the Art Restitution Act are fulfilled, restitution is not only possible but actually *compulsory*. If this obligation is not fulfilled, even civil *damage claims* are possible!

standards, where the Republic is considered to have joint responsibility for the injustices created by National Socialism, are to a large extent manifested in the Art Restitution Act 1998, today's legal situation is also considerably different from that prevailing in 1953.

b. It would obviously be possible for the decision taken then to still be binding regarding an element of the provision of the Art Restitution Act. And this was obviously the Art Restitution Advisory Board's opinion since it assumed that the then dismissal of the application for restitution of the Munch painting meant, with legally binding effect, that the painting had not been the object of a legal transaction in the terms of section 1 Annulment Act 1946.

But is this point stated in the 1953 decision of the URC at all? The URC's reason for dismissing the claim was not that there had *not* been a withdrawal of property in the case of the Munch painting. Instead it claimed – irrespective of that! – that the Gallery of the 19th Century has acquired property in good faith according to section 4 *para* 1 of the Third Restitution Act.

In order to answer this question, a more detailed examination of section 4 *para* 1 Third Restitution Act is necessary:

“Were moveable assets acquired at a public auction or in the context of execution or insolvency proceedings or in return for payment from an authorized trader or from persons to whom the owner him or herself had entrusted them for their use, for management or other purposes, then they are only considered withdrawn in the sense of section 1 *para* 1 if the purchaser knew or had to know that the property had been withdrawn.”

Already the text of the provision (“if the purchaser knew or had to know that the property had been *withdrawn*”) clearly suggests that acquisition in good faith requires a withdrawal.

For the commentators on the Third Restitution Act, Heller/Rauscher/Baumann⁵⁶ and – taking up their points – Graf,⁵⁷ the scope of applicability of this rule only includes property that has already been withdrawn, and

56 Compare Ludwig Viktor Heller, Wilhelm Rauscher & Rudolf Baumann, *Drittes Rückstellungsgesetz*, 2nd edition (Wien 1948), p. 207 [translation]: “The privilege pursuant to *para* 1 of section 4 only comes in useful to the purchaser of property that has already been withdrawn (i.e. beforehand). Therefore its version of the text denies the possibility to maintain the validity of the transaction by, for instance, claiming good faith to those who, in the owner's business enterprise, purchased a moveable asset at an unfair price because the owner was forced to sell it at a loss.”

57 See Graf, *Rückstellungsgesetzgebung*, p. 215 ff. The Restitution Commission probably interpreted the provision in a different way in certain constellations. However Rkv 91/49 = JBl 1949, p. 360 states that section 4 *para* 1 only privileges the original acquisition from non-owners.

thus not the sale by the damaged owner him or herself. The property must have been the object of a different transaction, which for its part had to qualify as a withdrawal.

The preparatory documents to the Third Restitution Act show that the intention was to introduce a position comparable to the original acquisition of property in section 367 Austrian General Civil Code into the Third Restitution Act for moveable assets.⁵⁸ This parallelism⁵⁹ gives further insights for the interpretation: The legislative body “like in section 367 Austrian General Civil Code” provided for “a special form of ‘original’ (i.e. independent of the successor’s rights) acquisition of property and therefore, in particular cases of acquisition, a denial of the restitution claim, the vindication.”⁶⁰ Section 4 *para* 1 Third Restitution Act protects acquisition in good faith or the objectively unsuspicious acquisition of withdrawn property by a non-authorized person analogous to sections 367 ff Austrian General Civil Code.⁶¹ This means that the lack of authorization of the previous holder is ‘cured’ and that property is acquired in good faith because the legislative body does not permit the effects of the underlying legal defect (in the case of section 367 Austrian General Civil Code: the lack of authorization *in rem*; in the case of section 4 *para* 1 of the Third Restitution Act: the existence of a void withdrawal of property).

