STATE COURTS OR ADR IN NAZI-ERA ART DISPUTES: A CHOICE “MORE APPARENT THAN REAL”?

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I. INTRODUCTION

This article explores the first and arguably most important procedural choice a party can make when instituting a claim in respect to Nazi-era art, namely between alternative dispute resolution (“ADR”) and state court litigation. A sound analysis of the meeting points and potential conflicts of processes involving administrative bodies, ADR fora and the judiciary can contribute to more effective law reform.

The looting of art by the Nazis during WWII at the behest of Adolf Hitler, Reichsmarshall Hermann Goering and the Minister of Art and Culture, Alfred Rosenberg, was not a simple by-product of war. The looting was part of the “Final Solution” that required deliberate and methodical extinction of a culture.1 The “Final Solution” entailed a dramatic denial of the interests of a generation who lived then, and also of the interests of future generations, by rendering the past inaccessible.2 Photographs of artwork and furniture taken from across Europe by the Nazis appear in albums3 from which Hitler made selections for various museums, as if from “shopping catalogues.” Third Reich forces targeted artwork in France, Italy, the Netherlands, Poland, Germany and Russia.4 Degenerate Art was looted from German artists to be sent to the

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Paris art market or to Switzerland to be sold or traded. The estimated total generated from Nazi Spoliated Art was equated to around $2.5 billion, which was used for the private benefit of Nazi officials and to provide financial support for the Third Reich.5

The art proceeds of the Nazi crime entered into global trade and were widely dispersed. Sales and donations took place across jurisdictional boundaries in the post-war art market. Today, significant numbers of artwork are in the hands of public institutions and museums (state-owned and private) in the United States and in Europe.7 The cruel liquidation of entire families, towns and villages has left many artworks simply missing, while others unclaimed.8 Collectively, the individual pieces that remain on display in individual museums constitute an enormous “world museum” that is oddly reminiscent of Hitler’s last will for a Führer Museum to be established in Linz, Austria.

The scale and intensity of the injustice suffered by the persecuted families has proven difficult to rectify. Restitution has important symbolic value in this category of cases insofar as it contributes to the “remembering” of the victim and to the education of the public about the past.9 As with the repatriation of human remains, material value is not necessarily the uppermost concern.10


7 Hector Feliciano, The Aftermath of Nazi Art Looting in the United States and Europe: The Quest to Recover Stolen Collections, 10 DEPAUL-LCA J. ART & ENT. L. 1, 2 (2000).


The lifespan of remaining generations of Holocaust survivors is nearing its end, and time constraints for restitution are growing more pressing.\(^{11}\) This “unfinished business” in Europe qualifies as one of the most important challenges faced by the community of states. It is necessary to take stock. What is a “fair solution?” Is it achieved only when physical restitution is offered? Are there other ways by which to undo part of the harm perpetrated by the Nazis against European Jews?\(^{12}\) What about instances where fair market value had been paid or compensatory payments were made by one institution, but a state court ordered restitution?\(^{13}\) Individual answers to these and similar questions are still being worked out. The answers are closely tied in with the identification of a suitable forum. This choice determines the likelihood of succeeding with technical defenses against restitution.

Many would agree that an efficient resolution mechanism is needed.\(^{14}\) Neither the international law sphere, nor any of the domestic options on their own, provides a convincing model for dealing with the consequences and proceeds of war crimes.\(^{15}\) The “march away from law and litigation”\(^{16}\) seems attractive enough in view of assumptions that the legal framework is inadequate and unyielding; litigation is too time-consuming and costly; and burdens and standards of proof of ownership and title are too hard to discharge. Also, non-forensic resolution and alternative methods of recovery appear imminently preferable because the recovery rate of Nazi Spoliated Art through litigation has been low.\(^{17}\) Litigation is both complex and slow because of the difficulties associated with having to locate the art, establish the right to claim and deal with the effect of the passage of time. Just getting claims mov-
ing through the system with greater speed may still not be enough,\textsuperscript{18} given that more than property interests or concerns regarding the value of objects are at stake. Assessing and resolving all competing claims for restitution in terms of an ethical framework limited to property rights is not necessarily ideal. Other factors speak equally loudly in favour of ADR. Disputes that arise more than fifty years after an event seem better suited to the non-adversarial or extra-legal setting of a mediation commission. This option gains momentum when one considers the specificity of the work of art in question, the level of complexity of the dispute and the non-legal dimensions of certain contractual and non-contractual disputes.\textsuperscript{19} Moral persuasion, professional responsibility or diplomacy could meet the special dispute resolution needs in cases where soured foreign relations among nations, foreign private entities such as museums, or state entities and individuals would not be worthwhile.\textsuperscript{20}

Before 1995 only ten Nazi Spoliated Art claims were filed in the United States,\textsuperscript{21} but today there are numerous claims for recovery that are resolved on a case-by-case basis in state courts.\textsuperscript{22} At the same time, non-binding declarations of intent exhort states to cooperate and provide ADR mechanisms to resolve ownership disputes, calling for “just and fair” solutions.\textsuperscript{23} The idea that justice

\textsuperscript{18} Murphy, supra note 1, at 19.

\textsuperscript{19} Sarah Theurich, Update on Alternative Dispute Resolution in the Art and Cultural Heritage Sector, International Bar Association, available at http://www.ibanet.org/Article/Detail.aspx?ArticleUid=c93e2f2a-f5f6-4a64-a7d1-8bd907f0d3dd.


\textsuperscript{21} Bazyler, supra note 5, at 165.


demands nothing less than common ADR standards enforced in every country also has strong support. It has been suggested that these standards are to be developed in light of both public and private international law to help heal the past and prevent recurrence in the future. However, because so little progress has been achieved to date, conflicting decisions in state courts and non-judicial or quasi-judicial bodies present certain risks.

Dispute resolution in the United States and the United Kingdom are considered together with new German precedents in order to shed light on the parameters or overlaps in jurisdiction in legal systems in which ADR and state court litigation (Germany, for instance) are being pursued. Each form of dispute resolution has its own attractive features, but how it interacts is equally vital. The freedom of a litigant to exit an alternative dispute resolution process, when litigation seems to offer more seems highly relevant. Parallel processes will raise an issue of finality. In the U.K., conflicting findings between a court and the statutory mediation body are possible in theory, but are unlikely to arise in practice. In the U.S., the overwhelmingly strong attractions associated with litigation present fresh dilemmas in the choice between dispute resolution fora. While many assume that ADR is desirable, preferable and ideal, comprehensive information about different systems of dispute resolution is hard to obtain. There are not many databases of ADR in art law, and realistic evaluation is a challenge.

The complex interaction of public and private international law and the effect of public international law on the distinction between procedure and substance, jurisdiction and merit are at the forefront of the analysis. One of the crucial questions is whether the public policy exception is applicable to prevent one norm inter-

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25 Stamatoudi, supra note 22, at 189-90.


27 “Complementarity” renders it difficult to evaluate both strategies together and on an equal footing.
ferring with the intended functioning of another norm. This question will remain important for as long as litigation offers a viable dispute resolution strategy.

II. Restitution Claims: Legal Basis and Status in International Law

Ever since the 16th century, international legal authorities have expressed the desire to exempt cultural objects from the threat and consequences of acts of war. The 17th century saw the development of the principle that private property should not be plundered during war and that such plundering gives rise to a duty to identify, locate and restore the property to its country of origin. Grotius asserted:

But what is captured during an unjust war is to be restored, and not only by the captors [those who have taken property], but by others, into whose hands they have anyhow come. For no one can transfer to another more of right than he himself possesses; as the Roman Jurists say: which Seneca briefly explains, No one can give what he has not . . . the second or third possessor took this advantage . . . but if he uses this right against him who lost the property by an unjust act, he will not do rightly.28

By the beginning of the 19th century, the principle that the looting of works of art was contrary to the laws and customs of war29 had developed. The international community recognized a need to prohibit the plundering of a nation during wartime by international agreement. The 1907 Hague Convention on the Laws and Customs of War on Land30 was a statement of the laws of war and war crimes that reaffirmed, as well as elaborated on, the principle against looting. It forbade the seizure and destruction of cultural property in war except when military necessity required it,

29 In 1812, a Canadian court held that objects of artistic value aboard a ship had to be returned to the owner because they were protected from seizure during war. See generally Kevin Chamberlain, Holocaust Art Claims and Public International Law, 13 ART ANTIQUITY & LAW 351 (2008).
and provided for compensation when its provisions were violated.  
Not only did the 1907 Hague Convention not deter the Nazi art     
confiscation programme, but it also did not regulate the return of      
stolen property. The provision on destruction caused by military     
action was too narrow to qualify for application in Holocaust-era    
art claims.   
The Allied Nations introduced measures of restitution in the   
Declaration of London in 1943. These measures imposed state      
responsibility for the return of displaced property, and called on     
neutral states to undertake restitution. The Declaration included  
the right to declare invalid transfers by open looting or by seemingly legal means purportedly affected voluntarily. This was a public disavowal of the protection of anyone who acquired looted works of art in good faith on the basis of the underlying principle that no one ought to benefit from unlawful acts. These measures were reinforced in a number of other legal instruments, among which are the Final Act of the Bretton Woods Conference in 1944 and the Final Act of the Paris Conference on Reparations in 1945.

