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Mechanism for the Restitution of Nazi-Looted Art

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Chapter 1

Introduction



“She can teach us about justice, even justice that comes after more than seven decades: how fidelity to basic values...and no small measure of hard work can help to get some things right.”¹

The story behind this thesis, as well as the global resurgence of Nazi-looted art claims, begins with the tender portrayal of a young Austrian woman, Valerie Neuzil.² She is forever memorialized as the subject of the “Portrait of Wally” (hereinafter referred to as “Wally”), an oil-on-wood painting from 1912 measuring 32.7 x 39.8 cm. This work, once an intimate portrayal by her lover and Viennese artist, Egon Schiele, has now become “[t]he [painting] that launched a thousand lawsuits.”³ Like many other artworks and objects of cultural worth at the time, Wally was forcibly seized by the Nazi regime during World War II and kept separated from her rightful owner, Lea Bondi Jaray (“Bondi”), long after she had been liberated by American forces.

Bondi returned to her home in Vienna in 1948 to seek restitution but was ultimately barred from doing so because of costly litigation and legal discrimination.⁴ In the meanwhile, Wally was acquired by Dr. Rudolph Leopold in September 1954—at the time, Bondi had enlisted

¹ CNN Wire Staff, *Painting stolen by Nazi now on display in New York*, CNN (Jul. 29, 2010, 7:27 PM), <https://www.cnn.com/2010/CRIME/07/29/new.york.stolen.painting/index.html>.

² *United States v. Portrait of Wally*, 663 F. Supp. 2d 23, 237-38 (S.D.N.Y. 2009).

³ *Portrait of Wally* (illustration) (Portrait of Wally Productions 2012) [hereinafter *Portrait of Wally* film].

⁴ *Id.*

Leopold's help in reuniting her with Wally.⁵ This reunion would never come, despite Bondi's continued attempts at restitution. It would not be until Wally's debut at the Museum of Modern Art ("MoMA") on October 8, 1997, that Bondi's Estate received another chance at justice.⁶

Attempts at restitution by Bondi's estate triggered a 13-yearlong battle in courts, implicating everyone from the MoMA to the Leopold Museum and costing parties millions in legal fees.⁷ By the time settlement was finally reached in 2010, all original parties—including Bondi and her primary opponent, Dr. Rudolph Leopold—had passed away.⁸

The impact of Wally on the art world has been sizeable. The publicity and outcry surrounding litigation, including controversy over the United States ("U.S.") government's role in representing the victims against a sovereign state, drew global attention to the issue of Nazi Looted Art ("NLA"). Following litigation over Wally, countries across the world worked together to create international agreements aimed at supporting restitution-efforts, like the Washington Principles. Museums, concerned over the possibility of facing their own NLA scandals, were seriously pressured into reviewing the provenance of works within their collections.

Although twenty-five years have passed since the establishment of the Washington Principles, and over eighty since the beginning of the Holocaust, the issue of NLA has hardly ceased to be a matter of global importance. Of the 600,000 pieces of work looted by the Nazi regime, it is estimated that over 100,000 pieces remain undiscovered. To this day, prominent auction houses like Sotheby's and Christie's manage over 20 restitution cases a year. As museums continue to review the provenance of works within their collection, restitution claims continue to emerge. With each passing day, however, the ability for claimants to seek restitution becomes more difficult: equity defenses and statutes of limitations operate against claimants; evidence and witnesses disappear; and, most of all, public attention and support for restitution weakens.

This thesis aims to reposition arbitration as an alternative dispute resolution mechanism for Nazi-Looted Art claims by focusing on the unique stakeholders involved. Chapter 2 will provide a brief overview of the history of looting throughout World War II. Then, the stakeholders most implicated by Nazi-looted art will be introduced in connection with any

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

pertinent interests. Chapter 3 will introduce the legislative systems on which restitution claims are predicated. It will first provide a brief overview of the non-binding, international conventions that were developed in response to the widespread looting of cultural property by Nazi Germany. From there, the thesis will analyze the processes for restitution utilized by countries that were heavily impacted by Nazi looting. This thesis will also discuss the role of the U.S. government in advocating for restitution and the legislation it developed to aid such claimants in litigation. Finally, chapter 3 will focus on some of the key guidelines provided by museum associations for their members in dealing with NLA claims. As this chapter will demonstrate, the current legal structure fails to adequately respond to the needs and interests of claimants, as well as those of other stakeholders. Chapter 4 will focus exclusively on the legal difficulties associated with litigating restitution claims to demonstrate the need for a more flexible approach. As will be discussed, an ideal approach would resolve claims based on the facts and merits, rather than on the applicability of technical defenses like the statute of limitations.

Chapter 5 will provide a brief introduction to alternative dispute resolution mechanisms. This chapter will re-introduce the needs of stakeholders to characterize arbitration as the method best suited for the restitution of certain cases of NLA. Chapter 6 will focus exclusively on the potential efficacy of arbitration in resolving Nazi-looted cases. Special attention will be paid to the role of arbitration in *Republic of Austria v. Altman*, 541 U.S. 677 (2004). Finally, the thesis will consider the potential of a specialized tribunal for art disputes, much like the recently created Court of Arbitration for Art.

As this thesis will establish, the impact of factors like the passing of time, resource capabilities, and international relations on different stakeholders favors the use of alternative dispute resolution mechanisms; of these mechanisms, arbitration offers the most flexibility and finality for parties. It is more important, now than ever, to encourage the use of arbitration and alternative dispute resolution given the declining health of Holocaust survivors and their claims.

