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 albums[3] 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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1 Jennifer A. Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes*, 73 BROOK. L. REV. 155, 160 (2007); Nathan Murphy, *Splitting Images: Shared-Value Settlements in Nazi-Era Art Restitution Claims*, 3 FLA. ENT. L. REV. 41 (2010).

2 *E.g.*, U.S. v. Portrait of Wally, 105 F.Supp.2d 288 (S.D.N.Y. 2000); U.S. v. Portrait of Wally, No. 99 Civ. 9940, 2000 WL 1890403 (S.D.N.Y. Dec. 28, 2000); U.S. v. Portrait of Wally, A Painting by Egon Schiele, No. 99 Civ. 9940, 2002 WL 553532 (S.D.N.Y. Apr. 12, 2002); U.S. v. Portrait of Wally, A Painting by Egon Schiele, No 99-CV-09940 (S.D.N.Y. filed July 29, 2010).

3 Jamie Stengle, *Photo Albums Related to Nazi Art Theft Unveiled*, YAHOO! NEWS (Mar. 28, 2012), http://news.yahoo.com/photo-albums-related-nazi-art-theft-unveiled-182327253.html.

4 Hector Feliciano, *France and the Burden of Vichy*, *in* THE PLUNDER OF JEWISH PROPERTY DURING THE HOLOCAUST: CONFRONTING EUROPEAN HISTORY 164, 165-66 (Avi Becker ed., 2001); Katja Lubina and Hildegard Schneider, *Pringsheim, Provenance and Principles: A Case Study on the Restitution of Nazi Looted Art and Compensatory Payments*, *in* KULTURGÜTER-

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[6] 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]

SCHUTZ – KUNSTRECHT – KULTURRECHT: FESTSCHRIFT FÜR KURT SIEHR, 161 (Kerstin Odendahl & Peter J. Weber eds., 2010).

5 Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 161 (2000); NORMAN PALMER, MUSEUMS AND THE HOLOCAUST: LAW, PRINCIPLES AND PRACTICE 11 (2000).

6 *See e.g.,* 'Adele Bloch-Bauer I'; 'Adele Bloch-Bauer II'; 'Bücherwald'; 'Apfelbaum I'; 'Häuser in Unterach am Attersee' by Gustav Klimt (1862-1918); 'Femme en Blanc' and 'The Absynthe Drinker' by Pablo Picasso (1881-1973).

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).

8 Feliciano, *supra* note 7, at 9; Steven H. Resnicoff, *Theft of Art During World War II: Its Legal and Ethical Consequences: The Jewish Perspective*, JEWISH LAW, *available at* http://www.jlaw.com/Articles/art-theft.html; Owen C. Pell, *Using Arbitral Tribunals to Resolve Disputes Relating to Holocaust-Looted Art, in* RESOLUTION OF CULTURAL PROPERTY DISPUTES 307, 309 (International Bureau of the Permanent Court of Arbitration ed., 2004) (indicates that several lists of unclaimed property are compiled on an ongoing basis in various countries).

9 Karen J. Warren, *A Philosophical Perspective on the Ethics and Resolution of Cultural Properties Issues*, *in* THE ETHICS OF COLLECTING CULTURAL PROPERTY 1, 19 (Messenger ed., 1989); *see generally* John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1182 (1989).

10 BEAT SCHÖNENBERGER, THE RESTITUTION OF CULTURAL ASSETS 51-52; 236-237 (2009); Ciraj Rassool, University of the Western Cape, Human Remains, the Disciplines of the Dead and the South African Memorial Complex, Address at The Politics of Heritage, at 18 (July 8, 2011), *available at* http://sitemaker.umich.edu/politics.of.heritage/_____schedule_and_papers.

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-

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11 Shira T. Shapiro, Note, *How Republic of Austria v. Altmann and United States v. Portrait of Wally Relay the Past and Forecast the Future of Nazi Looted-Art Restitution Litigation*, 34 WM. MITCHELL L. REV. 1147, 1149 (2008); Murphy, *supra* note 1, at 13.

12 Bazyler, *supra* note 5, at 1, 165; Murphy, *supra* note 1, at 9.

13 Lubina and Schneider, *supra* note 4, at 161; Kreder, *supra* note 1, at 155, 206.

14 Pell, *supra* note 8, at 310.

15 *See generally* Joseph F. Sawka, Note, *Reconciling Policy and Equity: The Ability of the Internal Revenue Code to Resolve Disputes Regarding Nazi-Looted Art*, 17 U. MIAMI INT'L & COMP. L. REV. 91 (2009); Murphy, *supra* note 1, at 1, 41.

16 Norman Palmer, *Spoliation and Holocaust-Related Cultural Objects: Legal and Ethical Models for the Resolution of Claims*, 12 ART ANTIQUITY AND LAW 1, 8 (2007); Evangelos I. Gegas, Note, *International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property*, 13 OHIO ST, J. ON DISP. RESOLU. 129, 156 (1997).

17 Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes Over Title*, 31 N.Y.U. J. INT'L L. & POL. 15, 36 (1998).

ing through the system with greater speed may still not be enough,[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.[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.[20]

Before 1995 only ten Nazi Spoliated Art claims were filed in the United States,[21] but today there are numerous claims for recovery that are resolved on a case-by-case basis in state courts.[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.[23] The idea that justice

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18 Murphy, *supra* note 1, at 19.

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=c93cf2fa-f5f6-4a64-a7d1-8bd907fdf3dd.