Because typical cases of wartime plunder of cultural objects were originally classified as delicta juris gentium (an international crime), and the International Military Tribunal at Nuremberg declared the plunder of art a war crime, it has been argued that pertinent provisions of the 1907 Hague Convention ought to be treated as breaches of peremptory norms in international law (jus cogens). The definition of “war crimes” in the Charter of the Nuremberg Tribunal was in conformity with customary and treaty law

31 Id. at Articles 46, 47, 53, 56.
33 Chamberlain, supra note 29, at 353.
35 Article 6 of the Charter of the International Military Tribunal at Nuremberg annexed to the London Agreement on War Criminals, 8 August 1945, 82 UNTS 279 (no 251); Inter-Allied Declaration of 1943; Various different Treaties of Peace, including with Finland. 1947 UNTS No 746 Article 25.
36 Hague Convention (IV), at Articles 46, 47, 56.
37 Hartung, supra note 24, at 327, 333.
at the time. A well-established prohibition existed in customary international law against the “confiscation of private property by aggressive occupying powers” at the time. The prohibition found expression in Article 46 of the Hague Convention and in the Kellogg-Briand Pact of 1928. The prohibition is incontrovertible, but the extension of an obligation to ensure restitution of looted cultural objects to third states remains a contested proposition.

It has been suggested that states can, at best, act as custodians of property tainted by a war crime or crimes against humanity, but cannot impede the ownership interests of original owners. This has important implications for state-owned museums, which cannot assert rights to Nazi Spoliated Art. Spoliation of art as a “war crime” is more readily accepted than a “crime against humanity” would be because the latter was introduced into international law by the controversial Charter of the International Military Tribunal at Nuremberg.

The Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict sets a general policy direction. It provides for a starting point to the obligation to return and establishes the principle that cultural objects removed during armed conflict shall never be retained as war reparations. Unfortunately, it only applies to military action, and does not deal with restitution. Moreover, it protects a very


41 Pell, supra note 8, at 315.

42 Kaczorowska, supra note 39, at 212.


limited category of cultural objects with a view only to preventing
damage, destruction and pillaging in future conflicts.

To halt and suppress destruction of art, cultural objects and
heritage sites are as much a concern in peacetime. Most peace
treaties contained clauses on restitution of war booty. Cultural ob-
jectives were often the most popular kind. Several multilateral trea-
ties contemplate the restitution and return of cultural objects,
promote international cooperation against the illicit trade in cul-
tural objects, and favour the settlement of disputes regarding their
return. Their shortcomings include that they create rights and obli-
gations only for States Parties and are non-retroactive in character.

At a normative level, restitution is conceptually consistent
with the prohibition on importing cultural objects stolen from the
documented inventory of an institution, which is found in the 1970
UNESCO Convention on the Means of Prohibiting and Preventing
the Illicit Import, Export and Transfer of Ownership of Cultural
Property. The Convention applies both in peacetime and in situa-
tions of military occupation. While it prevents further future de-
struction and looting of cultural property, it does not address Nazi
Spoliated Art specifically, nor does it contain a mechanism or for-
rum for adjudication of such claims. It simply requires the recover-
ing state to compensate an innocent purchaser without providing
for private parties’ claims.

Return of stolen art to its rightful owner is conceptually con-
sistent with the 1995 UNIDROIT Convention on Stolen or Ille-
gally Exported Cultural Objects. The Convention considers
claims for restitution brought by private individuals, providing
that “[t]he possessor of a cultural object which has been stolen
shall return it.” It would represent a step forward for Nazi
Spoliated Art, if only the absolute limitation of fifty years since the
theft occurred did not apply. No opportunity exists to claim ob-
jects looted more than sixty-six years ago, or prior to 1963. The

45 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and
Transfer of Ownership of Cultural Property, United Nations Educational, Scientific and Cultural
DO_TOPIC&URL_SECTION=201.html.
46 Kelly A. Falconer, Note, When Honor Will Not Suffice: The Need For a Legally Binding
International Agreement Regarding Ownership of Nazi-Looted Art, 21 U. PA. J. INT’L ECON. L.
47 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, UNIDROIT
htm.
48 Id. at Article 1-2.
49 Id. at Article 3(1).
Convention assists in the event of general art crime, and a Convention claim under either the UNESCO and UNIDROIT Conventions\(^50\) is valid against a person with valid title. However, neither one presents an option for settling Nazi-era art claims at this stage.

If international law limits for the reach of conflicting municipal laws are debatable, it is incontrovertible that Nazi Spoliated Art claims present neither a typical thief/victim scenario, nor a typical good-faith/bad-faith purchaser scenario. Their moral force means they have little in common with either simple art theft or the greed of wartime plunder.\(^51\)

### III. Declarations of Intent

Several “soft law” instruments provide guidance and advice to countries and institutions such as art dealers and museums with regard to claims involving Nazi-era art.\(^52\) Their creation appears to be linked to the difficulties that stand in the way of comprehensive binding agreements for the international community. None of the declarations of intent contain a uniform approach or overriding criteria and procedures for speedy, cost-effective recovery, or spell out the measures by which this aim can be realized.

The Principles associated with the 1998 Washington Conference on Holocaust-Era Assets\(^53\) came a mere three years after the UNIDROIT Convention. The principles set general goals and guidance to encourage claimants to step forward, but they lack definition and clarity.\(^54\) Among other things, whether or not “confiscation” includes or excludes forced sale is uncertain.\(^55\) This complicates matters for some claimants.\(^56\)

The Washington Conference was followed by the Parliamentary Assembly of the Council of Europe. It adopted Resolution

\(^{50}\) See id. at Article 7(b)(ii) and Article 3 respectively.  
\(^{51}\) E.g., Falconer, supra note 46, at 423.  
\(^{52}\) See supra note 23 and accompanying text.  
\(^{54}\) Sawka, supra note 15, at 41.  
\(^{55}\) DCMS Restitution of Objects Spoliated in the Nazi-Era: A Consultation Document (July 2006) at §3.5.  
\(^{56}\) An example is the looted Goudstikker Collection, which underwent a forced sale. Lawrence M. Kaye, Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust, 14 WILLAMETTE J. INT’L L. & DISP. RESOL., 243, 245-52 (2006).
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120557 without addressing any of the flaws and gaps in the Washington Conference Principles, apart from showing sympathy towards de-accession or other legislative changes that may be needed.58 The 2000 Vilnius International Forum on Holocaust Era Looted Cultural Assets and the 2009 Terezín Declaration59 do not improve the legal position of a claimant in actual terms, but merely reiterate the policies of the 1998 Washington Conference. The existence of a duty of restitution in domestic law is investigated next.

IV. RESTITUTION AT THE DOMESTIC LAW LEVEL

Disputes involving Nazi-era art are resolved mostly in court on a case-by-case basis under different municipal laws, which may encompass special restitution laws.60 Support for the principle of restitution in customary international law61 is found in national restitution legislation that gives effect to the Washington Principles.62 Austrian law is a case in point.63 Technically an Axis-power, Austria adopted a law that declared all transactions motivated by Nazi ideology null and void in 1946.64 This law continues to affect dispute resolution even today. In Switzerland, the ability

57 See citations and notes accompanying supra note 23.
59 See citations and notes accompanying supra note 23.
62 See supra note 23 and the accompanying text.
63 The Austrian Kunstrückgabegesetz of 1998 does not contain a cause of action for the return of artworks, but the scope of the Act imposes a restitution obligation on Austria.
of the *bona fide* possessor to obtain compensation from the state was a constitutional requirement, but the restitution law of Switzerland has long been repealed. Where no restitution law applies, general commercial law rules will determine title.

A recent authoritative ruling of the German Federal Court of Justice (*Bundesgerichtshof*) confirms that general civil law prevails over restitution law in Germany. In Germany, the seizure of Jewish property by the Nazi regime has been regarded as null and void in German law since the end of WWII. Contrasting decisions taken by various different bodies in respect to such property have provoked “much debate about procedure and forum.” One of the challenges has been to establish the parameters of jurisdiction of different fora in respect to Nazi-era art claims.

Whereas the legal concept of restitution implies return of a cultural object to the legal owner in accordance with what the law prescribes, there are several potential legal obstacles in the way of claimants and heirs wanting to recover their ancestors’ property. These include more or less technical defenses based on jurisdiction, choice of law, legal title, statutory limitations and de-accessioning provisions. Voluntary return and restitution may be blocked or stymied by statutory limitations or de-accession rules that were not designed for Nazi-era art claims. Private international law rules that control the application of domestic legal system’s concepts of time bars and adverse possession and title may have the same effect. Export regulations, declarations of ownership in domestic legislation, or the heirless status of an object could limit the operation of the applicable law. Depending on the facts of the case, this type of rule may also block restitution.