Chapter 2

Plunder, Provenance, & Restitution

“...this confiscation, this looting, wasn’t a byproduct of the Holocaust; it was a fundamental part of the Holocaust. The Nazis were essentially thieves. They stole your identity, stole your property, they stole your house, they stole your job, they stole everything from you.”⁹

2.1 A Brief History on Nazi Looting

In 1933, Adolf Hitler was appointed as the Chancellor of Germany—with this appointment came the rise of the Third Reich and the “greatest genocide in world history.”¹⁰ Over six million European Jews would be murdered over the course of the war. As part of their efforts to eradicate all traces of Jewish life and culture, the Nazi regime also engaged in the systematic, widespread looting of cultural property¹¹ across Europe. This looting was facilitated by several legal mechanisms and entities. Cultural property was first seized by the Nazi regime under a process known as Aryanization, or the transfer of Jewish-owned property to non-Jewish persons in Germany.¹² In 1933, Jews were “encouraged” to sell their property at radically reduced prices.¹³ This was known as voluntary Aryanization.¹⁴ Later, Jews were outright forced to transfer their property under new Nazi regulations passed after 1938.¹⁵ Jews residing in countries annexed or occupied by Germany were also subject to Aryanization policies.

In addition to Aryanization laws, important artworks were also seized as part of Hitler’s attack on “degenerate art”. These seizures largely targeted works of modern art¹⁶ that were assessed by the Nazi regime to be “insufficiently German”.¹⁷ Art created during the Weimar Republic (1918-1933) was particularly suspect as it was linked to ideas like democracy and

⁹ Press Release from Lord Eric Pickles, U.K. Special Envoy for Post-Holocaust Issues, 25th Anniversary of the Washington Principles on Nazi-Confiscated Art: Best Practices & the Way Forward (Mar. 5, 2024), <https://www.state.gov/briefings-foreign-press-centers/25th-anniversary-of-the-washington-principles-on-nazi-confiscated-art>.

¹⁰ Press Release from Stuart Eizenstat, Special Advisor on Holocaust Issues, Bureau of European and Eurasian Affairs, *The Lasting Impact of the Washington Principles and Best Practices for the Restitution of Nazi-Confiscated Art* (Mar. 5, 2024), <https://www.state.gov/release-of-best-practices-for-restitution-of-nazi-confiscated-art/>.

¹¹ Cultural property is used to refer to objects that one or more groups regard as important symbols or manifestations of their history, art, literature, religion, or science.

¹² See U.S. Holocaust Memorial Museum, *Aryanization*, HOLOCAUST ENCYCLOPEDIA (Oct. 24, 2017), <https://encyclopedia.ushmm.org/content/en/article/aryanization>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ This included works created using forms such as modernism, expressionism, cubism, etc.

¹⁷ Nicholas M. O’Donnell, *Nazi-Looted Art: Risks and Best Practices for Museums*, in *THE LEGAL GUIDE FOR MUSEUM PROFESSIONALS* 41, 42 (Julia Courtney ed., 2015).

decadence.¹⁸ These ideas were thought to present a danger to public security and order within the Third Reich.¹⁹ In contrast, art that reflected the values of the German people as interpreted by the Nazi regime featured straightforward themes such as: landscapes, female nudes, women as mothers, peasants and artisans engaged in the act of labor, and ‘heroic’ subjects.²⁰

Private owners, dealers, museums, and even artists, themselves, were all impacted under the Nazi’s policy against degenerate art. In a manifesto published by *Deutscher Kunstbericht*²¹ in 1933, the State laid out the groundwork for their new approach to modern art. According to the five-point manifesto:

- All works of a cosmopolitan or Bolshevik nature should be removed from German museums and collections, but first they should be exhibited to the public, who should be informed of the details of their acquisition, and then burned
- All museum directors who "wasted" public monies by purchasing "un-German" art should be fired immediately
- No artist with Marxist or Bolshevik connections should be mentioned henceforth
- No boxlike buildings should be built [an assault on Bauhaus architecture]
- All public sculptures not "approved" by the German public should be immediately removed [this applied especially to Barlach and Wilhelm Lehmbruck]²²

That same year, over twenty museum directors and curators were fired for purchasing “un-German” art.²³ Dealers of degenerate art were also precluded from work.²⁴ Artists who were deemed to produce degenerate work²⁵ were removed from any academic posts and forced to

¹⁸ See U.S. Holocaust Mem’l Museum, *Degenerate Art*, HOLOCAUST ENCYCLOPEDIA (Jun. 8, 2020), <https://encyclopedia.ushmm.org/content/en/article/degenerate-art-1>.

¹⁹ *Id.*

²⁰ Mary-Margaret Goggin, "Decent" vs. "Degenerate" Art: The National Socialist Case, 50 ART J., Winter 1991, at 84, 85.

²¹ *Deutscher Kunstbericht* refers to a German Art Report.

²² STEPHANIE BARRON, "DEGENERATE ART" THE FATE OF THE AVANT-GARDE IN NAZI GERMANY 13 (1991) [hereinafter *Degenerate Art*].

²³ *Id.* at 9.

²⁴ LYNN H. NICHOLAS, RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND SECOND WORLD WAR 19 (First Vintage Books ed., 1995).

²⁵ This list included artists like Max Beckmann, Ernst Barlach, Rudolf Belling, Dix, Ludwig Gies, Karl Hofer, Kirchner, Oskar Kokoschka, Kathe Kollwitz, Max Liebermann, etc. Of the 112 artists designated as degenerates, only 6 identified as Jewish. Barron, *supra* note 22, at 9.

either flee Germany, conform their art to Nazi ideals, or cease creating art altogether.²⁶ Given the options, many chose to leave.²⁷

Modernist works were first removed from state-owned museums beginning in 1933 to be shown as part of the regime's *Schandausstellungen* ("exhibitions of shame").²⁸ These exhibitions were staged to encourage the public to denounce modernist art and artists. The largest and most infamous of these propagandist exhibitions, the *Entartete Kunst*, premiered in Munich in 1937 and later traveled throughout Germany and Austria.²⁹ Of the approximately 16,000³⁰ works of art seized during the regime's attack on degenerate art: some were sold at auction in Switzerland in 1939,³¹ others were secretly burned in Berlin,³² and many others disappeared—likely disposed of through private dealers.³³

By 1940, the *Einsatzstab Reichsleiter Rosenberg* ("ERR") was the leading force in charge of seizing artwork and related property from museums, libraries, collections, and private homes.³⁴ The special task force was led by a Nazi ideologue, Alfred Rosenberg, and operated across France, the Netherlands, Belgium and much of Eastern Europe including Poland and parts of the Soviet Union.³⁵ As part of their fastidious process, the ERR created inventory cards for each work, detailing the artist's name, medium, the family or collection the work had been taken

²⁶ Nicholas, *supra* note 24, at 19-20.