20 The U.S. highlighted Austria's failure to seek justice for Holocaust victims in the Altmann case. This necessarily contributed to a souring of international relations. Jennifer A. Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust*, 88 OR. L. REV. 37, 101, 118 (2009); Jessica Mullery, Note, *Fulfilling the Washington Principles: A Proposal for Arbitration Panels to Resolve Holocaust-Era Art Claims*, 11 CARDOZO J. OF CONFLICT RESOL. 643, 661 (2010).

21 Bazyler, *supra* note 5, at 165.

22 Bert Demarsin, *Let's Not Talk About Terezín: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 BROOK. J. INT'L L. 117, 118 (2011); IRINI A. STAMATOUDI, CULTURAL PROPERTY LAW AND RESTITUTION 190-92 (2011); Sawka, *supra* note 15.

23 *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP'T OF STATE: BUREAU OF EUROPEAN AND EURASIAN AFFAIRS, Principle VIII, IX & XI (December 3, 1998), http://www.state.gov/p/eur/rt/hlcst/122038.htm; *Resolution 1205: Looted Jewish Cultural Property*, COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, Clause 16 (1999), http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta99/eres1205.htm; *Vilnius Forum Declaration on Holocaust Era Looted Cultural Assets*, (October 3-5, 2000), *available at* http://www.lootedartcommission.com/vilnius-forum; ICOM's new mediation programme for museums; *Terezín Declaration*, Holocaust Era Assets Conference (June 30, 2009), *available at* http://www.holocausteraassets.eu/program/conference-proceedings/declarations; *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in*

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.[24] 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,[25] 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,[26] and realistic evaluation is a challenge.[27]

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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case of Illicit Appropriation: Sixteenth Session, UNESCO (Sept., 2010), http://unesdoc.unesco.org/images/0018/001875/187506e.pdf. *Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War* (2009) and new rules for mediation and reconciliation to facilitate restitution of cultural property (ICPRCP, July 2010, CLT-2010/CONF.203/COM.16/2 Rev (Hereinafter *Promoting the Return of Cultural Property)*.

24 Pell, *supra* note 8, at 307, 308, 315; Hannes Hartung, *The Holocaust and World War II Looted Art: Arbitrated between Great Dreams and Reality*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES 327, 331-32 (The International Bureau of the Permanent Court of Arbitration ed., 2004).

25 STAMATOUDI, *supra* note 22, at 189-90.

26 *See generally* Anne L. Bandle and Sarah Theurich, *Alternative Dispute Resolution and Art-Law – A New Research Project of the Geneva Art-Law Centre*, 6 J. INT'L COMMERCIAL L. & TECH. 28 (2011) (discussing a project to create an effective database of ADR in art law).

27 "Complementarity" renders it difficult to evaluate both strategies together and on an equal footing.

fering 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 war[29] 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 Land[30] 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,

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28 Hugonis Grotii William Whewell & Jean Barbeyrac, De Iur Belli et Pacis Book III Section XVI, 281-82 (John W Parker, Cambridge, London 1853).

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).

30 International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, Refworld (Oct. 18, 1907), *available at* http://www.unhcr.org/refworld/docid/4374cae64.html (last updated Oct. 6, 2012, 3:44 PM) [hereinafter *Hague Convention (IV)*].

and provided for compensation when its provisions were violated.[31] 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.[32] 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.[33] 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.[34]

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,[35] it has been argued that pertinent provisions of the 1907 Hague Convention[36] ought to be treated as breaches of peremptory norms in international law (jus cogens).[37] The definition of "war crimes" in the Charter of the Nuremberg Tribunal was in conformity with customary and treaty law

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31 *Id.* at Articles 46, 47, 53, 56.

32 *Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation and Control*, COMMISSION FOR LOOTED ART IN EUROPE (Jan. 5, 1943), *available at* http://www.lootedartcommission.com/inter-allied-declaration.

33 Chamberlain, *supra* note 29, at 353.

34 Wojciech W. Kowalski, *General Observations: Claims for Works of Art and their Legal Nature, in* RESOLUTION OF CULTURAL PROPERTY DISPUTES 31, 39-40 (International Bureau of the Permanent Court of Arbitration ed., 2004); Chamberlain, *supra* note 29, at 343; Alexander M. Ritchie, Note, *Victorious Youth in Peril: Analyzing Arguments Used in Cultural Property Disputes to Resolve the Case of the Getty Bronze*, 9 PEPP. DISP. RESOL. L.J. 325, 332-33 (2009). The Monuments Men Foundation for the Preservation of Art continues with the work of the Allied forces to protect cultural treasures and return stolen items after the war.

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.[38] The prohibition is incontrovertible, but the extension of an obligation to ensure restitution of looted cultural objects to third states remains a contested proposition.[39]

It has been suggested that states can, at best, act as custodians of property tainted by a war crime[40] or crimes against humanity, but cannot impede the ownership interests of original owners.[41] 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.[42]

The Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[43] 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,[44] and does not deal with restitution. Moreover, it protects a very

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38 Princz v. Fed. Republic of Germany, 26 F.3d 1166, 1176-85 (D.C. Cir. 1994) (Wald, J., dissenting), *followed in* Altmann v. Republic of Austria, 317 F.3d 954, 964 (9d Cir. 2002); The Nurnberg Trial , 6 F.R.D. 69, 108-10 (1946), *available at* http://www.uniset.ca/other/cs4/6FRD69.html. Ritchie, *supra* note 34, at 332; Michael D. Murray, *Stolen Art and Sovereign Immunity: The Case of Altmann v. Austria*, 27 COLUM. J.L. & ARTS 301, 316, 319 (2004).