Outside the confines of the law, restitution includes efforts to surmount the legal obstacles in the way of return. Technical defenses may be applied less strictly in the light of the historic background and special circumstances of the case, either by virtue of “soft law” that creates special commissions or because ADR is pre-

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66 See infra VI.A.
67 Restitution of Identifiable Property; Law No. 59, 12 Fed. Reg. 7983 (Nov. 29, 1947) (Military Government Law 59) and post-war laws in Germany and Austria repudiated all spurious “transactions” of the Nazi-era, including art “deals” that were made to appear legal.
69 Schonenberger, *supra* note 10, at 228.
ferred to litigation. It is also possible to mitigate the strictness with which some technical defenses are applied in other ways. For instance, the classification device and the public policy exception of private international law directly affect the application or non-application of the forum’s statutory limitations.

U.S. executive policy on the validity of the acts of Nazi officials is reflected in the 1943 London Declaration and in statements made by the executive. The need for restitution of the art that had been dispossessed during the Nazi-era poses a unique challenge to all forms of dispute resolution.70

V. INCREASE IN CASES: THE PROMISE HELD OUT BY ADR

The 1943 Inter-Allied Declaration was applied with great enthusiasm at first. Inevitably this enthusiasm dwindled as time passed.71 Claims eventually stalled. Claims that had “previously simmered under the surface of Cold War tensions”72 have seen a sharp increase since access to the records started to assist claimants in meeting the evidentiary burden associated with proving title.73 After the Berlin Wall fell and the Eastern Bloc disintegrated, catalogues in many Third Reich archives became available for research. Government records relating to WWII were declassified, providing access to a number of texts documenting Nazi operations against Jewish culture in the Third Reich. More cases are being generated by precedent, increased art prices, syndicates investing in restitu-


71 Falconer, supra note 46, at 387.


tion claims and technological advances. Many claims still arise from chance finds, but public awareness of the Nazi obsession with art has improved rapidly on account of the work done by scholars and journalists investigating restitution claims. Auction houses, galleries, states and museums are more exposed to restitution claims than ever before.

Parties either compete for all-or-nothing in court, or they consent to a non-judicial dispute resolution mechanism. Freedom of contract allows parties to limit legal uncertainty and risk by way of choice of court clauses, or to opt for tailored ADR clauses, submission agreements, ADR mechanisms in normative instruments, or pledges to ADR by cultural institutions. For instance, there is support for an international commission or panel that would eliminate the need to quantify and prove the original owner’s search for the property or of confiscation, which would render statutory limitations, the discovery rule and other miscellaneous defenses inapplicable. Next, attention turns to what the alternative frameworks that support mediation, arbitration and negotiation in Germany, the United States and the United Kingdom can offer.

A. Mediation

Mediation seeks to resolve disputes on a private and informal basis by a neutral intermediary who assists the parties in identifying common ground. It is not conducted on strict law and does not require the application of any law or set of rules, whether domestic or international. Special mediation processes take account of their highly specific subject matter, the multiple stakes at play in disputes over ownership and possession, and of commercial, cultural, ethical, historical, moral, religious and spiritual aspects. Typical
hurdles in litigation may thus be overcome. Future relationships and goals are considered important; legal analysis and redress of past conduct are not. Successful mediation yields a settlement agreement with tangible outcomes tailored to the interests of the parties that can be enforced under contract law. Confidentiality and low cost add to its attraction, but a judgment may be needed if one of the parties resists the enforcement of the agreement.

It is vital to identify the best stage at which to mediate—too early, and the parties will be insufficiently informed about each other’s cases; too late, and high costs may already have been incurred.

1. Germany

The 1998 Washington Conference Principles and the 1999 Common Statement issued by the Federal Government, Länder and Municipal Associations pledge that efforts will be made to find a fair and just solution for art held in public collections but lost from private ownership due to Nazi persecution. Neither instrument creates a cause of action for third parties; however, restitution efforts continue. The German Government established the Advisory Commission in Connection with the Return of Cultural Property Seized Due to NS Persecution, particularly from Jewish Ownership, in 2003, to give effect to the 1998 Washington Conference Principles. Comprised of high-ranking persons, this statutory mediator issues a moral recommendation if both parties require it after having exhausted traditional legal remedies or if statutory limitations have taken effect. It does not deal with claims in terms of the restitution laws and corresponding case law. Earlier


82 The Advisory Commission is located at the Central Office for the Documentation of Lost Cultural Property.

83 See supra note 23.
compensation payments are to be taken into account when artworks are returned to their former owners or heirs.\footnote{Hartung, supra note 24, at 327, 335; Harald König, Claims for the Restitution of Holocaust-Era Cultural Assets and their Resolution in Germany, 12 ART ANTIQUITY AND LAW 59, 62 (2007).}

The Allied restitution laws and the Property Settlement Act of 1990 (Vermögensgesetz) encourage claimants, current owners and agencies to come to an amicable settlement.\footnote{E.g., Article 15 USREG; Article 12.2 BrREG; § 31 Abs. 1a and 5 VermG.} The Property Settlement Act is a special law that establishes offices responsible for unsolved property questions concerning restitution and indemnification in Eastern Germany. Any settlement can be challenged in the administrative courts that are authorized to interpret the Property Settlement Act.\footnote{König, supra note 84, at 60-61.} Only decisions that are not subject to further appeal have “formal legal authority” and are conclusive for a case. Legal stability is reached once the highest authority, the Federal Court of Justice, has spoken. Decisions taken at first or second instance remain tentative and may be revisited at any point.\footnote{Yuval Sinai, Reconsidering Res Judicata: A Comparative Perspective 21 DUKE J. COMP. & INT’L L. 353, 384 (2011).}

2. The United Kingdom

cludes all cases where a subject has exploited the weakness of another for cultural gain.\footnote{92 Tullio Scovazzi, The Return of the Benevento Missal to the Chapter Library of Benevento from the British Library, 16 Ar t A ntiquity and Law 285, 294 (2011).} The Panel takes account of both the moral strength of the claimant's case and the moral obligations resting upon the holding institution. It is deprived of jurisdiction if a cultural object is seized by the police or if a court in one of the Member States of the EU has given an order to freeze property and the relevant museum is no longer in possession.\footnote{93 Council Framework Decision 2003/577/JHA of 22 July 2003, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2003F0577:20030802:EN:PDF; Palmer, supra note 16, at 13.}

The Panel cannot determine legal rights as to title. The first return recommended was for the British Museum to make an unconditional return of the Benevento Missal. The Missal was likely stolen by Allied Forces from the Benedictines between 1943 and 1944.\footnote{94 Report of the Spoliation Advisory Panel in Respect of a Renewed Claim by the Metropolitan Chapter of Benevento for the Return of the Beneventan Missal Now in Possession of the British Library, Department for Culture, Media and Sport, available at http://www.culture.gov.uk/publications/7412.aspx; Scovazzi, supra note 92, at 285.} Requests for its return were made in 1978 and in 2002, but failed due to the strict terms of the British Library Act 1972. The Panel’s Report of 2010\footnote{95 Report of the Spoliation Advisory Panel in Respect of a Claim in respect of a 12th Century Manuscript Now in the Possession of the British Library, Department for Culture, Media and Sport, available at http://webarchive.nationalarchives.gov.uk/+/http://www.culture.gov.uk/reference_library/publications/3733.aspx.} finally granted the claim based on the power of the Panel under the Holocaust (Return of Cultural Objects) Act 2009 to recommend restitution of objects held by British museums. The statute removes any lengthy bar to de-accessioning cultural objects lost during the Nazi era until November 2019.\footnote{96 Prior to the promulgation of the Holocaust (Return of Cultural Objects) Act 2009, all national museums in the UK were statutorily barred from restitution. The absence of a statutory mechanism for restitution meant that the British Museum was barred from restituting Old Master drawings in its possession in Her Majesty’s Attorney-General v. The Trustees of the British Museum [2005] EWHC 1089 (Ch)). The case triggered the change in the statutory framework for the restitution of Holocaust-era art. Kaye, supra note 56, at 254.}

The very choice between different types of dispute resolution and forum creates room for different conclusions in different fora concerning whether and how compensation payments received after WWI ought to be taken into account when restitution is de-
Panel recommendations are not limited to physical returns only. The Panel acknowledged the moral claim of the Feldmann heirs when it received a joint submission from the British Museum and the claimants in which the claimants moderated their claim to one for financial compensation. The Panel recommended that the government make an ex gratia payment of £175,000. It confronted the prominent question of financial compensation and redirected the debate on restitution when it recognized that “Nazi persecution was a predominant motive” in the sale of drawings (by Corinth and Renoir) by the initial owner in 1933, yet still squared a finding of a forced sale with its conclusion that the prices fetched in auction were reasonable and market related. The Panel also treated post-war compensation payments made by the German authorities in respect to the loss of the art collection as relevant. Double recompense was avoided because the moral strength of the claim on the part of the heirs was deemed to be too weak to justify a transfer of the drawings.