It should therefore be noted in respect of section 4 *para* 1 Third Restitution Act that, in all cases, a withdrawal is the prerequisite for the applicability of the provisions on acquisition in good faith. In the case of good faith, an original acquisition of property by the purchaser is possible. In this respect the provision contains an order concerning the *in rem* allocation of property, but does not give any information on the legal quality of the title. This must, however, still be regarded as a withdrawal; it is merely ordered that the legal effects of a withdrawal under the Third Restitution Act – especially the claim to restitution of the originally damaged owner – shall not happen.

There is no doubt, however, that the sale of the Munch painting to the Austrian Gallery (at that time the Gallery of the 19th century) in 1940 constitutes a void legal act in the sense of the Annulment Act. The application of the criteria of the Third Restitution Act leads to the same result. Since Alma Mahler-Werfel was a politically persecuted person, there is only one

58 See the explaining remarks to the government proposal in: Heller/Rauscher/Baumann, *Drittes Rückstellungsgesetz*, p. 147, to section 4 [translation]: “Here the provisions of section 367 ABGB are extended to other forms of acquisition in the context of execution or insolvency proceedings for practical reasons and reasons of equity.”

59 Graf, *Rückstellungsgesetzgebung*, p. 215 ff criticizes the lack of parallelism to the acquisition in good faith according to section 367 ABGB in the starting situations to be regulated and concludes that there was no factual need for a privilege of the acquisition in good faith in the case of restitutions.

60 Heller/Rauscher/Baumann, *Drittes Rückstellungsgesetz*, p. 206.

61 Cf Heller/Rauscher/Baumann: *Drittes Rückstellungsgesetz*, p. 205 ff.

situation in which this would not constitute a withdrawal of property, namely if the specific legal transaction would have taken place in the same manner if the National Socialists had not taken over power. But surely this is not the case.⁶²

As an interim résumé it is worth noting that:

- a) the legally binding ruling by the Restitution Commission in 1953 merely stated that the painting was the property of the Republic of Austria, but by no means excluded the possibility of a void 'withdrawal of property' in the sense of section 1 Annulment Act to the disadvantage of Alma Mahler-Werfel during the National Socialist period;
- b) the contrary view of the Art Restitution Advisory Board inadmissibly mixed the existence of a void legal action in the sense of section 1 Annulment Act with the question of a restitution obligation for objects acquired in good faith under section 4 of the Third Restitution Act; therefore this opinion of the Advisory Board must not be followed;
- c) the prerequisites of section 1 clause 2 Art Restitution Act 1998 had certainly been met in the case of the Munch painting *Summer Night on the Beach*.

3. Legally Inadmissible Reasoning of the 1953 Decision of the URC Vienna

The Art Restitution Advisory Board's recommendation not to return the Munch painting to Alma Mahler-Werfel's legal successor was based not only on the argument of the legally binding effects of the 1953 URC decision – above already qualified as unfounded – but also includes an evaluation of the two decisions, which came to different conclusions on this point. The fact that the Advisory Board's recommendation followed the decision in second instance was thus based not only on the legal effectiveness of this decision, but also on the alleged higher *persuasiveness* of the URC's decision in comparison to the 1953 decision in first instance by the RC Vienna, which was in favour of Alma Mahler-Werfel. The Advisory Board uncritically adopted the evaluations, which the appellate body (URC Vienna) in turn used to justify its departure from the decision in first instance. A closer analysis of the decision by the URC Vienna shows, however, that it is by no means better or more convincingly argued than the decision in first instance,

⁶² For the stricter criteria of the *Befreiungsbeweis* ('liberating proof', the proof of the independence of the legal transaction from the National Socialists' takeover of power) see Meissel/Olechowski/Gnant: *Untersuchungen zur Praxis der Verfahren vor den Rückstellungskommissionen*, p. 53 ff, p. 97 ff, p. 144 ff.

which stated that the Munch painting should be restituted to Alma Mahler-Werfel.

The need for an ex-post evaluation of the circumstances regarding the non-restitution arises from the purpose of the Art Restitution Act 1998, which – as the preparatory legislative documents show – specifically also seeks to cover those cases in which the seemingly lawful acquisition of art works by the Republic of Austria is later subject to doubt.⁶³ The 1953 decision of the URC Vienna will consequently be assessed in terms of its legal ‘dubiousness’ below.