39 Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules,* INTERNATIONAL COMMITTEE OF THE RED CROSS*, at* 136-37 (2005), http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf; Chamberlain, *supra* note 29, at 355. The Nuremberg Tribunal and its main shortcomings are discussed by ALINA KACZOROWSKA, PUBLIC INTERNATIONAL LAW 209-13 (Routledge ed., 4th ed. 2010).

40 Charter of the International Military Tribunal, Nuremberg Trial Proceedings Vol. 1, THE AVALON PROJECT, Art. 6(b), http://avalon.law.yale.edu/imt/imtconst.asp; Hartung, *supra* note 24, at 327, 333.

41 Pell, *supra* note 8, at 315.

42 KACZOROWSKA, *supra* note 39, at 212.

43 *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, The Hague (Mar. 26, 1999), *available at* http://www.icrc.org/ihl.nsf/INTRO/590 (last updated Sept. 3, 2004). The U.S. and the UK have not ratified it.

44 Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 388 (1995).

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 objects were often the most popular kind. Several multilateral treaties contemplate the restitution and return of cultural objects, promote international cooperation against the illicit trade in cultural objects, and favour the settlement of disputes regarding their return. Their shortcomings include that they create rights and obligations 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.[45] The Convention applies both in peacetime and in situations of military occupation. While it prevents further future destruction and looting of cultural property, it does not address Nazi Spoliated Art specifically, nor does it contain a mechanism or forum for adjudication of such claims.[46] It simply requires the recovering state to compensate an innocent purchaser without providing for private parties' claims.

Return of stolen art to its rightful owner is conceptually consistent with the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.[47] The Convention considers claims for restitution brought by private individuals,[48] providing that "[t]he possessor of a cultural object which has been stolen shall return it."[49] 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 objects looted more than sixty-six years ago, or prior to 1963. The

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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 Organization (Nov. 14, 1970), http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=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. 383, 389 (2000).

47 *UNIDROIT Convention* on Stolen or Illegally Exported Cultural Objects, UNIDROIT (June 24, 1995), *available at* www.unidroit.org/english/conventions/1995culturalproperty/main.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

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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.

53 *Washington Conference on Holocaust-Era Assets*, U.S. State Department, *available at* http://www.state.gov/www/regions/eur/wash_conf_material.html.

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).

1205[57] 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 Declaration[59] 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 law[61] 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

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57 *See* citations and notes accompanying *supra* note 23.

58 Clauses 12 and 13. Daniel Range, Note, *Deaccessioning and Its Costs in the Holocaust Art Context: The United States and Great Britain*, 39 Tex. Int'l L.J. 655, 658 (2004).

59 *See* citations and notes accompanying *supra* note 23.

60 *Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation and Control*, *supra* note 32 (covering open looting and transactions that were apparently legal). Military Government Regulations and Restitution Laws in the three western occupied zones included Law No. 59, U.S. Military Government for Germany, 10 November 1947 – Amerikansiches Kontrollgebiet – ABl. (Amtsblatt der Militarregierung Deutschland) Ausgabe G, S. 1 (USREG); Regulation No. 120 of 10 November 1949, ABl. of the French High Command in Germany No. 119 of 14 November 1949; Gesetz No. 59 der Militarregierung – Britisches Kontrollgebiet – ABl. No. 28, S.1169 (BrREG). *See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147*, Office of the United Nations High Commissioner for Human Rights (Dec. 16, 2005), *available at* http://www2.ohchr.org/english/law/remedy.htm.

61 *Factory at Chorzow* (Germ. v. Pol.) 1927 P.C.I.J. (ser. A) No. 9 (July 26), 21, *available at* http://www.worldcourts.com/pcij/eng/decisions/1927.07.26_chorzow.htm.

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.

64 Republic of Austria v. Altmann, 541 U.S. 677, 682 (2004); Majken Hofmann, Anna Lokrantz, Maria Müller, Andreas Müller Hofmann und Lena Müller Hofmann v. Republic of Austria (Nov. 21, 2005) (Arbitral award in German), *available at* http://www.bslaw.com/altmann/Zuckerkandl/Klage/284724.doc.

of the *bona fide* possessor to obtain compensation from the state was a constitutional requirement,[65] 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.[66] 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.[67] Contrasting decisions taken by various different bodies in respect to such property have provoked "much debate about procedure and forum."[68] 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.[69] 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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65 Lyndel V. Prott, *Responding to World War II Art Looting, in* RESOLUTION OF CULTURAL PROPERTY DISPUTES 113, 116 (The International Bureau of the Permanent Court of Arbitration ed., 2004).

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.

68 Hans Sachs Poster Collection, COMMISSION FOR ART RECOVERY, http://www.comartrecovery.org/cases/hans-sachs-poster-collection.

69 SCHÖNENBERGER, *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-

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[70] Robert K. Paterson, *Resolving Material Cultural Disputes: Human Rights, Property Rights and Crimes Against Humanity*, 14 Willamette J. Int'l L. & Disp. Resol. 155, 158 (2006). *Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation and Control*, *supra* note 32, covering open looting and transactions that were apparently legal; Law 59, U.S. Military Government for Germany, Nov. 10, 1947; Military Government Gazette, Amtsblatt der Militarregierung Deutschland, Amerikansiches Kontrollgebiet, Part I, Article 1; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, *supra* note 60.

[71] Falconer, *supra* note 46, at 387.