²⁷ *Id.*

²⁸ Jason Farago, *Degenerate Art: The Attack on Modern Art in Nazi Germany, 1937 review – What Hitler dismissed as 'filth'*, THE GUARDIAN (Mar. 13, 2014, 2:57 PM), <https://www.theguardian.com/artanddesign/2014/mar/13/degenerate-art-attack-modern-art-nazi-germany-review-neue-galerie>.

²⁹ Goggin, *supra* note 20, at 88.

³⁰ This number reflects the works of art that had been seized by the Nazi regime up to 1937 as part of their policy against degenerate art. See Jacques Schuhmacher, *'Entartete Kunst': The Nazis' inventory of 'degenerate art'*, VICTORIA AND ALBERT MUSEUM, <https://www.vam.ac.uk/articles/entartete-kunst-the-nazis-inventory-of-degenerate-art#:~:text=had%20to%20offer.-,Confiscations,exhibition%20on%20'degenerate%20art'> (last visited Apr. 21, 2024).

³¹ An estimated 126 works (including paintings and sculptures from renowned artists) were auctioned in Lucerne, Switzerland on June 30, 1939. Despite the auctioneer's insistence that proceeds from the sale would go to German museums, all proceeds went toward funding the Nazi party. See Nicholas, *supra* note 24, at 11-12.

³² The Nazi Propaganda Ministry burned around 5,000 artworks in the courtyard of the Berlin Fire Department on March 20, 1939. Of the estimated 5,000 burned works, 1,004 were paintings, and 3,825 consisted of drawings, watercolors, and graphics. See Schuhmacher, *supra* note 30; see also Nicholas, *supra* note 24, at 32.

³³ TATE, *Degenerate Art*, <https://www.tate.org.uk/art/art-terms/d/degenerate-art> (last visited Apr. 21, 2024).

³⁴ Evelien Campfens, *Sources of Inspiration: Old and New Rules for Looted Art*, in FAIR AND JUST SOLUTIONS? ALTERNATIVES TO LITIGATION IN NAZI-LOOTED ART DISPUTES: STATUS QUO AND NEW DEVELOPMENTS 13,15 (2015) [hereinafter Fair and Just Solutions?].

³⁵ See Patricia Kennedy Grimsted, *Reconstructing the Record of Nazi Cultural Plunder* (Aug. 2015), https://www.lootedart.com/web_images/pdf2022/ERR_Guide_Introduction.pdf.

from, and its fate.³⁶ Everything confiscated was categorized “down to the last teaspoon.”³⁷ By their own count, the ERR had plundered 69,619 Jewish homes and seized more than 21,903 works of art by July 14, 1944.³⁸

By the end of the war, over 600,000 works of art had been seized by the Nazi regime. A task force—known as the Monuments, Fine Arts, and Archives team (“MFAA”)—was formed amongst the Allied military to aid in the restitution of looted works to their original owners.³⁹ The MFAA largely consisted of young art historians, archaeologists, and museum curators who represented 13 nations.⁴⁰ The task force proved quite successful in their charge and discovered hundreds of caves and mines that had been used to store NLA.⁴¹ Most notably the MFAA discovered over 6,500 important works in a salt mine located at Alt Aussee in Austria.⁴² These works were then consolidated into four central collection facilities across Western Europe and itemized for restitution purposes.⁴³ Despite the MFAA’s best attempts, it is estimated that over 100,000 pieces remain undiscovered.⁴⁴ Even works that were recovered were not automatically returned to their original owners; instead, they were turned over to their countries of origin whose governments were then tasked with creating their own systems of restitution.⁴⁵

It is widely acknowledged that these national authorities failed in restituting items of cultural interest. For one, the process of restitution was emotionally and financially demanding for victims and their heirs. Many were coping with the horrors they had just endured; not to mention, returning to looted homes and in some cases, frosty receptions from their towns and villages. For these victims and their heirs, the restitution of property was not a high priority—at least, not initially. Another barrier to restitution came from national authorities seeking to

³⁶ Works were indicated as either having been featured in the *Entartete Kunst*, sold, exchanged, on commission with an approved dealer, or destroyed. See *Schuhmacher*, *supra* note 30.

³⁷ See Annemarie Marck and Marleen Schoonderwoerd, *An Interview with Ella Andreisse and Robert Sturm*, in *FAIR AND JUST SOLUTIONS?* 141, 142.

³⁸ Campfens, *supra* note 34, at 15.

³⁹ PATTY GERSTENBLITH, *CULTURAL OBJECTS & REPARATIVE JUSTICE: A LEGAL AND HISTORICAL ANALYSIS* 146 (Francesco Francioni & Ana Filipa Vrdoljak eds., 2023).

⁴⁰ Anne Rothfeld, *Nazi Looted Art*, *PROLOGUE MAG.*, Summer 2002, available at <https://perma.cc/24SZ-YNPR>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ For widely accepted histories of Nazi-era art looting, see the following sources: Michael J. Kurtz, *America and the Return of Nazi Contraband: The Recovery of Europe’s Cultural Treasures* (2006); Greg Bradsher, *Documenting Nazi Plunder of European Art*, *The Record* (November 1997), <https://www.archives.gov/research/holocaust/records-and-research/documenting-nazi-plunder-of-european-art.html>; Alex Shoumatoff, *The Devil and the Art Dealer*, *Vanity Fair* (Mar. 19, 2014).