Skeptics have predicted that the Panel mechanism will not ensure consistent application of a recognized set of norms. The recommendation concerning “The Coronation of the Virgin” by Sir Peter Paul Rubens in December 2010 was controversial because the Panel adopted the view that the sale was negotiated freely. The heirs of a Jewish banker could not claim ownership. It is a well-known fact, however, that Dresdner Bank routinely implemented anti-Jewish and Nazi policies against its own staff and that the work may have been sold at a compulsory Jewish auction.

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100 Range, supra note 58, at 665.

Whenever one norm conflicts with another, the matter will turn on enforceability. Panel recommendations lack enforceability in principle.

3. The United States

The guidelines of both the American Association of Museums (AAM)\(^{102}\) and the Association of Art Museum Directors (AAMD)\(^{103}\) encourage the use of mediation to resolve claims regarding Nazi Spoliated Art. These are voluntary associations without a regulating authority. American courts have ruled that the choice between mediation and technical defenses used in courts is up to museums. Their guidelines of these associations cannot be taken to constitute a waiver of such a defense.\(^{104}\) Because these guidelines do not contain directly enforceable legal claims, the incentive for United States museums to pursue mediation is lacking. The institutions that work in this area do not have terms of reference comparable to the Spoliation Advisory Panel in the United Kingdom.\(^{105}\) Legislation exists at both federal and state levels.\(^{106}\) The most recent state legislation in California comes the closest to the Holocaust (Return of Cultural Objects) Act 2009, but no Panel has been established.

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\(^{105}\) These institutions include foreign arbitration organizations; auction houses; IFAR (since 1969); the Art Loss Register (which is a joint initiative in the form of a “for profit” company in existence since 1991); the New York Holocaust Claims Processing Office established on the basis of the Washington Principles; the Presidential Advisory Commission on Holocaust Assets established under the Holocaust Assets Commission Act; the Interagency Working Group established in terms of the Nazi War Crimes Records Disclosure Act of 1998, to identify classified records of Nazi war crimes and recommend declassification to render them available to the public; and the Nazi-Era Provenance Internet Portal. No database is comprehensive and has international governmental support.

\(^{106}\) Including Holocaust Victims Redress Act 1998 (no right to sue for return of confiscated property); Nazi War Crimes Disclosure Act 1998; and Holocaust Assets Commission Act (which never engaged with returning stolen art, but merely authored a report).
B. Arbitration

An arbitration clause could maximize predictability in art transactions, depending on the type of arbitration chosen. Arbitration is an accelerated procedure that offers opportunities to expedite proceedings in addition to non-conventional remedies that can ensure restorative justice.\textsuperscript{107} There is notable potential for settlement.\textsuperscript{108} Advantages may include more control and greater flexibility for parties from different cultural and linguistic backgrounds. Virtually every decision apart from the outcome belongs to the parties in commercial arbitration. They are able to agree on (a) the rules of procedure that should apply to their case; (b) the applicable law or set of non-binding rules, or to have the arbitrator decide ex aequo et bono on the basis of fairness or as an amiable compositeur to restore the relationship between the parties;\textsuperscript{109} (c) the specialists to conduct the arbitration; and (d) whether to publish or keep anonymous a ruling before publication.\textsuperscript{110}

If, at the time proceedings to enforce an award are commenced, that state is a party to the 1958 New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards (NYC),\textsuperscript{111} the arbitral award will qualify for international enforcement.\textsuperscript{112} There is as of yet no counterpart for the recognition and enforcement of arbitral awards in litigation. While unsatisfactory from the point of view of the parties, the judgments of one state’s courts have no force in another state by themselves. Re-litigating is highly impractical and costly; yet, in the case of a foreign judgment, sanctions will not automatically follow non-compliance. All

\textsuperscript{107} Theurich, supra note 75, at 574-75. Examples include provision of other artworks, long-term loans, capacity-building exchanges, and shared ownership.


\textsuperscript{109} Norman Palmer, Arbitration and the Applicable Law in Resolution of Cultural Property Disputes, in RESOLUTION OF CULTURAL PROPERTY DISPUTES 291, 301 (International Bureau of the Permanent Court of Arbitration ed., 2004); Schonenberger, supra note 10, at 248.

\textsuperscript{110} If no agreement is in place, it depends on the rules that govern the operation of the tribunal. Theurich, supra note 75, at 579.


foreign judgments require enforcement beyond what the narrow sphere of application of the 2005 Choice of Court Agreements Convention would include, once it enters into force.

Scholars and commentators have regularly acknowledged the potential for arbitration in art and cultural heritage disputes.113 There is no common arbitration forum for art looted during WWII or for Nazi-era art disputes.114 Various models and institutions have been proposed.115

Ad hoc arbitration yields arbitral awards that may require enforcement under the NYC, but precedent is not established. The awards may still be based on strict legal technicalities.116 Setting up national arbitration panels under common guidelines117 would only work if the panels waived the application of strict legal rules that impose obstacles to restitution. “Binding international arbitration” is attractive in the context of Nazi Spoliated Art claims because parties can appoint arbitrators who are familiar with such claims and who could prevent any single nation from asserting too much control over the process.118

International solutions for settling Nazi Spoliated Art cases have consistently been argued for,119 but the proposals have not yielded common rules or a uniform procedure.120 The statutory limitations provisions of the 1995 UNIDROIT Convention mean

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114 Hartung, supra note 24, at 327, 331.

115 These include the International Court of Justice, the Permanent Court of Arbitration (PCA), UNCLOS III, the International Commission on Holocaust Era Insurance Claims (ICHEIC), or the Claims Resolution Tribunal of the Holocaust Victim Assets Litigation against Swiss Banks and other Swiss Entities. Gegas, supra note 16, at 151-59; Maria O Wantuch and Anne Niethammer, Compensation for Nazi Wrongdoing: The Case for an Integrated Approach, 12 ART ANTIQUITY & L. 55 (2007).

116 Palmer, supra note 109, at 292.

117 Mullery, supra note 113, at 643, 668.


119 E.g., Rebecca Keim, Filling the Gap Between Morality and Jurisprudence: The Use of Binding Arbitration to Resolve Claims of Restitution Regarding Nazi-Stolen Art, 3 PUB. Disp. Resol. L.J. 295, 298 (2003) (arguing for “the creation of international law or treaty designating arbitration as the forum to resolve claims of stolen art”).

120 Murphy, supra note 1.
that Nazi-era art claims are outside the scope of the arbitration provision in Article 8(2).

Owen Pell is among the most widely cited authorities on the point that litigation in the U.S. court system fosters inefficient results and that in rem jurisdiction of every nation in ADR is the only answer. Pell investigated the effects of subjecting Nazi-era art claims to three distinct principles of international law: (i) no nation may assert ownership interests in such art superior to that of the original owners; (ii) each nation has an affirmative obligation to identify and return it; and (iii) laws or policies that hinder return (e.g. statutory limitations, theories of abandonment, export restrictions, etc.) should be invalid.121

Pell’s set out a broad framework for title registration, a claims tribunal, and made recommendations on the qualifications, powers and functions of the arbitrators.122 The initial proposal for international arbitration was later modified to setting up the PCA as the forum with final authority.123 After some defined period, absent a claim, the tribunal would declare the object cleared, while works subject to claims would be sent to arbitration.124 The Anglo-American law rule that a looter cannot pass good title would be institutionalized. Rules of proof and evidence would facilitate settlements and assure that claimants are not unfairly disadvantaged by the passage of time. The registration of a work would cut off or relinquish all claims against prior sellers or holders. There would be special rules for heirless property. Tribunal proceedings would take precedence, counteract choice of law problems, ensure consistency of decisions on like claims and avoid jurisdictional problems. Importantly, the tribunal would have the power to determine the res judicata effect of prior rulings.125 Tribunal rulings would be final as to the parties and would protect both the claimant and former holders against any other claims relating to a given work of art, including claims by other alleged heirs of the true owner. Uniform rules, procedures and standards would benefit claimants, museums and other holders of Holocaust-looted art.

122 Pell, supra note 8, at 317-24.
123 Pell, supra note 8, at 307, 309, 317, 320, 325.
124 Id. at 317.
125 Id. at 320.
Pell’s proposal was considered by the European Parliament in 2003, but was never implemented. The reasons why the vision never materialized are discussed infra Part VIII.

An Austrian arbitration panel arbitrated successfully when litigation in the United States reached a dead-end in a case involving a claim by Maria Altmann. Altmann pursued a claim against the Austrian Government in 1998 for the return of six Gustav Klimt pieces, valued at approximately USD 150 million. The two arbitrations that followed are isolated examples. Given the evidence and the time pressures of Nazi Spoliated Art claims, it seems unrealistic to expect a new international agreement to settle the matter. Hartung comments on the failure to ascertain “even one just and global common standard of public international law.” Legal remedies may arguably be inappropriate on principle, yet it is not clear that Nazi Spoliated Art cases are best solved by international policies. Ad hoc arbitrations hold out greater promise, but if one of the parties resists arbitration, litigation must run its course first, as was the case in the case involving Maria Altmann.