[72] Lynn H. Nicholas, The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War (1994); Hector Feliciano, The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art (1997); Demarsin, *supra* note 22; Howard N. Spiegler, *Recovering Nazi-Looted Art: Report from the Front Lines*, 16 Conn. J. of Int'l L. 297, 301 (2000-2001).

[73] *E.g.,* Goodman v. Searle, Complaint, No. 96 Civ. 5310 (S.D.N.Y. 1996); Rosenberg v. Seattle Art Museum, 70 F.Supp.2d 1163, 1165 (W.D. Wash. 1999), *vacated by* Rosenberg v. Seattle Art Museum, 124 F.Supp.2d 1207 (W.D. Wash. 2000); Feliciano, *supra* note 4, at 4-6.

tion claims and technological advances.[74] 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.[75] 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.[76] 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.[77] 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

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74 Lauren F. Redman, *The Foreign Sovereign Immunities Act: Using a "Shield" Statute as a "Sword" for Obtaining Federal Jurisdiction in Art and Antiquities Cases*, 31 FORDHAM INT'L L.J. 781, 784-85 (2008).

75 Sarah Theurich, *Alternative Dispute Resolution in Art and Cultural Heritage – Explored in the Context of the World Intellectual Property Organization's Work, in* KULTURGÜTERSCHUTZ – KUNSTRECHT – KULTURRECHT: FESTSCHRIFT FÜR KURT SIEHR 569, 575 (Kersten Odendahl and Peter J. Weber eds., 2010). Arguably, a case in point is Rosenberg, 70 F.Supp.2d at 1165, *vacated by* Rosenberg v. Seattle Art Museum, 124 F.Supp.2d 1207 (W.D. Wash. 2000).

76 Theurich, *supra* note 75, at 580.

77 Lerner, *supra* note 17, at 36-37; Anna O'Connell, *Immunity from Seizure Study, Report prepared for the Ameurus Conference*, 1, 23 (Sep. 30, 2005), *available at* http://www.lending-for-europe.eu/fileadmin/CM/public/training/Antwerp/Immunity_from_Seizure_Paper_Anna_O_Connell.pdf.

hurdles in litigation may thus be overcome. Future relationships and goals are considered important; legal analysis and redress of past conduct are not.[78] Successful mediation yields a settlement agreement with tangible outcomes tailored to the interests of the parties that can be enforced under contract law.[79] 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.[80]

1. Germany

The 1998 Washington Conference Principles and the 1999 Common Statement issued by the Federal Government, L*ä*nder and Municipal Associations[81] 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,[82] to give effect to the 1998 Washington Conference Principles.[83] 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

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78 Norman Palmer, *Litigation: The Best Remedy?, in* RESOLUTION OF CULTURAL PROPERTY DISPUTES 113 (International Bureau of the Permanent Court of Arbitration ed., 2004).

79 J. Christian Wichard and Wend B. Wendland, *Mediation as an Option for Resolving Disputes Between Indigenous/Traditional Communities and Industry Concerning Traditional Knowledge, in* ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 475, 477 (Barbara T. Hoffman ed., 2006).

80 Lord Rupert M. Jackson, *Review of Civil Litigation Costs: Final Report* (1st ed., The Stationery Office 2010).

81 Common Statement on the Tracing and Return of Nazi-confiscated Art, Especially from Jewish Property, *available at* http://www.lostart.de/nn_64192/Webs/EN/Koordinierungstelle/GemeinsameErklaerung.html?_nnn=true.

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.[84]

The Allied restitution laws and the Property Settlement Act of 1990 (Verm*ö*gensgesetz) encourage claimants, current owners and agencies to come to an amicable settlement.[85] 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.[86] 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.[87]

2. The United Kingdom

Established in 2000 to give effect to the Washington Conference Principles in the UK and to consider claims for the return of objects lost during 1933-1945, the Spoliation Advisory Panel operates under the Department for Culture, Media and Sport. It offers advisory mediation to museums and claimants on what might be an appropriate and diplomatic solution,[88] and makes recommendations subject to certain approvals.[89] The Panel's objective is to "achieve a solution which is fair and just both to the claimant and to the institution."[90] Cultural objects within the ambit of the Panel's terms of reference are objects now in the possession of a UK national collection or another UK museum or gallery established for the public benefit.[91] The scope of the Panel's work in-

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84 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).

85 *E.g.*, Article 15 USREG; Article 12.2 BrREG; § 31 Abs. 1a and 5 VermG.

86 König, *supra* note 84, at 60-61.

87 Yuval Sinai, *Reconsidering Res Judicata: A Comparative Perspective* 21 DUKE J. COMP. & INT'L L. 353, 384 (2011).

88 Hartung, *supra* note 24, at 327, 335 (characterizing it as an arbitration panel, but that it mediates art claims directly).

89 Spoliation Advisory Panel, DEPARTMENT FOR CULTURE, MEDIA AND SPORT, a*vailable at* http://www.culture.gov.uk/what_we_do/cultural_property/3296.aspx.

90 Spoliation Advisory Panel, *Constitution and Terms of Reference*, DEPARTMENT FOR CULTURE, MEDIA AND SPORT, Art. 11, *available at* http://www.culture.gov.uk/images/publications/SAPConstitutionalandTOR11.pdf.

