

**Justice Alito and Arbitration: His Opinion in China
Minmetals**

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JUSTICE ALITO AND ARBITRATION: HIS OPINION IN *CHINA MINMETALS*

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Like Chief Justice Roberts, Justice Alito joins the U.S. Supreme Court with a history of decisions as a judge of the U.S. Court of Appeals. Alito's concurrence to the 3rd Circuit's 2003



Rebecca J. Wright

decision in *China Minmetals Materials v. Chi Mei* provides some indication of how he will approach international arbitration as a member of the Court.¹

The *China Minmetals* case involved the motion of China Minmetals, a Chinese corporation, to confirm and enforce in U.S. courts an arbitral award rendered in its favor by a China International Economic and Trade Arbitration Commission (CIETAC) panel against Chi Mei, a New Jersey corporation. Chi Mei, in both the arbitration and the U.S. enforcement action, consistently alleged that the contracts containing the arbitral clause were forged. The CIETAC panel concluded that Chi Mei had not submitted sufficient evidence to establish its claim that the

(See *CHINA MINMETALS* on page 2)

INSIDE THIS ISSUE...

Int'l Centre for Dispute Resolution	Page 3
Conferences in 2006.....	Page 7
Experts in the News	Page 8
Scoreboard of Treaty Adherence.....	Page 10
Membership Form	Page 16

ARBITRATORS RULE THAT BLOCH-BAUER'S HEIRS WIN RESTITUTION OF KLIMT PAINTINGS FROM AUSTRIA

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Daniela Ehrlich

Seven years of various proceedings finally came to an end in which Maria Altmann and some of her relatives, all of them heirs of Ferdinand Bloch-Bauer, were seeking the return of five Gustav Klimt paintings from the Republic of Austria.

By arbitral award of January 15, 2006, a panel of three Austrian arbitrators chosen by the parties resolved that: (i) the Republic of Austria had gained ownership of the Klimt paintings in 1948 by an agreement concluded with the representative of the heirs at that time; and (ii) those paintings were to be returned to the heirs without remuneration on the basis of a law that Austria enacted in 1998².

This article aims to highlight the procedural chronology of this case and the material terms of the award.

The facts of the dispute can be summarized as follows:

Both parties, the Republic of Austria and Maria Altmann, together with some other heirs of Bloch-Bauer, claimed to have ownership of six³ Klimt paintings which originally belonged to Ferdinand Bloch-Bauer. Bloch-Bauer was Mrs. Altmann's uncle and the head of a wealthy Jewish family in early 20th-century Vienna. These paintings were seized by the Nazis soon after they came to power in Austria in 1938⁴. Most of the paintings have been housed in the Austrian National Gallery for over 50 years.

(See *KLIMT PAINTINGS* on page 5)

Austria contended rightful ownership of the paintings because Adele Bloch-Bauer (Ferdinand's wife and Altmann's aunt) in her will (she died in 1925) requested her husband to donate the art to the Gallery. Mrs. Altmann contested the Republic's position. She claimed that the Gallery had gained possession of the paintings by unlawful seizure by the Nazis. Irrespective of an agreement concluded with the heirs after the end of the World War II, Mrs. Altmann maintained that the paintings were to be returned due to the Art Restitution Law of 1998.

When her request for the paintings was rejected for the first time by the Austrian Cultural Ministry in 1999, and after a first attempt to arbitrate failed, Mrs. Altmann considered filing a suit against the Republic of Austria before an Austrian court. With the value of the claim amounting up to approximately €145 million, the claimants — though having been granted limited legal relief by the Austrian court — abandoned the idea of initiating legal proceedings in Austria⁵.

Instead, the heirs brought legal action before a Californian court in August 2000. The court agreed to take jurisdiction of the claim, overruling Austria's objection that the plaintiffs must exhaust legal means in the foreign state before bringing suit in the United States, and the Republic's further claim that Austria enjoys immunity from the jurisdiction of courts in the United States.

Due to the U.S. Foreign Sovereign Immunity Act of 1976 (FSIA), foreign states are presumed to be immune from the jurisdiction of United States' courts unless one of the FSIA's exceptions applies. In the course of the proceedings, the plaintiffs succeeded in referring to the expropriation exception, which provides that a foreign state will not be immune in any case in which rights in property taken in violation of international law are at issue, and that property must be owned or operated by an agency or instrumentality of a foreign state (i.e. the agency or instrumentality must be engaged in commercial activity in the United States).

Austria in contrast argued that the FSIA was inapplicable because the alleged wrong-doing took place prior to the enactment of the FSIA and prior to the State Department's 1952 adoption of the restrictive theory of sovereign immunity⁶.

On appeal, the U.S. Supreme Court only addressed the question of whether the FSIA is applicable to pre-enactment

conduct and whether this would interfere with the principle that a law is not to be applied to have retroactive effect, unless the law explicitly so provides. However, the U.S. Supreme Court denied the anti-retroactive presumption in this case and found that the FSIA applies to all pending cases regardless of when the underlying conduct occurred⁷.