⁴⁵ Campfens, *supra* note 34, at 17.

expedite the process. These governments often set unrealistic deadlines that did not account for the realistic timeline required by claimants. Many countries had shut down avenues for NLA claims by the late 1940s/early 1950s.⁴⁶

Increasing tensions during the Cold War soon turned the eyes, and efforts, of the world elsewhere. It would not be until the fall of the Berlin Wall in 1989, and the subsequent reunification of East and West Germany, that attention would return to the issue of restitution. Researchers could now access previously locked archives and museums located in East Germany.⁴⁷ Individuals who had been isolated from the world, under the Iron Curtain, could now travel to seek what was taken from them. Historiographies published in the mid-1990s, like Lynn Nicholas' *the Rape of Europa*, further served to redirect global attention back towards NLA. This environment quickly gave rise to the era of restitution litigation, including the cases of Wally and Altman.

2.2 Relevant Stakeholders

Unlike other disputes within the art world, restitution claims involve a variety of relevant stakeholders like national governments, private collectors, foundations, auction houses, museums, and victims of the Holocaust. For the purposes of this paper, the discussion of relevant stakeholders will focus on claimants, museums, lenders/borrowers of NLA, auction houses, and sovereign states. By understanding the role each of these stakeholders may play in NLA disputes, as well as their underlying interests and needs, we can better understand the kind of dispute resolution mechanism that is best suited to finding just and fair solutions.

Claimants

It is important to acknowledge that in cases dealing with art looted by the Nazi regime, there are interests far greater than finances at stake. These are cases dealing with cultural property—vestiges of people and their history—and so they are deeply intertwined with the trauma of the Holocaust. The return of a painting to surviving children may act as a tangible

⁴⁶ See Select Committee on Culture Media and Sport, *Seventh Report Cultural Property: Return and Illicit Trade*, HC 371-I, 1999-2000, ¶ 174, <https://publications.parliament.uk/pa/cm199900/cmselect/cmcmums/371/37102.htm>.

⁴⁷ Magdalena Pasikowska-Schnass, *Jewish art collections – Nazi looting*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE, 5 (Jan. 2022), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/698872/EPRS_BRI\(2022\)698872_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/698872/EPRS_BRI(2022)698872_EN.pdf).

memory or connection to family they have lost. For others, the return of looted property may instead serve as the fulfillment of a debt of honor owed to their family. Others, still, may not even seek the return of looted property but rather the public's acknowledgement of a historical wrong enacted against them and their families.

Another important factor to consider is that the identity of claimants may have changed. As 75 years have passed since the Holocaust, many NLA claims may now be brought by the estates and heirs of Holocaust victims. These claimants may not have a full understanding of what exactly was taken from them. One such claimant, Alfred Jacobsen, described being unaware of his family's eligibility for restitution:

This is because there is no trading stock inventory that we know about and also as far as I know my grandmother, who survived the war, never drew up a list of what was missing after the liberation. She was probably not able to do so because only my grandfather, who was murdered in Auschwitz during the war, would have known what had been in the shop. Similarly my sisters and I, their grandchildren, could not have known anything. At home very now and then, we did talk about things that been stolen from my grandfather's gallery, but we did not know which items were involved.⁴⁸

Another claimant, Robert Sturm, noted, “[t]he major problem is that during the fifty to seventy years since the war, a generation who knew the objects has died... [my mother] would have knew the things that were stolen later on; she was much nearer to them.”⁴⁹ Despite not knowing exactly what was taken, these claimants share a deep understanding that *something of theirs* was taken. They hope for restitution and the chance to rectify past wrongs on behalf of their family.

In the battle for restitution, claimants may face a variety of obstacles. One of the largest obstacles is time. Claims may be time barred⁵⁰ and those that are not may be muddled by ambiguous information or disappearing witnesses and memories. For claims being brought by Holocaust survivors, this can result in their passing away prior to seeing any real justice occur. In

⁴⁸ Annemarie Marck and Marleen Schoonderwoerd, *An Interview with Alfred Jacobsen*, in *FAIR AND JUST SOLUTIONS?* 103, 104.

⁴⁹ See *An Interview with Ella Andreisse and Robert Sturm*, *supra* note 37, at 142.

⁵⁰ The HEAR Act, which will be discussed in greater length in Section IV, has helped mitigate some concerns relating to time bars. However, claimants may still have to affirmatively respond to equitable defenses such as laches.

some cases, the issue of theft may be further complicated by the Allied armies' attempts to return works to their countries of origin.

Attempts at restitution may be further hindered by a fear of biased rulings. Claimants are essentially asked to trust restitution proceedings set up by states that engaged—either explicitly or complicity—in the taking of their property. In some cases, initial attempts at restitution were fraught with corruption and bias against Jewish citizens. An example of this can be seen in the case of Wally's owner, Bondi. Bondi had been forced under Aryanization laws to sell her art gallery, the Würthle Gallery, to Nazi-party member, Friedrich Welz.⁵¹ After returning to Vienna in 1948, Bondi sought restitution of her gallery before the Austrian Restitution Committee.⁵² Although Bondi was granted restitution, the Austrian Court of Restitution found that Welz had made improvements upon the gallery and ordered Bondi to make payment of 9000 Schillings⁵³ within 14 days.⁵⁴ This was not uncommon practice for restitution proceedings in Austria at the time.⁵⁵ Bondi's initial experiences were so negative that she never brought her claims for Wally before the committee. Bondi believed, "if the litigation was lost, [Wally] would irrevocably be taken from my possession."⁵⁶

The cost associated with restitution can be burdensome for many claimants. Those bringing claims before national restitution legislation may have to pay filing fees. For claimant Maria Altman, a 1% filing fee for the restitution of her property amounted to over \$1.8 million.⁵⁷ Claimants may also be asked to pay for storage and transport charges incurred by the government during the years they possessed the item.⁵⁸ For some, prohibitive expenses may push them to bring cases in the U.S., where firms representing NLA claims tend to operate on a contingency basis. Some firms, like Herrick, Feinstein LLP, have made a name for themselves in the world of

⁵¹ See Portrait of Wally film, *supra* note 3.