C. Negotiation

The unique factual background of Nazi Spoliated Art cases necessitates the consideration of all available options for settlement. Scope exists under U.S. tax law for structuring a transaction to take advantage of its provisions. A tax deduction could moti-
vate parties to allow artwork to remain in the museums, with charities, and within the public domain where they belong. At the same time, compensation is provided to the Holocaust victims, their heirs and descendants. This possibility also avoids the complexities of litigation. The Federal Internal Revenue Code of 1986 does not require major changes, and there is minimal societal cost involved.

The shared ownership of “Landscape with Smokestacks” by Degas (1834-1917) resulted in compensation for a good faith purchaser, relief for the family of the victims of the looting, and protection of the public’s interest in art. An out-of-court settlement was achieved on the basis of sections 501(c)(3) and 170 of the Federal Internal Revenue Code. Daniel Searle, a U.S. pharmaceuticals magnate, purchased the pastel by Degas in 1987 for approximately $850,000. In 1996, the Goodman family demanded damages and recovery of the painting, which, they contended, had been stolen from their ancestor, Friedrich Gutmann, who was beaten to death when he refused to sign a document transferring all his possessions to the Third Reich. The heirs attempted to locate the painting but managed to do so only in 1994, when it was put on exhibit in the Art Institute of Chicago. Shortly before the trial commenced in Chicago in 1999, Searle relinquished one-half share to the claimants and donated his remaining share to the Art Institute of Chicago. The donation enabled him to claim a charitable deduction of $243,750. The Art Institute bought the heirs’ half-share. The painting has since remained accessible to the public ever since then. A plaque explains its history.

It is widely believed that restorative justice was achieved; yet the model has not proved popular. The “just and fair” solutions standard of the soft law instruments seems to have been taken to refer to uncompromised physical restitution. Members of the legal establishment also prefer the legal certainty that the ventilation of legal questions concerning proof, title, prescription, esoppel and good faith bring.

134 Falconer, supra note 46, at 425.
136 Goodman, Complaint at 14.
137 Sawka, supra note 15, at 24.
138 Id. at 24; Lubina and Schneider, supra note 4, at 170; Theurich, supra note 75, at 574-75.
VI. DO TECHNICAL DEFENSES KEEP CLAIMANTS DISINTERESTED IN ADR?

A legal rule that allows the acquirer to achieve good title to stolen goods creates an obstacle to restitution. 140 A successful statutory limitations defense precludes a decision on the merits of the case because it bars or extinguishes the claim. The more likely that statutory limitations would preclude investigation into the merit of the claim, the less likely that the possessor would be amenable to an ADR agreement, which cannot offer what judicial precedent can. The United Kingdom has an interesting precedent favoring the restitution of the painting The Holy Family with Saints John and Elizabeth with Angels (1603) by Joachim Wtewael to the City of Gotha and the Federal Republic of Germany. 141 The United Kingdom also steers a middle ground in mediation. United States and German approaches form a striking contrast at this stage.

A. Application or Rejection of Statutory Limitations

Opinions differ widely on this aspect of United States law. Support can be found for “absolute deadlines;” extending the time limits; unifying the point of accrual of the action; and for the wholesale suspension of these statutes for a limited period or extended period of time. 142 Some commentators focus on the inapplicability of rules of property law and the actual process of litigation in this context, preferring return by institutional means.

rather than by property law claims. But those very institutions may insist on the certainty that legal time limits provide.

Many commentators differentiate between Holocaust Era art claims and other claims with respect to statutory limitations on the basis of the unique status of the former in international law. Either a “crime against humanity” argument or a “war crime” argument may be used to justify a refusal to apply statutory limitations, whereas the public policy exception can be used to block foreign statutory limitations. The former may be more flawed than the latter, but the pliability of private international law and the confluence between public and private international law can neutralize obstacles to restitution either way.

Efforts to neutralize the effect of statutory limitations by way of a legislated exception known as the “California Holocaust Exception” had constitutional implications in California. The exception rejected time-related limitations for restitution claims on the part of Holocaust victims and their heirs, provided that the claim were lodged by December, 1, 2010. This exception was intended for cultural institutions that display or sell art. It was struck down as unconstitutional in Von Saher v. Norton. The action, which was instituted by a U.S. citizen against a United States museum, concerned two works by Lucas Cranach the Elder located in the Untied States International law was implicated because the court had to determine the validity of appropriations made by the Dutch and Soviet governments. The act of state defense preempted California’s rejection of statutory limitations for claims instituted before December 31, 2010. Under the United States Constitution, the foreign affairs power is within the exclusive reserve of the federal government, and it includes the power to legislate restitution and reparation claims. Losses caused by war are subject to foreign policy and are to be dealt with at the federal level. California has now amended its general statute of limitations so that the (longer) limitation period of six years begins to run upon the claimant’s ac-

143 Julia Parker, World War II and Heirless Art: Unleashing the Final Prisoners of War, 13 Car dozo J. Int’l & Comp. L. 661, 692 (2005); Paterson, supra note 70, at 154, 158.
144 E.g., the overturned ruling in Peter Sachs v. Stiftung Deutches Historisches Museum, Berlin Higher Regional Court, 28 January 2010, 8 U 56/09, para 1(d).
145 See infra II.
147 Demarsin, supra note 22, at 255.
tual discovery of the whereabouts of the artwork and the suffi-
ciency of the facts that indicate the interest of the claimant in the
work concerned.148 This period applies to actions brought on or
before December 31, 2017, at which point the statute ceases. This
reform amends the statute of limitations applicable to all lawsuits
brought to recover works of fine art as a general category. It does
not create a new cause of action overtly designed to benefit Holo-
caust victims and their heirs, nor does it reject time limitations for
restitution claims.149

A notable number of United States scholars and jurispruden-
tial authority are specifically interested in legal arguments support-
ing the “indirect victims,” the bona fide possessors of Nazi
looting.150 Equitable estoppel offered such support in Springfield
Library and Museum Ass’n, Inc. v. Knoedler Archivum, Inc.151
when estoppel defeated a motion for a judgment on the pleadings
by the dealer agent who had sold Jacopo da Ponte’s “Spring Sow-
ing” to the Springfield Museum in 1955. The Museum returned
“Spring Sowing” to Italy and instituted an action for compensation
from the agent on the basis of the breach of contractual warranty
under Massachusetts law.152 The agent relied on statutory limita-
tions under Massachusetts law. The court held that the agent
should be equitably estopped from asserting this defense for having
induced the Museum to delay Italy’s claim because he had en-
couraged the Museum to question the claim and the evidence, and
the Museum reasonably relied on this advice.153 Consequently, It-
aly’s claim was permitted.154

In the United States, the suspension of statutes of limitation is
a contested view even from within Jewish quarters.155

148 Assembly Bill No. 2765 passed to amend Section 338 of the Code of Civil Procedure,
relating to civil actions, approved September 30, 2010 took effect in January 2011, available at
149 Andrew Adler, The Lubomirski Dürers: A Case for Legal and Moral Restitution, 1 CUL-
ReviewII.pdf.
150 E.g., Keisha Minyard, Adding Tools to the Arsenal: Options for Restitution from the Inter-
mediary Seller and Recovery for Good-Faith Possessors of Nazi-Looted Art, 43 TEX. INT’L L.J.
115 (2007).
151 Id. at 115, 127; Springfield Library and Museum Association v. Knoedler Archivum, Inc.,
152 Springfield Library, 341 F.Supp.2d at 37.
153 Id. at 39-40.
154 Id. at 41.
senthal, a former Exhibitions Secretary of the British Royal Academy of Arts and son of Jewish
In a progressive ruling in support of the non-application of statutes of limitation in a claim involving Nazi Spoliated Art, the German Federal High Court ended a seven-year legal battle in 2012. Peter Sachs, the son of Has Sachs, a Jewish collector who had assembled a large famous collection of poster art, advertisements and political propaganda was entitled to the return of approximately 4,200 vintage posters. The Sachs collection was much larger when it was seized by the Gestapo, but roughly one-third of 12,000 posters came into the possession of communist East Germany. After the reunification of Germany, the collection ended up in the German Historical Museum in Berlin, which made it available for research. The Sachs family fled to the United States after Kristallnacht. After the war, Hans Sachs assumed that the posters had been destroyed and he accepted about 225,000 German marks (then worth about $50,000) from West Germany in 1961. However, in 1966, he learned that part of the collection had survived in the custody of a formerly East German art museum administered by the German Historical Museum after reunification. His queries led nowhere and he died in 1974. When Peter discovered the whereabouts of the posters, he took steps to recover the collection from the German Historical Museum. A government panel and various court instances reached opposite conclusions.

The Advisory Commission in Connection with the Return of Cultural Property Seized Due to NS Persecution, particularly from Jewish Ownership, decided against physical restitution to Peter in 2007. It held that a restitution payment had been made to the collector, who would never have been able to obtain any information about his collection from East Germany during his lifetime. However, Peter tested his claim in a legal action that concerned only two posters. The trial court (Landgericht) ruled that the collection had to be returned. The museum’s appeal against this ruling resulted in the Berlin Higher Regional Court (Kammerger-

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157 Peter Sachs and the Museum differed as to when this was. According to Sachs, he became aware of the whereabouts in 2005; according to the Museum it was in 1998.