The U.S. Supreme Court decision finally paved the way for the decisive arbitration that was conducted in Vienna according to Austrian substantive and procedural law pursuant to an arbitration agreement concluded by the parties prior to commencement of the proceeding. The panel, composed by agreement of the parties of Dr. (jur.) Andreas Nödl, Prof. Walter H. Rechberger, and Prof. Peter Rummel, chairman, was instructed to resolve the questions (i) whether and in what manner Austria acquired ownership of the paintings and (ii) whether these paintings were to be returned to the heirs without remuneration pursuant to section I of the Art Restitution Law.

With respect to the acquisition of property, the arbitral tribunal first examined whether Adele's disposition in her will constituted a legal title (*titulus*) for the alleged ownership in the form of a binding legacy or a non-binding request to her husband only. Having carefully evaluated the sophisticated wording of the will in context with other dispositions, it was held that Adele merely expressed a wish to her husband as to how he should dispose of the paintings. Additionally, the panel sought to clarify the ownership of the paintings as between Ferdinand and Adele Bloch-Bauer. As this could not definitely be resolved, the panel recognized that, in this doubtful case, any of the property acquired during matrimony is the property of the husband (*presumptio Muciana*), a presumptive rule which was applicable according to the Austrian Civil Code at that time. Adele's will therefore gave no basis for a sufficient property title to be established for the Republic of Austria.

Moreover, the panel decided, any subsequent disposition of the paintings made by the state-appointed administrator in the course of the liquidation of the property of the Bloch-Bauer family must be considered to be invalid for several reasons. First, any of these transactions could not be based upon a valid legal title as it would have been if Adele's will had had binding effect in this respect. Second, almost all of these transactions were acts of "Aryanizing" property in connection with the Nazi takeover. After the end of the Nazi regime, Austria had to cope with these kinds of Nazi

crimes and enacted the Nullification Act in 1946. This law stated that all transactions and other acts effected during the German occupation of Austria were null and void if they were effected in the course of the political and/or economic "Anschluss" of Austria by the German Reich on March 13, 1938, in order to deprive persons of property or equivalent assets to which they were entitled. However, this Act provided that its implementation should be the subject of special federal laws on restitution which were later enacted and by which the manner of restitution and the time limits for applications were set. Moreover, any acquisition of property by the state through these forms of transactions or acts must be deemed invalid, regardless of whether in the meantime a claim according to restitution legislation would have been time-barred. Any other interpretation was unacceptable, the tribunal ruled, since it would allow a state to gain property by an unlawful legal act or by the former owner neglecting to claim his property. These circumstances would not permit ownership to be gained under civil law legislation.

Ultimately the arbitral panel examined whether Austria had gained ownership by the agreement it had concluded with the representative of Bloch-Bauer's heirs in 1948. In this respect the parties had controversial views about the applicability of section 1 of the Art Restitution Law. Section 1 provides that *"those art objects shall be transferred to the original owners or their legal heirs which were objects of restitution to their original owners or their legal heirs and after May 8, 1945 came into the possession of the federal government in the course of a subsequent proceeding concerning the requirements of the federal law prohibiting the export of objects of historical, artistic or cultural importance, and are still in the possession of the federal government."*

It was crucial for the answer of this case to recognize whether the receipt of export-permission for some art objects was connected with the surrender of other works to the government. Having assessed the extensive correspondence between the Gallery and the representative of the heirs, it seemed very likely, according to the tribunal, that the heirs had given up the paintings to the Gallery – although possibly erroneously assuming that they were obliged to do so according to Adele's will – only for the sake of receiving permission for the export of other pieces of art which were claimed to have been returned. As a result, the panel considered such a negotiation position sufficient ground for the restitution of the paintings pursuant to Section 1 of the Law. Although Austria had ultimately gained a valid title for its

ownership by legal acknowledgement (or settlement), the circumstances of this result were to a great extent motivated by the pressure to achieve the desired authorization for the export of other art objects. Such a result was not intended by the legislator.

The full text of the arbitral award is available at www.adele.at in its original German text and in English translation.

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- 2 Federal Act regarding the restitution of art objects from Austrian Federal Museums and Collections dated December 4th, 1998, Federal Law Gazette I No. 181/1998, in the following "Art Restitution Law" or the "Law".
- 3 One painting is the subject of a pending arbitral proceeding.
- 4 For those readers who are interested to read more about the history of the family and of the paintings, see detailed information on Web site www.adele.at.
- 5 As in many other continental European jurisdictions, Austrian procedural law provides for legal expenses triggered by the proceedings to be reimbursed by the party who loses the case. The claimants did not want to take the risk of possibly bearing the costs.
- 6 Prior to the issue of the 1952 *Tate Letter*, according to the principle of grace and comity, absolute immunity was granted against friendly sovereigns in all actions, but thereafter the immunity of a sovereign was recognized with regard to sovereign or public acts (*jure imperii*) only, not with respect to private acts (*jure gestionis*) (the so-called restrictive theory of sovereign immunity).
- 7 2004 U.S. LEXIS 4030 U.S. June 7th, 2004, at 20. A brief article about this decision in the German language can be found on the author's law firm's Web site www.bepaw.com.