⁵² *Id.*

⁵³ This number amounts to \$500,581.47 in current USD. *Id.*

⁵⁴ None of the artwork that had been part of the gallery's collection was included in this restitution as they were considered 'lost' at the time. *Id.*

⁵⁵ *Id.*

⁵⁶ *Portrait of Wally*, *supra* note 2, 275.

⁵⁷ Douglas Davidson, *Just and Fair Solutions: A View from the United States*, in FAIR AND JUST SOLUTIONS? 91, 98.

⁵⁸ *An Interview with Ella Andreisse and Robert Sturm*, *supra* note 37, at 143.

art restitution this way.⁵⁹ However, not all looted objects will bring in large paydays⁶⁰ and these firms may be reluctant to take on cases for less lucrative, modest works. As many of the collections of pre-war families fit this profile,⁶¹ claimants may struggle to find legal representation or experts willing to investigate their claims.

In addition to preliminary obstacles, claimants may face further difficulty achieving the *kind* of restitution they desire. As discussed, restitution can take on many forms, depending on the interests and needs of the claimants. Restitution can look like: the material restitution of the looted object; monetary compensation;⁶² shared ownership; a temporary loan for exhibition; the public acknowledgement of the original theft; or even just the opportunity to pursue their claims with due process. If parties are too adversarial to negotiate freely, then these ideal resolutions may never be reached. As discussed below, some countries may not even offer material restitution as an option for claimants.

Museums

Another important stakeholder to consider is museums. There is little question that NLA has ended up in museums across the world. Even U.S. museums are not free from such accusations—the Met’s Provenance Research Project lists 3,401 objects⁶³ in their collection as having Nazi-era provenance⁶⁴ with only 69 of these having been restituted.⁶⁵ NLA may also

⁵⁹ See Carol Kino, *Stolen Artworks and the Lawyers Who Reclaim Them*, N.Y. TIMES (Mar. 28, 2007), <https://www.nytimes.com/2007/03/28/arts/artsspecial/28law.html>.

⁶⁰ The firm that helped facilitate a \$19 million settlement for the Portrait of Wally received between \$5-6 million for their work. See Portrait of Wally film, *supra* note 3. Similarly, the Guelph Treasures at dispute in *Federal Republic of Germany v. Philipp*, 592 U.S. ____ (2021) were estimated to be worth \$250 million and likely would have brought in a sizeable payment for a firm.

⁶¹ Monica Dugot, International Director of Restitution, Christie’s, Congressional Panel Testimony (June 7, 2016) <https://art.claimscon.org/wp-content/uploads/2022/03/Monica-DugotTestimony1.pdf> (“In the last decade [Christie’s has] handled over 200 claims, the majority for financially modest artworks. . . .”) [hereinafter Dugot, Congressional Panel Testimony].

⁶² Monetary compensation can prove problematic as parties may disagree on the value of an object. Valuations can range from the current market value of the object to the value of the object when it was first taken.

⁶³ *Provenance Research Project List*, MET MUSEUM, <https://www.metmuseum.org/art/collection/search?showOnly=NEprovenance>.

⁶⁴ This term is commonly associated with artworks “with changed ownership in continental Europe between 1933 and 1945 or whose provenance is unknown during that time.” MET MUSEUM, *Provenance Research Project*, <https://www.metmuseum.org/about-the-met/policies-and-documents/provenance-research-project> (last visited Dec. 9, 2022). Although these gaps in ownership do not conclusively mean an artwork was stolen by the Nazis, this period of history is known as the largest art theft in history.

⁶⁵ This category includes items that, “were once stolen, seized, or sold under duress during the Nazi era and subsequently restituted to their rightful owners, who then put the works on the market or donated them to the Museum.” *Id.*

come into a museum's possession through loan agreements with international collectors or other museums. Due to their often possessory role, litigation against public museums over restitution has proliferated in U.S. courts over the past two decades.⁶⁶

When it comes to accessioning or acquiring new pieces, museums are only given as much information as the seller can convey.⁶⁷ This can pose serious problems within the U.S. as buyers can never acquire title to stolen objects.⁶⁸ Museums who fail to conduct due diligence or who are unable to fully investigate an item's provenance therefore risk both costly litigation and serious reputational harm. To protect themselves in these circumstances, museums may rely on a self-policing system pursuant to guidelines published by the preeminent professional associations within the museum field. In the U.S., the two most influential organizations are the Association of Art Museum Directors ("AAMD") and the American Association of Museums ("AAM"). Internationally, museums may look to the International Council of Museums ("ICOM") for guidance.

In the years following the Washington Principles, many museums (as well as several auction houses) established their own provenance programs. As part of their research process, these groups collect or verify information relating to provenance such as the dates of ownership, methods of transfer used over the years, locations where the work has been kept or sold, and the identities of those who have owned the piece.⁶⁹ The digitization of information, as well as the declassification of crucial archival information in the late 1990s, has greatly aided researchers in investigating provenance across the world.⁷⁰ Artificial intelligence, while not currently in use, is expected to further aid researchers in tracking and verifying provenance through its ability to mass analyze datasets, auction catalogs, and museum collections.