91 Spoliation Advisory Panel, *Constitution and Terms of Reference*, DEPARTMENT FOR CULTURE, MEDIA AND SPORT, *available at* http://www.culture.gov.uk/images/publications/SAPConstitutionalandTOR11.pdf.

cludes all cases where a subject has exploited the weakness of another for cultural gain.[92] 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.[93]

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.[94] 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[95] 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.[96] It applies in respect to art held in seventeen named public collections in England and three in Scotland, provided that the Secretary of State or the Scottish Ministers agree with the recommendation of the Panel and that no condition applies to the object concerned.

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-

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92 Tullio Scovazzi, *The Return of the Benev. VI 29 Missal to the Chapter Library of Benevento from the British Library*, 16 ART ANTIQUITY AND LAW 285, 294 (2011).

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.

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.

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.

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.

manded.[97] 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.[98] It confronted the prominent question of financial compensation and redirected the debate on restitution[99] 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.[100] 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[101] and that the work may have been sold at a compulsory Jewish auction.

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97 *E.g.,* Vineberg v. Bissonnette, 529 F.Supp.2d 300, 305-06, 311 (DRI 2007), *aff 'd* 548 F.3d 50 (1st Cir. 2008); Catherine Hickley, *Jewish Heir Fights Restitution, Wants Museum to Keep Art*, BLOOMBERG (May 31, 2011, 10:06 A.M.), www.bloomberg.com/news/2011-05-30/jewish-heir-fights-restitution-wants-museum-to-keep-grandfather-s-legacy.html (decision of administrative court in Berlin of 26 May 2011 VG 29 K 126.09); Lubina and Schneider, *supra* note 4, at 161, 171.

98 Report of the Spoliation Advisory Panel in Respect of Four Drawings Now in the Possession of the British Museum, 10 (Apr. 27, 2006), *available at* http://www.official-documents.gov.uk/document/hc0506/hc10/1052/1052.pdf.

99 Report of the Spoliation Advisory Panel in Respect of Eight Drawings Now in the Possession of the Samuel Courtauld Trust, Para. 43, 47 (June 24, 2009), *available at* http://www.official-documents.gov.uk/document/hc0809/hc07/0757/0757.pdf; Lubina and Schneider, *supra* note 4, at 173-75.

100 Range, *supra* note 58, at 665.

101 *Courtauld Defeats Jewish Heirs to Keep Rubens*, ART HISTORY NEWS (Dec. 20, 2010), *available at* http://www.arthistorynews.com/articles/1_Courtauld_defeats_Jewish_heirs_to_keep_Rubens.

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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102 *See Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era*, AMERICAN ASSOCIATION OF MUSEUMS (April 2001), *available at* http://aamus.org/museumresources/ethics/upload/ethicsguidelines.naziera.pdf.

103 *See Report of the Task Force on Spoliation of Art in the Nazi/World War II Era* (1933-1945), ASSOCIATION OF ART MUSEUM DIRECTORS (June 4, 1998), *available at* http://www.aamd.org/papers/guideln.php.

104 *See e.g.*, Toledo Museum of Art v. Ullin, 477 F.Supp.2d 802, 808-09 (N.D. Ohio Dec. 28, 2006) (claim dismissed under Ohio's four-year statute of limitations); Detroit Institute of Arts v. Ullin, No. 06-10333, 2007 U.S. Dist LEXIS 28364 (E.D. Mich. Mar. 31, 2007) (Institute brought a successful action to quiet title of "The Diggers" by Van Gogh, claimed by the heirs of Martha Nathan).

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.[107] There is notable potential for settlement.[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;[109] (c) the specialists to conduct the arbitration; and (d) whether to publish or keep anonymous a ruling before publication.[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),[111] the arbitral award will qualify for international enforcement.[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

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

108 Majken Hofmann, Anna Lokrantz, Maria Müller, Andreas Müller Hofmann und Lena Müller Hofmann v. Republic of Austria (Nov. 21, 2005) (Arbitral award in German), *available at* www.bslaw.com/altmann/Zuckerkandl/Klage/284724.doc; WIPO ADR Arbitration and Mediation Center, http://www.wipo.int/amc/en/index.html; Theurich, *supra* note 19.

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); Schönenberger, *supra* note 10, at 248.

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.

111 Concluded 10 June 1958; *Compare* 9 USCA §§ 201–8 *with* UNCITRAL Model Law on International Commercial Arbitration, Art. 8 (June 21, 1985) (United Nations documents A/40/17, Annex I), and amended in 2006 by UNCITRAL's report on the work of its 39th session (UN Doc. A/61/17 Annex I).

112 James J. Fawcett and Janeen M. Carruthers, Cheshire, North & Fawcett Private International Law 740 (14th ed., 2008).

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 guidelines[117] 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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113 Bandle & Theurich, *supra* note 26; Gegas, *supra* note 16, at 151; Brooks W Daly, *The Potential for Arbitration of Cultural Property Disputes; Recent Developments at the Permanent Court of Arbitration*, Law & Practice of Int'l Cts. & Tribunals 261 (2005); Emily Sidorsky, *The 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects: The Role of International Arbitration*, 5 Int'l J. of Cult. Prop. 19 (1996); Palmer, *supra* note 109; Jessica Mullery, *Fulfilling the Washington Principles: A Proposal for Arbitration Panels to Resolve Holocaust-Era Art Claims*, Cardozo J. of Conflict Resol. 643 (2010).

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.

118 Charlene A. Caprio, *Artwork, Cultural Heritage Property, and the Foreign Sovereign Immunities Act*, Uniform L. Rev. 285 (2006).

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 Pepp. 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]

Pells 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.

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121 Owen C. Pell, *Holocaust-Looted Art: Lost But Not Forgotten,* UVA LAWYER, *available at* http://www.law.virginia.edu/html/alumni/uvalawyer/f02/opinion.htm; Pell, *supra* note 8.