158 Recommendation of 25 January 2007; see para 2 (dd) of Peter Sachs v. Stiftung Deutsches Historisches Museum, Berlin Higher Regional Court, 28 January 2010, 8 U 56/09. This ruling contains extensive reasoning based on the Property Settlement Act of 1990, the German Law on the Regulation of Unsolved Property Questions.

159 Landgericht Berlin, 10 February 2009, 19 O 116/08.
overturning the decision of the trial court in its entirety in late January 2010. The Higher Regional Court ruled that restitution claims could not be enforced in civil proceedings in Germany, and that the trial court lacked the authority to compel the German Historical Museum to return the collection under the Property Settlement Act of 1990 (Vermögensgesetz). Usually in cases of conflicting norms, the Property Settlement Act would prevail over the rules of the German Civil Code because it has procedural precedence over the assertion of restitution claims under civil law. Because of the reservation of mandatory or exclusive jurisdiction for administrative courts under the Act, recourse in ordinary courts is precluded regardless of the merits of the individual case. The Higher Regional Court warned that the ruling of the trial court invites double claims and nullifies, for Germany, the Principles of the 1989 Washington Conference with regard to works of art seized by the Nazis. It regarded the trial court’s ruling as contrary to the widely held assumption that restitution claims could only be asserted under the Allied restitution laws and the Property Settlement Act of 1990. The collective restitution claim of the Conference on Jewish Material Claims Against Germany (JCC) in New York was the only claim it was prepared to recognize. The JCC is the legal successor of Jewish beneficiaries when no heirs can be found or the heirs did not file restitution claims in good time. It also acts in East Germany.

At the time of the appeal to the Berlin Higher Regional Court, parallel appeal proceedings were also pending before the Federal Administrative Court. Different decisions taken at various different levels provoked a debate about the proper venue and the procedure for claims.

The Federal Court of Justice finally granted the petition lodged by Peter in July 2010. It ordered the return of the posters despite the expiry of the statutory limitation, which commenced

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161 Id. at Para 1(a)-(l). Cf BGH NJW 1953, 1909; BVerwGE 98, 261; König, supra note 84, at 60-61.
162 Peter Sachs v. Stiftung Deutsches Historisches Museum, U 56/09, at Para 1(6) VermG.
163 Id. at Para (d) and para (h).
164 Id. at Para 1 (e)-(g).
165 BVerfGE 8 C 12/09; see the remark in para 1 (i).
running upon reunification. The Sachs ruling has been applauded for its development of art restitution law in Germany further to the Washington Conference Principles on Nazi-Confiscated Art. The case is instructive for any new dispute resolution model designed to operate where normative obstacles to restitution exist.

B. The Lex Situs Rule as a Defense in Litigated Cases

The lex situ rule is a special and authoritative conflicts rule that allocates a legal relationship in respect to property in a particular legal system, which may confirm transfer of title. The reliance on the domestic law conception of the lex situ rule leads to a variety of different answers depending on whose law applies, but it confers title on a bona fide purchaser if the law of the place where

167 BGH Decision of 16 March 2012 V ZR 279/10 para 33.
168 Id. at para 26.
169 Id. at paras 15, 21; Restitution of Art Stolen by Nazi Regime, German Am. L.J., available at http://galj.info/2012/03/16.
170 German High Court Rules Famous Poster Collection Stolen by the Nazis must be Returned to Collector’s Son, OSEN LLC (March 16, 2012), http://www.osen.us/index.php?id=29.
172 Nazi-seized Art Ordered Return to American Man, supra note 157.
173 Restitution of Art Stolen by Nazi Regime, supra note 170.
the object is situated does so. The systemic effect of the choice of law rule in transnational trade can ensure that good title passes even if the owner had originally lost possession to a thief or a person lacking good faith.

Litigated claims for restitution that rely on the lex situs rule involve conceptions of property law and ownership rights. A choice of law analysis is necessarily confined to a rights framework. The connection to a particular territory points to the legal system to be applied in a private international law method. Legal argument based on the lex situs rule could undermine restitution to the extent that the possessor benefits from the promise of legal certainty that the lex situs rule offers. The lex situs rule could contradict not only the right of return, but also may deny the moral and emotive considerations that support the right of return.

States may continue to offer litigants choices in a cross-border conflict even if looted art is found in their territories, but it has been asked on what basis they insist on the application of their own law if that law does not accommodate the unusual circumstances of war and persecution. In the United Kingdom, scope exists for the situs rule to trump the advice of the Spoliation Advisory Panel when the claimant and owner made a joint request for advice, but the situs rule corroborates the title of the owner. This has led commentators to emphasize the importance of recognizing the distinction between a voluntary repatriation and a legal obligation to make restitution. Because Panel recommendations do not constitute legally binding determinations as to legal rights, their observation is a matter of convention. It has been argued that legal claims may be litigated at the behest of a party who does not accept the recommendations if they leave legal ownership acquired under the situs rule in limbo. A legal claim for return definitely re-

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175 Moustakas, supra note 9, at 1182-83.

176 Hartung, supra note 24, at 334.

177 Carruthers, supra note 140, at para 5.39, 5.40.

178 Id. at para 5.12.

179 Range, supra note 58, at 670.

mains open in respect to Panel recommendations made prior to the promulgation of the 2009 Act to the effect that *ex gratia* payments be made.181 A claimant may not be willing to let go of the promise held out by the *lex situs* even if choice of law arguments are bound to introduce complexities into litigation. The general *lex situs* rule may be considered to be a more authoritative norm182 than global cooperation.183

In respect to various disputes over export control and claims concerning Nazi Spoliated Art,184 a choice of law analysis may lose sight of factors other than an ownership link.185 “Remembering” the victims of the Holocaust in terms of the de-accession provisions of the Holocaust (Return of Cultural Objects) Act 2009 and the enforcement in a court of law of clear and unassailable legal title to Nazi-era art based on the law of the place where the object is situated represent two very different interests. Bodies that come within the purview of the Act are highly unlikely to institute proceedings on the basis of the validity of the transfer. In fact, these bodies may wish to avoid the moral dilemmas that technical defenses might introduce or that might present themselves when ethical considerations and non-legal factors of a cultural, historical, moral, political, religious or spiritual nature186 are skirted.

Where more than just property interests are at stake in a dispute, it must be asked what private international law is meant to achieve. Which policies or values are being promoted when the law’s potential to control impediments to states’ restitution obligations, such as statutory limitations, remain unused? When moral

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1. A case in point is the very first case the Panel dealt with in its *Report of the Spoliation Commission in Respect of a Painting Now in the Possession of the Tate Gallery* (The Stationary Office Jan. 18, 2001). The Panel ordered payment of £125 000 in respect of “View of Hampton Court Palace” by Jan Griffier the Elder (c1645-1718). Carruthers, supra note 139, at para 5.41 (highlighting the tension between the ruling and the *situs* rule of private international law).

2. Carruthers, supra note 140, at paras 5.37, 5.48.

3. E.g., id. at para 5.34.

4. Schonenberger, supra note 10, at ch. 2, 3.

5. Id. at 90-91 (referring to three examples: the anti-smuggling initiatives that provide for repatriation of cultural objects and implement Article 9 of the UNESCO Convention and Chapter III of the UNIDROIT Convention; restitution claims brought under Article 5 of the UNIDROIT Convention, which extends the interests to be weighed beyond mere territorial links, to cultural, preservation, affiliation and emotive interests in the case of indigenous and tribal communities; and claims in respect to the repatriation of human remains where preservation interests have no role).

6. E.g., when a possessor benefits from the proceeds of a crime against humanity on the basis of a point of law. See Paterson, supra note 70, at 155, 159.
aspects are “left to idealists” courts become hesitant to give effect to a moral principle to return or are slow to take account of non-legal factors of Holocaust claims. An unclear substitute “standardization of norms” takes place when courts are unwilling to take account of the ethical, moral and cultural considerations that support recovery of Nazi Spoliated Art. Law and morality need not be set up in opposing camps. Legal standards can ultimately meet basic moral standards, just as moral standards can be refined by reference to a comparison with carefully selected legal principles. The relationship between public and private international law makes the question more challenging, but the public policy exception also accommodates greater responsiveness to individual circumstances.

VII. PUBLIC INTERNATIONAL LAW AND APPLICABLE LAW: THE PUBLIC POLICY EXCEPTION

In private international law, the lex situs rule behaves in many respects like a “super-mandatory” rule, which cannot be derogated from by agreement and which applies regardless of any chosen law. It applies regardless of the law governing the contract; regardless of the law of the place where the contract was concluded; and even regardless of an agreement in respect to the forum. It also qualifies as a rule of public international law, but even then it has a special status as defining an element in a public international law rule rather than setting a minimum standard, as many other rules of international law do. As a consequence of its status under public international law, the public policy exception

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188 Scovazzi, supra note 94, at 285, 295.
189 The most recent landmark case is Sachs v. the German Historical Museum, decision of 16 March 2012 v. ZR 279/10.
190 SCHÖNENBERGER, supra note 10, at 228; Palmer, supra note 16, at 11 (arguing for a more integrated approach).
191 These are rules of internal substantive law that provide for their own application without having been selected by a choice of law rule or a default choice of law rule of the forum that applies regardless of the governing law. They are also known as “overriding mandatory rules,” “lois de police,” or “scope rules.”
cannot apply to matters involving title to property. Its inapplicability renders the lex situs rule mandatory. However, where expropriation without compensation occurs, the rule admits exceptions. Consequently, the exception applies in Nazi-era art claims.