While these provenance programs are a step in the right direction, they do not come without faults. In their efforts to research the provenance of works within their collection, museums may run into the following issues: not all works have a fully-discoverable provenance;

⁶⁶ O'Donnell, *supra* note 17, at 41.

⁶⁷ David L. Hall & Ivana D. Greco, *Stolen Cultural Property*, in THE LEGAL GUIDE FOR MUSEUM PROFESSIONALS 13, 13 (Julia Courtney ed., 2015).

⁶⁸ Whether title can be acquired through a good-faith purchase varies throughout different jurisdictions. Civil law countries, including much of the European Union, recognize good-faith acquisitions to varying degrees. In contrast, the U.S. relies on a Common Law system under which stolen property can never receive good title.

⁶⁹ Sharon Flescher, *A Brief Guide to Provenance Research*, in THE LEGAL GUIDE FOR MUSEUM PROFESSIONALS 55, 58 (Julia Courtney ed., 2015).

⁷⁰ *Id.* at 56-57.

pieces may change in title or attribution over time; generic names such as “private collection” may be used in lieu of owners; previously published provenances may be incomplete, incorrect, or even falsified; and some provenance researchers may experience a particular difficulty in distinguishing between voluntary sales and forced sales conducted between the years 1933 and 1945.⁷¹ More broadly, these programs may be limited in effectiveness due to the short timespans given to research, constrained budgets for provenance research, the inaccessibility of private collections, and the loss of documentation and evidence over the years. Provenance programs are also limited in efficacy as there is currently no central registry with works of Nazi-looted provenance. For museums, this means that they may have to access numerous databases across the world to verify the provenance for one item. For claimants, this can make identifying looted property almost impossible.

When it comes to addressing NLA claims, most museums must carefully balance their wide array of interests such as, fears over negative publicity; a desire to support continued loans from foreign museums; a willingness to follow the guidelines established by the AAM, AAMD, and Washington Principles; and a desire to continue further provenance research while maintaining a healthy budget for other needs. Museums must also consider the interests of the public, for whom they are entrusted with providing culture and education. With these needs in mind, the “best resolution [for museums] is usually a quick one.”⁷² In other words, museums are often better suited opting for alternative dispute resolution as opposed to costly and highly publicized litigation. It is for this reason that the U.S. Museum community has adopted ethical standards advocating for the resolution of NLA claims through mediation. The impact of these guidelines is apparent—over 80% of the most recent fifty NLA claims have settled out of court.⁷³

Lenders/Borrowers of NLA

Loaned objects with Nazi-looted provenance place museums in uniquely difficult positions. This is because most museums—even larger institutions like the Museum of Modern Art or the Met—rely on loaned artworks to augment their permanent collections. These loans increase public access to works located abroad and help keep museum’s selections ‘fresh’ when

⁷¹ *Id.* at 57-58, 66.

⁷² O’Donnell, *supra* note 17, at 52.

⁷³ Stephen K. Urice, *Elizabeth Taylor’s Van Gogh: An Alternative Route to Restitution of Holocaust Art*, 22 DePaul J. Art, Tech. & Intell. Prop. L. 1, 9 (2011).

otherwise restricted by limited budgets.⁷⁴ The danger, however, is that loaned objects may be seized or deterred under a variety of circumstances, including i) pre- or post- judgement attachment to satisfy jurisdictional requirements or liability concerns; ii) seizure pending the resolution of litigation; iii) seizure by the Executive branch of the U.S. government due to political controversy; iv) withholding by the exhibiting museum pending the resolution of a claim against the lender or the lender's government; and v) customs seizure.⁷⁵ If museums are no longer able to assure lenders that borrowed works will be returned, those in a position to do so will be disinclined, if not entirely opposed, to lending such objects.

In the case of *Wally*, the MoMA in New York entered into a loan agreement with the Leopold Museum in Vienna to exhibit 150 paintings by Viennese artist, Egon Schiele.⁷⁶ Unbeknownst to the MoMA, some of the loaned paintings had been “stolen or otherwise misappropriated by Nazi agents or collaborators.”⁷⁷ Just days before the exhibitions close, the heirs of two Holocaust victims, including the Bondi estate, staked their claims on the paintings.⁷⁸ Initially, MoMA was asked to retain the paintings pending the resolution of litigation over ownership. MoMA refused. They stated that retaining the paintings, or allowing them to be subpoenaed, would constitute a breach of their agreement with the Leopold.⁷⁹ This could, in turn, deter future institutions from lending artworks and disrupt the free flow of art that large cultural institutions rely on.⁸⁰ Ultimately, the court ordered *Wally* to remain in the U.S. while litigation continued. As the overseeing judge, Michael Mukasey penned, “...art to loan to a museum—even a ‘world-renowned museum’—is not exempt [from forfeiture].”⁸¹ This ruling found everyone interested in acquiring new art—from museum directors and trustees to art collectors, dealers, and auction houses—turning to seek guidance on provenance issues.⁸²

⁷⁴ See Derek Fincham, *An Interview with Nout van Woudenberg on Immunity*, ILLICIT CULTURAL PROP. (May 7, 2012) <http://illicitculturalproperty.com/an-interview-with-nout-van-woudenberg-on-immunity/>.

⁷⁵ See Rodney M. Zerbe, Comment, *Immunity from Seizure for Artworks on Loan to United States Museums*, 6 NW. J. INTL. L. BUS. 1121, 1129 (1984/85); See also Laura Popp, *Arresting Art Loan Seizures*, 24 COLUM. VLA J.L. & ARTS 213 (2001).

⁷⁶ See *People v. Museum of Modern Art (In re Grand Jury Subpoena Duces Tecum)*, 93 N.Y.2d 729, 732-34 (1999).

⁷⁷ *Id.* at 742.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 733-34.

⁸¹ *United States v. Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445, at 86 (S.D.N.Y. 2002).