As elaborated above, the Provenance Research Commission’s dossier already expressed doubts about the acquisition in good faith at the time. At least, according to Monika Mayer’s résumé, the Austrian Gallery (then the Gallery of the 19th century) had always known that the Munch painting did not belong to Marie Eberstaller or Carl Moll, but to Alma Mahler-Werfel.

Upon closer legal examination, the 1953 decision of the URC Vienna actually turns out to be a downright misjudgement without any conclusive argumentation to support it.

The URC Vienna justifies the non-restitution of the Munch painting by stating that it had been acquired in good faith in accordance with section 4 *para* 1 of the Third Restitution Act, thus meaning there was no obligation of restitution. This central point of the URC’s reasoning is subjected to an extensive legal assessment below.

For the prerequisites of section 4 *para* 1 Third Restitution Act⁶⁴ to be fulfilled with regard to the case in consideration a) a moveable asset must be acquired, b) in return for remuneration, c) by somebody to whom the owner himself had entrusted it, provided that d) the purchaser did not know (or did not have to know) that the asset had been withdrawn.

Section 4 *para* 1 Third Restitution Act represents a case of denied restitution of a withdrawn object, in which, according to the lawmaker’s intention, the provisions of section 367 Austrian General Civil Code, i.e. of original acquisition of property in good faith⁶⁵, shall extend⁶⁶ to other forms

63 The fact that this does not necessarily imply a reproach of wrongdoing on the part of the person acting for the Republic of Austria was convincingly shown by Graf, ‘Überlegungen zum Anwendungsbereich des § 1 Z 2 KunstrückgabeG’, *NZ* (2005), p. 331 ff.

64 Section 4 *para* 1 Third Restitution Act provides: “Were moveable assets acquired at a public auction or in the context of execution or insolvency proceedings or in return for payment from an authorized trader or from persons to whom the owner him or herself had entrusted them for their use, for management or other purposes, then they are only considered withdrawn in the sense of section 1 *para* 1 [note: and must therefore be restituted] if the purchaser knew or had to know that the property had been withdrawn.”

65 Section 367 Austrian General Civil Code states: “An ownership complaint does not lie against the *bona fide* possessor of moveable property when he proves that he has acquired the property either at a public auction, from a tradesman authorized to carry

of acquisition in the context of execution or insolvency proceedings “for practical reasons and reasons of equity.”

Regarding the acquisition from a person of confidence, the modification in contrast to section 367 Austrian General Civil Code was that the good faith was intended to be excluded in the event of knowledge (or negligent non-knowledge) that the object was part of withdrawn assets, i.e. that when the object was acquired from a non-authorized person, mere good faith regarding ownership was not enough if the connection to withdrawn assets was known to the acquirer or at least recognizable with due care.⁶⁷

The individual elements of section 4 *para* 1 Third Restitution Act will now be assessed with regard to the Munch painting. A moveable asset and an acquisition in return for remuneration are given. The prerequisites of an acquisition from a person of confidence and especially of good faith, however, are not fulfilled.

a. Carl Moll and Marie Eberstaller as ‘Persons of Confidence’ (Intermediary Agents) entrusted by Alma Mahler-Werfel?

A prerequisite for the denial of restitution under section 4 *para* 1 Third Restitution Act was that Carl Moll or Marie Eberstaller qualified as persons of confidence (intermediary agents) of the owner, i.e. as persons “to whom the owner himself had entrusted them for use, preservation or other purposes” (section 4 *para* 1 Third Restitution Act). The URC Vienna assumed that Carl Moll or Marie Eberstaller had been entrusted with the painting by Alma Mahler-Werfel. In reality Alma Mahler-Werfel had in 1937 entrusted the paintings to the Austrian Gallery, which in turn returned them to Carl Moll (after Alma Mahler-Werfel’s escape). Strictly speaking, therefore, Moll was only ‘a person of confidence of a person of confidence’.