At the crossover between public and private international law, the public policy exception determines the outcome of litigation. The foreign rule will not apply if its application would be manifestly incompatible with the principles that apply in the forum. Even the duration and conditions of a prescriptive or limitation period operate as aspects of public policy. In the *Gotha* case, the work concerned was located in the Soviet Union between 1946 and the mid-1980s, but the court referred to the public policy embodied in the 1980 Limitation Act that would prevent a statute of limitations running in favour of a thief and any transferee that did not purchase in good faith. A domestic state ownership law that obstructs international law in respect to Nazi Spoliated Art claims may, likewise, fail to operate if the public policy exception applies.

### VIII. ADR and State Courts in the United States

The reluctance to develop and use ADR in the U.S. is not adequately explained by a lack of action, interest, coordination or enforcement. First, the ownership question remains relevant even in the face of recovery through litigation being cumbersome, expensive, time-consuming, “gladiatorial” and unpredictable. That the court has the “power to make a determination regarding ownership” is an important factor that may convince a party to rescind an ADR agreement and to rely on the right of access to the court. The role of law remains a necessary one in the West, and may also be regarded as the more powerful moral argument. When the stakes rise, the willingness to incur higher litigation costs increases

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194 Id. at 221.
197 Pell, *supra* note 8, at 315.
and the interest in ADR wanes. Questions of application of foreign law and the choice of law layer of the argument are significantly more expensive to pursue than the alternatives offered by criminal law or import and export controls. Litigation expenses escalate if questions of fact and law are intricate, proof of place of origin and original ownership is difficult, or if expert testimony is required with regards to the objects, facts, or the law. Questions of application of foreign law and the choice of law layer of the argument are significantly more expensive to pursue than the alternatives offered by criminal law or import and export controls. Litigation expenses escalate if questions of fact and law are intricate, proof of place of origin and original ownership is difficult, or if expert testimony is required with regards to the objects, facts, or the law.199 Litigation costs will always be among the potential factors that determine the venue.

The social costs of litigation can be minimized through out-of-court settlements based on choice of law rules. When the parties settle, they still incur some litigation costs, but it is usually much lower than the cost of going to trial.200 Known as “jurisdictional trade,” it is an area that mainstream conflicts scholarship tends to avoid.201 One may assume that claimants would want to avoid high transaction costs in art restitution claims by settling, and it has already been demonstrated that settling is the most economically efficient course of action in Nazi-era art restitution claims.202 However, Nazi-era art cases do not settle at the expected rate.203 Party expectations, information asymmetries and the fact that the object is a unique, apparently indivisible asset will affect the likelihood of settlement.204

The most plausible explanation for the low settlement rate likely involves the procedural advantages that litigation offers to

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200 Murphy, supra note 1, at 29.


203 ISABELLE F. GAZZINI, CULTURAL PROPERTY DISPUTES: THE ROLE OF ARBITRATION IN RESOLVING NON-CONTRACTUAL DISPUTES, (Transntonal Pub., 2004) 57-58 (enumerating some of the costs of a typical art restitution action); Sawka, supra note 15, at 1, 33; Murphy, supra note 1, at 22, 26.

204 WHINCOP AND KEYES, supra note 201, at 129; Murphy, supra note 1, at 27-29.
the possessor in a state court in the U.S. Once a U.S. court has established jurisdiction, strong evidence-gathering powers in the form of orders for disclosure take effect. Parties have an opportunity to pursue interlocutory orders such as an injunction to “freeze a situation” until a final decision is reached. Stays may be ordered if another court is shown to be more appropriate. Litigation does not preclude recourse in other modes of dispute resolution, even while the court proceedings are under way.

Museums often prevail on technical grounds in U.S. cases concerning Nazi Spoliated Art and Degenerate Art. U.S. courts will endorse technical defenses for as long as the power to legislate restitution and reparation claims remains within the exclusive reserve of the federal government without any action being taken. Guidelines and soft law notwithstanding, public and private cultural institutions in the U.S. rely on limitations in Holocaust art cases even when ADR is clearly more appropriate. The half-hearted response of governments and private actors to apply solutions that are “just and fair,” and to resolve cases on the facts and merits as opposed to legal technicalities, can be understood as a result of special features associated with U.S. litigation that made


207 In Grosz, 772 F.Supp.2d 473, the district court noted that there was no clear evidence of a federal policy disfavouring statute of limitations in Holocaust claims, as the language of the Terezín Declaration was too general and too hedged. See also Toledo Museum of Art v. Ullin, 477 F. Supp 2d 802 (N.D. Ohio 2006); Detroit Institute of Arts v. Ullin, 2007 U.S. Dist. LEXIS 28364, 2006 WL 1016996 (E.D. Mich. 31 Mar. 31, 2007).

208 Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954 (9th Cir. 2010) (foreign affairs doctrine preempted California’s extension of statutes of limitations to Dec. 31, 2010).


modern Holocaust litigation possible in the first instance. Legal redress came as a result of the scope of jurisdiction, jury trials, discovery rules, class actions, the kind and extent of damages, contingency fees, the approach to human rights abuses and restitution efforts.

Negotiation was compromised in a recent unsettling ruling in Grosz v. Museum of Modern Art. A cause of action was allowed to accrue during amicable negotiations. The court held that the contestation of possession was an implicit refusal of the demand for the artworks. Claimants would refuse to attempt to negotiate if efforts to reconcile differences before submitting to litigation (or arbitration) could mean that the opportunity to argue the merits in court would be denied.

Pell’s suggestions are regularly revived and have reappeared in different guises. Supporters either favor existing instruments and bodies, or a new International Tribunal functioning under a new international arbitration agreement with limited but exclusive jurisdiction. The scope of Pell’s model illustrates great ambition, but ultimately overreaches its grasp. Among the problematic aspects is the proposed power of determining the effect of prior litigation. Many parties will have incurred high litigation costs in order to obtain final determinations of ownership, and a new arbitration procedure would erode the public policy interest in the conclusiveness of legal proceedings. The proposal also draws on distinctive features of almost all forms of ADR, combining the roles of adjudicator, mediator, advocate, advisor and legal assistant. Tribunal staff has to provide assessment of how claims would be handled, as well as auction services and settlement agreements for the division of proceeds. These services would be provided in the shadow of sanctions against museums and dealers who fail to cooperate with the tribunal. Conceptions of arbitration—which addresses the harm of the past without requiring the consent of the

211 In re Holocaust Victim Assets Litigation I, 105 F.Supp.2d 139, 154-63 (E.D.N.Y. 2000) (first successful class action delineating several classes of claimants eligible under the settlement).

212 Wantuch and Niethammer, supra note 115, at 29, 46-47.

213 Grosz, 772 F.Supp.2d 473.

214 Pell, supra note 8, at 310; Ian Barker, Thoughts of an Alternative Dispute Resolution Practitioner on an International ADR Regime for Repatriation of Cultural Property and Works of Art, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 483 (Barbara T. Hoffman ed., 2006).

215 Falconer, supra note 46, at 383; Mullery, supra note 20, at 643; Kreder, supra note 1, at 155.

216 Pell, supra note 8, at 323.
parties for the enforcement of an award—and mediation—which looks to the future of the relationship and requires the consent of the parties for the enforcement of the agreement—combine with strict rules on how and when the burden of proof shifts alongside certain rights of information. Kreder suggests that the new international agreement, or the 1958 New York Convention, would attribute res judicata effects to the tribunal’s awards.217 Absent such rules, there would have to be rules for parallel proceedings by means of stays or other devices suitable for managing the risk of conflicting decisions.218 The conflicts that may arise between mechanisms in different legal traditions, diverse approaches to res judicata, and in respect to the intended functioning of different norms would require much more detailed treatment to be convincing. Binding common standards under the auspices of a central institution imply, at a minimum, a binding international protocol, special statutory regulations and an agreement on where to set it up. This alternative is not necessarily less costly or time-consuming than litigation would be.219

The jurisdiction of a proposed United States Nazi Loot Restitution Panel, first mooted at the Prague Holocaust Era Assets Conference in 2009, is also contentious.220 The United States State Department is soliciting input on how the Commission should be structured and how it should operate. A proposal221 that the Panel must have mandatory jurisdiction to rule out efforts to rely on technical defenses and ensure that cases are decided on the merits raises questions about a dissatisfied claimant’s access to court. To render ADR compulsory or impose mandatory jurisdiction would erode the contractual nature of ADR,222 which leaves parties free not to engage with ADR. Tampering with that will lead to conflicts of competence and interference with the intended function of norms.