⁸² Lisa Koenigsberg and Sharon Flescher, *Introductions & Welcomes*, in 3 IFAR J. 8, 9 (Apr. 29, 2000).

Nowadays, U.S. museums protect themselves (and their loans) against similar seizures by filing for a grant of protection under the Federal Immunity from Seizure Act (“IFSA”). Works of art that are deemed to be of “cultural significance” and in the “national interest” are eligible for such protection.⁸³ This does not, however, protect foreign lenders from facing litigation in the U.S.

The expropriation exception to the Foreign Sovereign Immunities Act allows litigants to file suit against foreign states or their agents (here, a state-owned museum or institution) when rights in property are involved and the foreign state is engaged in commercial activities within the U.S. Under this Act, a commercial activity is defined as “either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”⁸⁴ Courts have previously held that the mere act of loaning an artwork in the U.S. *can* constitute a commercial activity under this definition.⁸⁵ Depending on the circumstances—i.e., whether a fee is paid or if representatives from the museum are sent in connection with the work⁸⁶—lenders can face litigation in the U.S. even if their loan is ultimately returned.

Auction Houses

As some of the biggest players in the art world, auction houses can play an equally important role in NLA claims. Their interactions with rare and private collections place them in a unique position to identify never-before seen objects with Nazi-looted provenance. The sheer volume of objects they interact with each year would also bolster the impact they could have on restitution efforts.

Auction houses primarily serve as intermediaries between consigners and third-party buyers, facilitating the sale of billions⁸⁷ per year in auctions and private sales.⁸⁸ In this role,

⁸³ 22 U.S.C. § 2459(a).

⁸⁴ 28 U.S.C. § 1603(d).

⁸⁵ *See generally Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298 (D.D.C. 2005).

⁸⁶ *Id.*

⁸⁷ Angelica Villa, *Updated: As Sales Contract, Christie’s and Sotheby’s Report 13 Percent Drop in 2023 Figures*, ARTNEWS (Jan. 2, 2024), <https://www.artnews.com/art-news/news/sales-contract-christies-and-sothebys-report-13-percent-drop-in-2023-figures-1234691937/> (reporting that the top two auction houses netted a combined \$14.2 billion across private sales and auctions in 2023).

⁸⁸ *Id.*

auction houses are merely transactional facilitators and therefore often incur no special obligations or responsibilities.⁸⁹ As private institutions, auction houses are also not required to disclose provenance information or the identity of their sellers, even to prospective purchasers.⁹⁰ In fact, one of the primary concerns for auction houses is the ability to maintain anonymity over their client's identity.

Despite not being required to act under these circumstances, auction houses may still feel obligated to do so. After all, an auction house's reputation is tantamount to their commercial success—their brand necessarily depends on the strength of the reputation of their provenance experts as well as the quality of the pieces they help sell. Selling objects with Nazi-looted provenance can damage this reputation by creating an association between the house and objects of questionable provenance. Purchasers cannot be sure that they will receive good title or that they will not have to face litigation over the piece down the line. Those seeking to sell pieces through the house will also be at risk of having their pieces devalued because of the house's association with NLA.⁹¹

Much like museum associations, some auction houses have developed their own ethical guidelines. For instance, Christie's, an internationally renowned auction house, has committed to support the resolution of NLA claims for consigned works and to honor the spirit of the Washington Principles.⁹² According to their published guidelines for dealing with NLA issues, Christie's is committed to addressing claims "openly, seriously, responsively, and with respect for the dignity of all involved."⁹³ When NLA issues are identified in the provenance of a consigned object, Christie's will "work with the consignor to establish provenance" and conduct their own provenance research when necessary.⁹⁴ If Christie's is unable to convey good title to an

⁸⁹ Under the Uniform Code of Conduct ("U.C.C."), a party's obligation to another depends on the relationship between them. For instance, art dealers purchase works directly to sell them to a third-party. In temporarily purchasing the work, art dealers retain a financial stake in the work, and incur a financial obligation to both the seller and the future buyer. Per U.C.C. § 2-312, they must be able to transfer title that is good and rightful. In contrast, auction houses do not purchase the work but rather gain their commission from facilitating the sale between parties. They retain no financial stake in the work and are therefore, not subject to the U.C.C.

⁹⁰ Alexandra M.S. Wilson, *The Business of Art Theft: Assessing Auction House Standard of Care and The Sale of Stolen Cultural Property*, 4 AM. U. BUS. L. REV. 505, 513 (2016), <http://digitalcommons.wcl.american.edu/aublrvol4/iss3/6513>.

⁹¹ Objects often see higher valuations when they are not connected with war-related blemishes. For example, a painting with nazi-looting provenance nearly doubled in price from its original listing when it was re-listed by Sotheby's following settlement. See *An Interview with Ella Andreisse and Robert Sturm*, *supra* note 37, at 146.

⁹² *About Christie's Restitution*, CHRISTIE'S, <https://www.christies.com/en/services/restitution-services>.

⁹³ *Christie's Guidelines for Dealing with Nazi-era Art Restitution Issues*, CHRISTIE'S (2009) [hereinafter Christie's].

⁹⁴ *Id.*

artwork, they will decline to sell it.⁹⁵ Where an outstanding ownership claim is found *and* the potential claimant is known to Christie's, they agree to contact the claimant with any information⁹⁶ and documentation available.⁹⁷ If a supported claim is made but no resolution has been reached, Christie's will withdraw an item from sale and retain it for up to 6 months while parties seek a new solution. To facilitate a just and fair resolution, Christie's will often try to act as an intermediary between parties.