Whether an entrusting in the sense of § 367 Austrian General Civil Code could be assumed in the case of such a chain of intermediary agents has been disputed for a long time⁶⁸ and is today accepted by the prevailing doctrine.⁶⁹ Yet, the possibility that an intermediary agent refers to the acquisi-

out such trade or by purchase from someone to whom the plaintiff himself had entrusted the property for use, custody or any other purpose. In these cases full ownership is acquired by the *bona fide* possessor and the former owner is entitled only to demand damages against those who are liable to him therefore.”

66 Illustrating remarks on the government suggestion [*Regierungsvorlage*] of the Third Restitution Act; printed in Heller/Rauscher/Baumann, *Verwaltergesetz - Rückgabebe-
setz - Zweites und Drittes Rückstellungsgesetz* (Wien 1947), p. 147.

67 Cf the Commentary by Heller/Rauscher/Baumann, *Verwaltergesetz - Rückgabebe-
setz - Zweites und Drittes Rückstellungsgesetz*, p. 206.

68 This is denied, for instance, by Hans Neuburg, *Kommentar zu den Rückstellungsgeset-
zen* (Wien 1949) p. 40.

69 Cf Karl Spielbüchler in: Peter Rummel (ed.), *Kommentar zum ABGB*, 3rd edition (Wien 2000), Rz 9 zu § 367 ABGB.

tion from another intermediary agent to who he himself had entrusted the object, must be rejected, since in this hypothesis the agent refers to possession, the appearance of a right⁷⁰, which he had caused himself. An act of 'entrusting' with Alma Mahler-Werfel's consent can subsequently only be accepted if one assumes that she agreed to give the painting to Moll. The latter was expressly denied by her in the restitution trial and could only be deemed evident by the URC Vienna by deducing from the transfer of the villa in Breitenstein in the form of a donation or a trust, that Alma Mahler-Werfel had entrusted her *total assets*, which she had left behind, to Moll or Marie Eberstaller. This conclusion, however, is certainly not the only logical conclusion and, apart from that, contradicts general experience of life.

b. Good faith of the acquirer?

Even if one accepts the 'entrusting' (as the URC Vienna did), the good faith of the purchaser still has to be examined. When acquiring from a non-authorized person, the purchaser must in principle have been convinced of the seller's ownership according to the then and currently prevailing doctrine and jurisdiction.⁷¹ Good faith with respect to the authorization to sell is only sufficient when purchasing from a business person entitled to carry out such business.⁷² The investigations carried out in the trial showed that the Gallery of the 19th Century and its director, Professor Grimschitz, knew that Alma Mahler-Werfel was the owner of art works including the Munch painting. This means that the good faith only extended to Moll's or Maria Eberstaller's authorization to sell, which would not in itself be sufficient.

Apart from that, the intended or actual use of the proceeds for the house on the Semmering would also not have been sufficient to assume such authorization: Had Alma Mahler-Werfel not known about the concrete negotiations in 1940 nor agreed to them, the behaviour of Moll and his

70 To the ratio of the privileged acquisition from a person of confidence, compare for instance Helmut Koziol & Rudolf Welser, *Bürgerliches Recht I*, 12th edition (Wien 2002), p. 298. A re-acquisition in good faith by the non-authorized seller is inadmissible, too: Spielbüchler in Rummel, *Kommentar zum ABGB*, 3rd ed. (2000), Rz 12 zu § 367.

71 Cf Heinrich Klang in: Heinrich Klang, *Kommentar zum ABGB*, I/2, 1st edition (Wien 1931), p. 79; Armin Ehrenzweig, *System des österreichischen allgemeinen Privatrechts I/2*, 2nd edition (Wien 1957), p. 190; Franz Bydlinski, *Juristische Blätter* (1967), p. 355; Koziol/Welser, *Bürgerliches Recht I*, 12th ed. (2002) p. 296; OGH in GIUNF 6644 (from 1913); OGH in SZ 39/65 = JBl 1967, p. 202. Of different opinion, however, is Spielbüchler in: Rummel, *Kommentar zum ABGB*, 3rd ed. (2000), Rz 6 zu § 367 ABGB (with reference to Franz Zeiller, *Commentar II/1*, p. 136) as well as earlier jurisdiction.