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,[126] 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.[127] The two arbitrations that followed are isolated examples.[128] 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.[129] Hartung comments on the failure to ascertain "even one just and global common standard of public international law."[130] Legal remedies may arguably be inappropriate on principle, yet it is not clear that Nazi Spoliated Art cases are best solved by international policies.[131] *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.[132] A tax deduction could moti-

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126 Eur. Parl. Doc. A5-0408/2003 (2003) (Report on a Legal Framework For Free Movement within the Internal Market of Goods whose Ownership is likely to be Contested (2002/2114(Ini) (2003)).

127 Altmann v. Republic of Austria, 142 F.Supp.2d 1187 (C.D. Cal. 1999) *aff'd and remanded by* 317 F.3d 954 (9d Cir. 2002), *rehearing denied en banc*, 327 F.3d 1246 (9d Cir. 2003), *stay granted pending petition for writ of certiorari*, 123 S.Ct, 2129 (2003), *cert. granted in part by* 539 U.S. 987 (2003) *aff'd on other grounds by* 541 U.S. 677 (2004), *on remand to* Altmann v. Republic of Austria, 335 F.Supp.2d 1066 (C.D. Cal. 2004).

128 Maria V. Altmann, Francis Gutmann, Trevor Mantle, George Bentley, and Dr. Nelly Auersperg v. Republic of Austria (Jan. 15, 2006) (Arbitral award in German), *available at* http://bslaw.com/altmann/Klimt/award.pdf. The restitution of the sixth painting, a portrait of Amalie Zuckerkandl, was rejected in a separate arbitration (Majken Hofmann, Anna Lokrantz, Maria Müller, Andreas Müller Hofmann und Lena Müller Hofmann v. Republic of Austria (Nov. 21, 2005) (Arbitral award in German), *available at* http://www.bslaw.com/altmann/Zuckerkandl/Klage/284724.doc.

129 Murphy, *supra* note 1, at 1, 13.

130 Hartung, *supra* note 24, at 327, 333.

131 Sawka, *supra* note 15, at 1, 12.

132 *Id.* at 1.

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)[133] 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.[134] An out-of-court settlement was achieved on the basis of sections 501(c)(3) and 170 of the Federal Internal Revenue Code.[135] 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.[136] 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.[137] 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;[138] 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, estoppel and good faith bring.[139]

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133 Goodman v. Searle, Complaint (N.D. Ill. July, 17, 1996) (No 96 – 6459).

134 Falconer, *supra* note 46, at 425.

135 Stacey Falkoff, *Mutually-Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL'Y 265, 265-66 (2007); Sawka, *supra* note 15, at 1.

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.

139 JANEEN M. CARRUTHERS, THE TRANSFER OF PROPERTY IN THE CONFLICT OF LAWS, para 5.18 (Oxford Univ. Press ed., 2005).

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

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140 Lyndel V. Prott, *UNESCO and UNIDROIT: A Partnership Against Trafficking and Cultural Objects*, 1 Unif. L. Rev. 59, 67 (1996).

141 City of Gotha and the Federal Republic of Germany v. Sotheby's and Cobert Finance SA [1998] 1 WLR 114 (QB).

142 *E.g.*, Stephanie Cuba, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 Cardozo Arts & Ent. L.J. 447 (1999) (citing moral considerations and practical obstacles to investigation); D.J. Rowland, *Nazi-Era Art Claims in the United States: 10 Years after the Washington Conference, in* Art and Cultural Heritage Law Newsletter 30, 34 (American Bar Association Section of International Law ed., 2009) (emphasizing that "Nazi-era losses occurred under special circumstances"); Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Arts*, 103 Yale L.J. 2437, 2437 (1994) (supporting the elimination of statutes of limitations in all stolen art cases); Lawrence M. Kaye, *Looted Art: What Can and Should Be Done*, 20 Cardozo L. Rev. 657, 659 (1998).

rather than by property law claims.[143] But those very institutions may insist on the certainty that legal time limits provide.[144]

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.[145] 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.[146] 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.[147] 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-

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143 Julia Parker, *World War II and Heirless Art: Unleashing the Final Prisoners of War*, 13 CARDOZO 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.

146 The U.S. Court of Appeals for the Ninth Circuit in Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954 (9th Cir. 2010) held unconstitution Cal. Code. Civ. Proc. § 354.3, which took effect on January 1, 2003. The U.S. Supreme Court declined von Saher's petition for review on June 27, 2011.

147 Demarsin, *supra* note 22, at 255.

tual discovery of the whereabouts of the artwork and the sufficiency 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 Holocaust victims and their heirs, nor does it reject time limitations for restitution claims.[149]

A notable number of United States scholars and jurisprudential authority are specifically interested in legal arguments supporting 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 Sowing" 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 limitations 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 encouraged the Museum to question the claim and the evidence, and the Museum reasonably relied on this advice.[153] Consequently, Italy'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]

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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* http://www.asil.org/pdfs/CHAR/CHAReviewII.pdf.

149 Andrew Adler, *The Lubomirski Dürers: A Case for Legal and Moral Restitution*, 1 CULTURAL HERITAGE & ARTS REV. 8 (2010), *available at* http://www.asil.org/pdfs/CHAR/CHAReviewII.pdf.

150 *E.g.*, Keisha Minyard, *Adding Tools to the Arsenal: Options for Restitution from the Intermediary 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., 341 F.Supp.2d 32, 34-5 (D. Mass 2004).