Ideas designed to break the impasse in U.S. law include federal law reform to suspend statutory limitations. This proposal is

217 Kreder, supra note 1, at 210.  
218 Wantuch and Niethammer, supra note 115, at 56; contra Pell, supra note 8, at 316, 319.  
219 Sawka, supra note 15, at 16; Barker, supra note 215, at 483-84, 486.  
221 See, e.g., proposal by Gegas, supra note 16, at 155-58.  
222 Ambassador Stuart E. Eizenstat, who led the Prague Holocaust Era Assets Conference in 2009, did not support the notion of mandatory jurisdiction either.
to be implemented via the Holocaust Victims Redress Act 1998.\footnote{Cuba, supra note 143, at 488. The University of Leipzig v. Germany represented by the Federal Office that deals with Restitution Affairs and Unsolved Property Questions, decision of administrative court in Berlin of 26 May 2011 VG 29 K 126.09; available at http://www.bloomberg.com/news/2011-05-30/jewish-heir-fights-restitution-wants-museum-to-keep-grandfather-s-legacy.html.} Piecemeal reform in a single area of law may help, but because choice of law could lead to the application of non-U.S. law, it would not necessarily improve matters. Moreover, the procedural advantages associated with litigation make it worthwhile to deviate from ADR.

IX. JUDICIAL AND NON-JUDICIAL SOLUTIONS IN GERMANY

A. Narrow Conception of Res Judicata

In the multilevel apparatus of justice in the German legal system, decisions taken at first and even second instance are readily treated as tentative. German civil justice offers numerous appellate remedies to parties who are dissatisfied with judicial findings at almost every stage of the proceedings. Appellants ordinarily have at least two potential levels of resort beyond the first instance local or district court proceeding.\footnote{Sinai, supra note 87, at 386.} Decisional stability is reached only after the Federal Court of Justice has ruled.\footnote{Id. at 384.} This conception of \textit{res judicata} contrasts strongly with that found in common law jurisdictions.

The Sachs case, discussed earlier, referred to above was among a handful of cases that were brought to the German Advisory Commission in Connection with the Return of Cultural Property Seized Due to NS Persecution. Peter Sachs rejected the recommendation of the Commission and commenced litigation. The Federal Court of Justice overruled the Commission on both jurisdiction and the norms applied during the mediation. The court challenged the jurisdiction of restitution bodies and took full account of the moral dimension of art disputes. The ruling by the highest authority had \textit{res judicata} effect; the others did not.
B. Sixteen Years of Court Action and Negotiation

Sixteen years of court action preceded the reaching of an out-of-court settlement over the Egyptian collection built up by the Egyptologist Professor Georg Steindorff (1861-1951) in *University of Leipzig v. Germany*. The case is a striking example of the readiness of parties to litigate in the face of intensive state involvement that switched sides as the case made its way through the system. It also illustrates the substantive problem involving the classification of artifacts that were not spoliated, but were acquired for fair market value in a pre-April 1938 transaction.

An appeal was brought against a decision of the Federal Office that deals with Restitution Affairs and Unsolved Property Questions (BADV) in Germany to cede the collection of Egyptian artifacts to the JCC. Steindorff was a Protestant of Jewish descent who had spent most of his professional life working for the University of Leipzig. He was appointed chair of the Egyptology department in 1893. He was forbidden to teach on account of his Jewish ancestry in 1934, but was able to continue with his academic work well into his retirement and was treated as a German national for all other purposes. His initial plan was to donate his collection to the University, but he instead decided to sell it. Steindorff was keen for the collection to remain at the institution he dedicated his life’s work to. He turned down a rival offer from another University. University funding was eventually procured and the parties agreed in March 1937 that 8000 RM would be paid in three installments. This price was twenty percent lower than what Steindorff would be able to obtain for the individual items, but he accepted the University’s offer. The Steindorffs emigrated to the U.S. in March 1939. What survived of the original collection went on exhibition after the war.

The legal question turned on the effect of the 1935 Nuremberg laws on the sale and the legal presumption that sales concluded during that period were involuntary. The University bore the onus of proving that the Nazi laws played no part in the sale, but the Berlin Court ruled in 2011 that it was a forced sale and thus

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226 The University of Leipzig v. Germany represented by the Federal Office that deals with Restitution Affairs and Unsolved Property Questions, decision of administrative court in Berlin of 26 May 2011 VG 29 K 126.09.

227 Property lost during the Nazi era can be claimed under German restitution laws where a direct link can be shown to exist between the pressure of the persecution and the loss. See König, *supra* note 84, at 63.
invalid. The basis of the finding was a letter written in the autumn of 1936 by a colleague of Steindorff’s. The letter states that the price requested is reasonable, the objects very interesting and complementary to the current collection, the chance unique, and that rival institutions would be very interested. The court took no note that comparable prices were paid for similar sales at the time, nor of Steindorff’s attitude in respect thereof.\footnote{Dietrich Raue, \textit{Georg Steindorff and his Collection}, available at www.iae-egyptology.org/uploads/Facts\%20about\%20the\%20case.pdf.}

The spotlight fell on the role and jurisdiction of the JCC. After German unification, former Jewish citizens of East Germany could apply for restitution from 1990 to 1992. The JCC staked a claim to the Steindorff collection based on information obtained about the history of the University in 1995. Steindorff’s only surviving legal heir, his grandson Thomas Hemer, wished for the collection to be left in the care of the University. He remained unaware of his option to claim. Between 2006 and 2011, Hemer declined to be represented by the JCC. During this period, the Federal Office wrote to Hemer for details about the Museum’s acquisition in 2006 and requested the JCC to withdraw its claim because Hemer wished for the collection to remain where it was. However, when Hemer claimed the collection from the Federal Office he was informed that he was too late. Since the collection had been sold before Steindorff’s death, it was not part of Hemer’s inheritance.\footnote{Id.} The JCC was the legal owner of the property and it denied having had any knowledge of Hemer’s existence when it staked its claim.\footnote{Catherine Hickley, \textit{Jewish Heir Fights Restitution, Wants Museum to Keep Art}, BLOOMBERG (May 31, 2011, 10:06 AM), available at http://www.bloomberg.com/news/2011-05-30/jewish-heir-fights-restitution-wants-museum-to-keep-grandfather-s-legacy.htm.} It declared itself willing to sell the artifacts to the Steindorff Museum at their current market value.

The case illustrates that the existence of a right can depend on jurisdiction in Nazi-era art cases. The collection was exported and assembled with the permission of the Antiquities Service in Egypt by Steindorff, but by allowing the JCC to define and exercise jurisdiction, the assertion of a right was prevented. If the sale had been forced as had been held on May 26, 2011, the collection does, in fact, form part of Hemer’s inheritance and may be claimed by him. German law was the only law pertinent to the classification of the transaction. Ironically, however, it was precisely the approach adopted in respect to the sale that caused the University to lose the
collection to the JCC. Allowing jurisdiction and applicable law to run alongside each other in this way could create special risks in international cases.

The court order directing that the objects had to be handed to the JCC led to public protests. The Egyptian Minister for Antiquities demanded that the JCC return the objects to Egypt. The University and the JCC agreed that the University could keep the collection and devote the compensation that would have been paid to the JCC to documenting Steindorff’s life and work.231

X. Conclusion

Restitution and anti-restitution movements co-exist in several jurisdictions in this area. The movement in support of restitution is most clearly discernable in the U.K. and in Germany. In the U.K. the restitution movement is strongly supported through mediation as well as court action. Competing conclusions in different fora may undermine mediation conducted by the Spoliation Advisory Panel due to the lex situs trump card, but court action is unlikely to follow mediation. English courts permit rights to be exercised in terms of foreign law under the overarching check of the public policy exception.

Litigation stems the marketability of Nazi-era art in Germany because there is no uncertainty in respect of finality or in respect of the resolution of normative conflicts. Rights are settled only when the highest court has ruled.

In the U.S., court action tends to increase the marketability of Nazi-era art. Soft law will not reverse the preference for court action while procedural advantages tempt the possessor. Innovative compromises have been reached between private parties, but this has not seen wide replication. While the Klimts ‘precedent’ is encouraging, arbitration followed only after Austria became unwilling to risk another failure in court. Had ad hoc arbitration been tried first, there may have been a strategic deviation into litigation in the U.S. courts.

Many sources simply draw the simplistic equation that courts are bad and ADR is good, desirable, preferable and ideal. However, data to corroborate the prevalence of recourse to ADR in art disputes is scarce. It is growing increasingly unlikely that a worka-

231 Von Selle, supra note 187.
ble framework for compulsory international arbitration will ever materialize. Without a new treaty setting out the modus operandi, procedure and effects of the arbitral awards, there may be unexpected potential for conflicts of competence and norms. In addition, the U.K. model will not be readily transplantable into any legal system that offers distinct advantages over, above and beyond the lex situs rule. Several comparative trends now discernable in litigated cases support restitution as strongly as ADR does. These trends are based on private and public international law argument, the relationship between domestic and international law and between general civil law and special restitution law, and the public policy exception in particular. The domestic legal frameworks of the U.K. and Germany are sufficiently flexible to yield to moral interests and support restitution.