72 See, however, Koziol/Welser, *Bürgerliches Recht I*, 12th ed. (2002), p. 296.

daughter Marie could only be qualified as an agency of necessity,⁷³ which cannot replace an authorization, as accurately described in the second RC ruling.⁷⁴ Did Grimschitz therefore assume the existence of an authorization only because he thought that the proceeds would be used in Alma Mahler-Werfel's interests,⁷⁵ without her having given a corresponding authorization? If so, he made an error concerning the law.

Account also has to be taken of good faith in terms of section 4 Third Restitution Act: This is reliant on the fact that the purchaser did not know (or did not have to know) that the property was that of a victim of National Socialism. The fact that Alma Mahler-Werfel had to be considered a victim of political persecution, however, was known to everybody involved. For this reason alone, the acceptance of an acquisition in good faith in accordance with section 4 *para* 1 Third Restitution Act is completely incomprehensible.

c. Independence of the acquisition from the National Socialist takeover of power?

Apart from that, a demand for return by Alma Mahler-Werfel would have by no means been impossible, even if there had been valid authorization. Even if Alma Mahler-Werfel had carried out the sale to the Gallery by herself, she could have claimed restitution as a victim of political persecution under the Third Restitution Act, unless it could be proved that the purchase would also have occurred irrespective of the National Socialists' takeover of power (section 2 *para* 1 Third Restitution Act).

This may have been the reason why the URC added in its verdict (despite accepting the requirements of section 4 Third Restitution Act) that "due to the above mentioned correspondence between Professor Moll and Dr Schwarz⁷⁶ ... it [can] quite safely be assumed to be evident that the sale of the painting would also have taken place irrespective of the takeover of power."⁷⁷

73 In as far as they really wanted to act for Alma Mahler-Werfel, but not out of a personal interest in the repair and extension of the villa on the Semmering, which they used themselves.

74 Unless the proprietor [*Geschäftsherr*] later agrees.

75 As can be seen from, for example, the witness statement given by Dr Felicitas Hamburger, a close friend of Moll, at the request of the *Finanzprokuratur*: "He therefore decided to sell the Munch painting since he thought this would be in the applicant's interest ... I do not know anything about a written authorization." (witness statement on 25 September 1959, file pp. 161 - 162).

76 The URC here refers to letters of March 1938, in which Moll negotiates the sale of the Munch painting in Alma Mahler-Werfel's name. The authorization claimed by Moll was denied by Alma Mahler-Werfel in the restitution proceedings.

77 Rkb 186/53 = Rk 216/61, file p. 381.

This seems remarkable, especially because, according to the URC's jurisdiction regarding the Third Restitution Act, mere considerations to sell (even if made before 13 March 1938) were by no means sufficient to prove that the transaction was independent of the takeover of power by the National Socialists.⁷⁸ A crucial fact for the assumption of 'independence' was that the sale should take place under the *same or similar conditions* to those serving as the basis for negotiations before March 1938⁷⁹ and also that the sale should serve the *same economic purpose*⁸⁰. Neither of these conditions applied in the case of the sale of the Munch painting: Alma Mahler-Werfel wanted to sell the beloved painting only in order to fund her escape, but not to fund the costs of repairing the roof of the house in Breitenstein during her enforced absence. She tried to sell the painting abroad herself so that she could obtain the possible proceeds herself; apart from that, there had been no further contact with her before the painting was sold to the Gallery.

The overall conclusion – irrespective of the URC's exceptionally⁸¹ emotional appraisal, which was very unfavourable for the claimant – is therefore that the 1953 decision of the URC Vienna (even on the basis of the circumstances taken for granted by the URC) is in sharp contrast to the provisions of the Third Restitution Act and must consequently simply be qualified as unsustainable. In fact, compared to the general jurisdiction of the Restitution Commissions (which we studied extensively in the 'Practice of the Proceedings before the Restitution Commissions for the Historical Commission of the Republic of Austria' project⁸²) the decision of the URC is a rare case that has to be viewed as a clear misjudgement.