152 Springfield Library, 341 F.Supp.2d at 37.

153 *Id.* at 39-40.

154 *Id.* at 41.

155 *See* Sir Norman Rosenthal, *The Time Has Come for A Statute of Limitations*, THE ART NEWSPAPER, December 11, 2008, http://www.theartnewspaper.com/article.asp?id=16627. (Rosenthal, 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,[156] 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.[157] 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.[158] 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*)*[159] 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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refugees from Nazi occupied Europe, argues that a statutory time limit ought to apply to limit the ability of heirs to claim artwork from previous generations.).

156 *Nazi-seized Art Ordered Returned to American Man*, THEJOURNALE.IE, March 16, 2012, http://www.thejournal.ie/nazi-seized-art-ordered-returned-to-american-man-386991-Mar2012/.

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.

icht)[160] 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 (Verm*ö*gensgesetz). 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.[161] Because of the reservation of mandatory or exclusive jurisdiction for administrative courts under the Act, recourse in ordinary courts is precluded[162] regardless of the merits of the individual case.[163] 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.[164] 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.[165] 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.[166] It ordered the return of the posters despite the expiry of the statutory limitation, which commenced

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160 Peter Sachs v. Stiftung Deutches Historisches Museum, Berlin Higher Regional Court, 28 January 2010, 8 U 56/09.

161 *Id.* at Paras 1(a)-(l). Cf BGH NJW 1953, 1909; BVerwGE 98, 261; König, *supra* note 84, at 60-61.

162 Peter Sachs v. Stiftung Deutches 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 BVermG 8 C 12/09; *see* the remark in para 1 (i).

166 BGH Decision of 16 March 2012 V ZR 279/10; *See Nazi-looted Art: German Historical Museum, The Poster Collection Sachs Issue to the Heirs*, *available at* http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=59597&linked=pm&Blank=1.

running upon reunification.[167] It also refused to accept that the payment of compensation by the government could extinguish the claim.[168] The general principles of property law contained in § 985 of the German Civil Code were found to apply. Allied restitution laws established and administered by the occupational forces in post-war Germany were found inapplicable where the original owner could not claim restitution in time. A restitution claim was impossible to file because the objects had disappeared after the war and were located after the period during which claims were permitted had lapsed.[169] The Property Settlement Act was deemed inapplicable in respect to confiscations that took place on the western side of Berlin. The relationship between restitution law and general civil law (including prescription rules) was clarified,[170] and the priority of the civil law over compensation in terms of Allied restitution laws was confirmed.[171] Peter undertook to repay the compensation that his father had previously received when the posters are returned.[172]

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.[173] 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 situs 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 situs 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

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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.

171 Rückerstattungsanordnung BK/O (49) 180 der Alliierten Kommandantur Berlin betreffend die Rückerstattung feststellbarer Vermögensgegenstände an Opfer der nationalsozialistischen Unterdrückungsmaßnahmen (vom 26. Juli 1949, VOBl. für Groß-Berlin I S. 221).

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.[174] 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.[175] 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.[176] 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.[177] This has led commentators to emphasize the importance of recognizing the distinction between a voluntary repatriation and a legal obligation to make restitution.[178] Because Panel recommendations do not constitute legally binding determinations as to legal rights, their observation is a matter of convention.[179] 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.[180] A legal claim for return definitely re-

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174 Elizabeth B. Crawford and Janeen M. Carruthers, International Private Law: A Scots Perspective 523 (3rd ed. 2010); Fawcett and Carruthers, *supra* note 112, at 1212; Lord Collins ed., Dicey, Morris and Collins on The Conflict of Laws Rule 24 1164 (14th ed. 2006); Carruthers, *supra* note 139, at 79; Sharon A. Williams, The International and National Protection of Movable Cultural Property a Comparative Study 86 (1977).

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.

180 Carruthers, *supra* note 139, at paras 5.37-5.38, 5.40; *see* T. O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of Medusa?*, 22 Eur. J. Int'l L. 49 (2011).

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 norm[182] 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 nature[186] 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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181 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).

182 CARRUTHERS, *supra* note 140, at paras 5.37, 5.48.

183 *E.g.*, *id.* at para 5.34.

184 SCHÖNENBERGER, *supra* note 10, at ch. 2, 3.

185 *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).

186 *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"[187] courts become hesitant to give effect to a moral principle to return[188] or are slow to take account of non-legal factors of Holocaust claims.[189] 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.[190] 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,[191] 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.[192] 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

187 Claudia von Selle, *Latest Developments in Restitution of Nazi-looted Art in Germany* (Sep. 10, 2011), *available at* http://www.cvonselle.de/1/post/2011/10/latest-developments-in-restitution-of-nazi-looted-art-in-germany.html.

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 susbtantive 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."

192 *See* Garb v. Republic of Poland, 207 F.Supp.2d 16 (E.D.N.Y. 2002), *aff 'd* 440 F.3d 579 (2d Cir. 2006). The Second Circuit refused to establish jurisdiction in respect of claims for the return of real property to Polish victims of the Holocaust.

cannot apply to matters involving title to property. Its inapplicability renders the lex situs rule mandatory.[193] However, where expropriation without compensation occurs, the rule admits exceptions.[194] 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.[195] 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.[196] 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.[197]

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"[198] 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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193 Christopher Staker, *Public International Law and the Lex Situs Principle in Property Conflicts and Foreign Expropriations*, 58 BRIT. Y.B. INT'L L. 151, 219-20 (1987).