The decision by Dr Ehrenzweig of the RC Vienna regarding the obligation to restitute the Munch painting, on the other hand, has to be viewed as completely in accordance with the legal provisions of the Third Restitution Act and the decisions of the Supreme Restitution Commission.

78 Cf SRC of 3 July 1948, Rkv 63/48 = Heller/Rauscher, *Die Rechtsprechung der Rückstellungskommissionen I* (1949) No.73; SRC of 19 June 1948, Rkv 83/48 = Heller/Rauscher, *ibid.*, No.92. In general, transactions disposing over property caused by emigration were qualified as not "independent of the takeover of power"; compare, for instance, URC Vienna of 10 September 1948, Rkb 817/48 = Heller/Rauscher, *ibid.*, No. 221.

79 SRC of 11 September 1948, Rkv 111/48 = Heller/Rauscher, *ibid.*, No. 120

80 URC Vienna of 26 August 1948, Rkb 759/48 = Heller/Rauscher, *ibid.*, No. 219.

81 As already discussed, the investigation of the circumstances and the appraisal of evidence of the first and second instance are diverging, with the URC's position being considerably less favourable for the applicant than the position of the RC.

82 Cf Meissel/Olechowski/Gnant, *Untersuchungen zur Praxis der Verfahren vor den Rückstellungskommissionen*, summarizing p. 395 ff.

C) The Mahler-Werfel restitution case as 'extreme injustice' in the sense of the General Settlement Fund Law 2001

The previous legal analysis was based on arguments that did not touch on the question of the legally binding effect of the Upper Restitution Commission's ruling. Nevertheless, the question arises as to whether a misjudgement – and in this case, an evident misjudgement – of the post-war era should still be considered eligible for restitution today.

Austrian legislation itself recently gave an answer to this question in the General Settlement Fund Law (BGBl I 2001/12), which was enacted in order to offer a "comprehensive solution for open questions regarding the compensation" of victims of National Socialism. This law makes clear that official decisions, but also restitution settlements (irrespective of their legally binding effect!) shall not be observed if the decision or settlement is considered "extremely unjust".⁸³ Despite all the ambiguity in the term 'extreme injustice', this term is at any rate taken to mean an extremely inaccurate application of legal provisions and one deemed to occur if proceedings in compliance with the law would have required a substantially different decision.⁸⁴ In accordance with the decision practice of the Arbitral Authority for Restitution in Kind, established in accordance with the General Settlement Fund Law,⁸⁵ the existence of an extreme injustice is to be assessed on the basis of a comparison with a "hypothetically correct" decision of the restitution authority,⁸⁶ and the question of whether the "legal foundations were inadmissibly interpreted and applied to the disadvantage of the damaged person"⁸⁷ in the particular case shall be examined.

In the case of the restitution of the Munch painting denied to Alma Mahler-Werfel this question has to be answered in the affirmative, given the inadmissibility of the reasoning in the legally binding decision of the URC Vienna discussed above.

Sure enough, according to section 1 *para* 2 sentence 2 General Settlement Fund Law, the special legal provisions for the restitution of art objects

83 Sections 10 *para* 1, 15 *para* 1 clause 2, 28 *para* 1 clause 2 and *para* 2 clause 2, as well as 32 *para* 2 clause 1 General Settlement Fund Law, BGBl I 2001/12.

84 Georg Graf, 'Arisierung und Restitution', *Juristische Blätter* (2001), p. 746 ff; Franz-Stefan Meissel, 'Unrechtsbewältigung durch Rechtsgeschichte?', *Juridikum* (2003), p. 42 ff; Walter H. Rechberger, 'Ist Ungerechtigkeit komparationsfähig?', *Juridikum* (2005), p. 59 ff.

85 Its members are Josef Aicher (Professor of commercial law at the University of Vienna) as chairman as well as August Reinisch (Associate Professor of Public International Law at the University of Vienna) and Erich Kussbach (a former Austrian career diplomat and honorary professor of Public International Law at the University of Linz).

86 Arbitral Authority for Restitution in Kind, decision number 27/2005, Rz 445 and 477.

87 Arbitral Authority for Restitution in Kind, decision number 3/2003, p. 20, 22; decision number 27/2005, Rz 444.

are still applicable. Although the provisions of the General Settlement Fund Law cannot be directly applied to the restitution in kind of art objects, the idea of coherence of values still requires the general sense of the legal values expressly stated in the General Settlement Fund Law for the application of the Art Restitution Act 1998 to be consulted for the purposes of legal analogy (in the sense of section 7 Austrian General Civil Code).

It cannot be claimed that the lawmaker imposes the criterion of extreme injustice for the correction of individual cases as far as the restitution in kind of real estate (in proceedings before the arbitral authority under the General Settlement Fund Law) is concerned, but not as far as valuations regarding the restitution of art works are concerned. This would represent an unobjective differentiation in contradiction with the principle of objectivity under Austrian constitutional law (article 7 Federal Constitution Law [B-VG]). However, in line with the generally accepted rule of systematic interpretation of the law, an interpretation in accordance with the constitution must be preferred. In other words, an interpretation that advances the unity of the legal order.⁸⁸

In the opinion of the Supreme Court the legislative body that the General Settlement Fund Law lays down “must be understood now as good manners when solving compensation questions.” In this respect its purpose as a legal signal extends beyond the immediate scope of regulation.⁸⁹ In this sense, the perspective of an extreme injustice in the sense of the General Settlement Fund Law should also be considered in respect of the question of restituting the Munch painting to the legal successors of Alma Mahler-Werfel.

This means that even if the URC’s 1953 decision was binding with regard to the Munch painting in the context of the Art Restitution Act 1998 – and, for the above reasons, this is obviously not assumed in this legal opinion – it would still not be decisive for the question of a restitution obligation today according to section 1 clause 2 Art Restitution Act 1998, given the proven extreme injustice of the 1953 decision.

At last: The new Recommendation by the Advisory Board and Restitution of the Painting in May 2007

From a legal point of view, a new discussion of the issue by the Art Restitution Advisory Board was not excluded since the 1999 recommendation was not legally binding (see footnote 42 ff). Theoretically, the competent Federal Minister could even have effected restitution without a new (positive) recommendation by the Advisory Board since the Advisory

88 Cf. Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff*, 2nd edition (Wien 1991), p. 455 ff.

89 OGH [Supreme Court] 30 September 2002, 1 Ob 149/02x = *Juristische Blätter* (2003), p. 454.

Board merely has the right to be heard and since – as elaborated above –our legal analysis demonstrates that the legal provisions for restitution under section 1 clause 2 Art Restitution Act 1998 were undoubtedly fulfilled in the case of the Munch painting. Thus Marina Mahler (represented by her Dutch lawyer, Gert-Jan van den Bergh) requested restitution of the painting in February 2006 for the second time. She based her claim on a legal expert opinion by the author of this paper, in which the above arguments were laid down.

Supported by a report from the new President (Werner Fürnsinn, a former Judge at the Austrian Supreme Court of Administrative Law) of the Commission of Provenance Research in Austrian Federal Museums, which recommended a new debate on the issue, the Art Restitution Advisory Board agreed to discuss Ms Mahler's request again at the session of June 2006. The Art Restitution Advisory Board, however, did not reach a decision immediately and postponed the matter to its autumn session, thus keeping matters hanging in suspense. In the meantime Marina Mahler's claim was confirmed by two other legal opinions issued by internationally renowned scholars (Ewald Wiederin, Professor of Public Law at the University of Salzburg and Paul Oberhammer, Professor of Civil Procedure at the University of Zurich). In its session of November 2006, the Advisory Board accepted the new arguments and (in a unanimous decision) advised the Minister to restitute the Munch painting.

Five months later, on 9 May 2007, Claudia Schmied, Austria's current Minister of Culture and Education, handed the Munch painting to Marina Mahler at a memorable ceremony in the Marble Hall of the Belvedere Museum. Seventy years after the loan to the museum, 67 years after the looting and 43 years after Alma's death, the Munch painting was finally returned to the family of Alma Mahler-Werfel. At last, justice prevailed.⁹⁰

90 Translated by Irene Eckart and Franz-Stefan Meissel.