194 *Id.* at 221.

195 City of Gotha and the Federal Republic of Germany v. Sotheby's and Cobert Finance SA [1998] 1 WLR 114 (QB); The Times, 8 October 1998, transcript, case no 1997/G/185, 9 September 1998.

196 THE TIMES, 8 October 1998, transcript, case no 1997/G/185, (Sept. 9 1998), at 57.

197 Pell, *supra* note 8, at 315.

198 Falconer, *supra* note 46, at 425.

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.[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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199 The settlement in Goodman v. Searle, Complaint (N.D. Ill. July 17, 1996) (No. 96 – 6459) barely covered litigation expenses. Settlement prior to litigation is therefore far more preferable. Access to justice and legal fees posed problems in Austria v. Altman, 541 U.S. 677 (2004). *See generally* Bazyler, *supra* note 5, at 1, 183; Keim, *supra* note 120, at 295, 305.

200 Murphy, *supra* note 1, at 29.

201 MICHAEL J. WHINCOP AND MARY KEYES, POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS 128 (2001) (addressing this aspect).

202 *See e.g.*, U.S. v. One Oil Painting Entitled "Femme En Blanc" by Pablo Picasso, 362 F.Supp.2d 1175 (C.D. Cal. 2005); Bennigson v. Alsdorf, BC287294 (L.A. Cnty. Super. Ct. June 16, 2003)), *aff'd*, LEXIS 3681, 2004 WL 803616 (Cal. App. 2d Dist, Apr. 15, 2004) (affirming the insufficiency of the defendant's contacts with California to justify assertion of personal jurisdiction), *review granted*, S124828, 2004 Cal. Lexis 6903 (Cal. July 28, 2004), *dismissed*, S124828, 2005 Cal. Lexis 13370 (Cal. Nov. 30, 2005) (dismissing the case pursuant to notice of settlement). *See also* Alsdorf v. Bennigson, 2004 U.S. Dit. LEXIS 24696, 2004 WL 2806301 (N.D. Ill. Dec. 2, 2004) (granting a six-month stay awaiting resolution of Bennigson v. Alsdorf). *See generally* Murphy, *supra* note 1, at 23-26.

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.[205] 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.[206] U.S. courts will endorse technical defenses[207] for as long as the power to legislate restitution and reparation claims remains within the exclusive reserve of the federal government[208] 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.[209] 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,[210] can be understood as a result of special features associated with U.S. litigation that made

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205 JAMES A. NAFZIGER & ANN M. NICGORSKI, CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION AND COMMERCE 379 (2009).

206 In the Degenerate Art category, *see* Museum of Fine Arts v. Seger-Thomschitz, 623 F.3d 1 (1st Cir. Oct. 14, 2010) (declaratory judgment action, letter of demand sent four years after discovery of the whereabouts of "Two Nudes (Lovers)" by Kokoschka; Massachussets statute of limitations barred claim); Dunbar v. Seger-Thomschitz, 615 F.3d 574 (5d Cir. Aug. 20, 2010) (acquisitive prescription ran in respect of "Portrait of a Youth" by Kokoschka under Louisiana law); Grosz v. Museum of Modern Art, 772 F.Supp.2d 473 (S.D.N.Y. 2010), *aff'd* 403 Fed Appx. 575 (2d Cir. 2010), *cert denied* 132 S.Ct. 102; 181 L.Ed.2d 30 (2011) (claim barred by the statute of limitations).

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).

209 Toledo Museum of Art, 477 F. Supp.2d 802; Detroit Institute of Arts, 2006 WL 1016996. Museum of Modern Art v. Schoeps, 549 F.Supp.2d 543 (S.D.N.Y. 2008) and Schoeps v. Museum of Modern Art 594 F.Supp.2d 461 (S.D.N.Y. 2009) were eventually settled out of court. Conversely, in Vineberg v. Bissonnette, 529 F.Supp.2d 300, 305-06, 311 (D.R.I. 2007), *aff'd* 548 F.3d 50 (1st Cir. 2008), the plaintiff prevailed when the defendant waived the statute of limitations defense. Mullery, *supra* note 113, at 643, 664.

210 *Washington Conference Principles on Nazi-Confiscated Art* (1998) and *Terezín Declaration* adopted at the Holocaust Era Assets Conference in Prague in 2009 respectively.

modern Holocaust litigation possible in the first instance.[211] 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.[212]

Negotiation was compromised in a recent unsettling ruling in Grosz v. Museum of Modern Art.[213] 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,[214] or a new International Tribunal functioning under a new international arbitration agreement with limited but exclusive jurisdiction.[215] 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.[216] Conceptions of arbitration—which addresses the harm of the past without requiring the consent of the

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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 proposal[221] 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

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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.

220 Catherine Hickley, *Eizenstat Favours U.S. Nazi Loot Panel to Advise on Disputed Art*, BLOOMBERG (June 28, 2009, 3:00 PM), *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aB_A3zMb02Ko.

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.[223] 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.[224] Decisional stability is reached only after the Federal Court of Justice has ruled.[225] This conception of *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 *res judicata* effect; the others did not.

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223 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.

224 Sinai, *supra* note 87, at 386.

225 *Id.* at 384.

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*.[226] 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.[227] 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.[228]

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.[229] 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.[230] 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

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228 Dietrich Raue, *Georg Steindorff and his Collection*, *available at* www.iae-egyptology.org/uploads/Facts%20about%20the%20case.pdf.

229 *Id.*

230 Catherine Hickley, *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.

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-

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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.