As part of their commitments, Christie's has also developed one of the largest restitution teams of any auction house. Since its creation, Christie's restitution department has facilitated the resolution to hundreds of NLA claims, including that of major works like Vincent van Gogh's *Meules de blé*.⁹⁸ Sotheby's, another large player in the art market, has also dedicated a restitution department to the ongoing identification of NLA. Like Christie's, Sotheby's thoroughly reviews the provenance of any work consigned to them and where issues are found, will work with parties to find appropriate solutions. Sotheby's reports to handle between 15-20 restitution cases a year.⁹⁹ Both Sotheby's and Christie's were present at the initial Washington Conference in 1998 and continue to join in on major policy discussions regarding restitution.¹⁰⁰ As major players in the global art market, they are particularly interested in the development of international restitution policies.

Sovereign States

As briefly discussed, sovereign states may be implicated by NLA claims, either directly or indirectly. The primary ways in which they may be involved for the purposes of this paper are i) as defendants in NLA claims and ii) as a neutral party facilitating restitution via specialized commissions or legislation. First, as most museums in the European Union are government

⁹⁵ Dugot, Congressional Panel Testimony, *supra* note 61.

⁹⁶ Note that Christie's will not disclose the consignor's identity as part of this process.

⁹⁷ Christie's, *supra* note 93.

⁹⁸ See *Reclaiming lost history: 25 years of the Washington Principles on Nazi-Confiscated Art*, CHRISTIE'S (Jan. 25, 2023), <https://www.christies.com/en/stories/reclaiming-lost-history-anniversary-of-the-washington-principles-b3cde6088c1c4acd81b4c2e65262081b>; See also Dugot, Congressional Panel Testimony, *supra* note 61.

⁹⁹ See Steffanie Keim, *Plunder and Provenance: Using Restitution to Correct a Market Defect*, 46 COLUM. J.L. & ARTS 129, 146 (2022).

¹⁰⁰ See Gareth Harris, *Reflect, Restore, Rebuild: Restitution at Sotheby's*, SOTHEBY'S (Feb. 23, 2023), <https://www.sothebys.com/en/articles/reflect-restore-rebuild-restitution-at-sothebys>; See also Press Release from Christie's, Christie's Launches Year-Long Global Programme of Events Spotlighting the History and Vital Work of Restitution (Jan. 12, 2023), <https://press.christies.com/christies-launches-year-long-global-programme-of-events-spotlighting-the-history-and-vital-work-of-restitution>.

institutions, claims against these museums necessarily implicates the sovereign state. In the aftermath of World War II, many of these national authorities undertook the responsibility to restore cultural objects to their owners via specially developed restitution commissions. Some of these commissions, such as the Dutch commission, were initially created to handle claims specifically related to objects within the state's national collection. This connection, between the sovereign and the government-run museum, is what primarily allows litigants to file suit in the U.S. under the expropriations exception to the Foreign Sovereign Immunities Act.

Second, sovereign states may play a more neutral role in NLA claims if claimants choose to go through the restitution process in these respective states. As discussed, some states like the Netherlands or Austria, have developed their own restitution committees to resolve NLA disputes. These states often also have specific legislation geared towards the restitution of NLA. Although litigation outside of the U.S. is far less common, claimants in Europe are still able to pursue restitution via litigation.

Given their status, sovereign states have uniquely complex needs and interests in NLA cases. For one, these states likely desire to have sole jurisdiction over claims brought, or at the least, to have their laws applied to any cases litigated abroad. These claims directly relate to acts committed by, and against their citizens, for property that is now displayed in their national institutions. However, those bringing claims against sovereign states may hesitate to bring claims against the state in its home jurisdiction or through methods that favor wealthier, larger parties. Second, the responsibility to restore these objects belongs to the sovereign nation. States are also likely to be opposed to another nation rendering an opinion on their independent acts or decrees. In expressing these interests, sovereign states must be especially cautious to avoid ruining international relations or incurring negative publicity. Sovereign states must also consider any obligations they have under international conventions such as the Washington Principles.

Chapter 3

Legislative Systems on Restitution of Looted Artworks

“A good procedure in restitution cases is a means of ensuring that justice is done, but it is not an end in itself. It is important to meet the requirements of due care, but ultimately it is about whether the applicant feel that justice has been done.”¹⁰¹

3.1 International Conventions

The wholesale destruction of European cities and the accompanying widespread looting of property by the Nazi regime during WWII necessitated the adoption of an effective, international legal protection for historic and cultural property.

Prior to the second world war, there was little international law addressing cultural property taken during war. The closest attempts to do so were codified in the 1907 Hague Convention concerning the Laws and Customs of War on Land (“Hague 1907”). Article 56 of the regulations explicitly prohibited “[a]ll seizure of, destruction or willful damage done to institutions [dedicated to religion, charity and education, the arts and sciences], historic monuments, works of art and science”.¹⁰² This stipulation, understood in conjunction with Article 46 (“Private property cannot be confiscated”)¹⁰³ and Article 47 (“Pillage is formally forbidden”)¹⁰⁴, meant that all cultural property, regardless of whether it was privately owned, could not be damaged or seized. These regulations included no provision for restitution but did create a duty of compensation in case of violation. These provisions served as the governing law until the end of World War II when they were superseded by later conventions.

The 1907 provisions proved inadequate in the face of the staggering looting and destruction of cultural property throughout the two world wars.¹⁰⁵ They did, however, serve as the basis for Alfred Rosenberg’s conviction in the Nuremberg trials.¹⁰⁶ A short excerpt from the trial is available below:

¹⁰¹ *An Interview with Alfred Jacobsen*, *supra* note 48, at 105.

¹⁰² Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land art. 56, Oct. 18, 1907, entered into force Jan. 26, 1910, 36 Stat. 2277, T.S. No. 539.

¹⁰³ Hague Convention, art. 46.

¹⁰⁴ Hague Convention, art. 47.

¹⁰⁵ Gerstenblith, *supra* note 39, at 144.

¹⁰⁶ Indictment in the Nuremberg Trials, 1 Trial of the Major War Criminals Before the International Military Tribunal 29, 55–56, 58–60 (Nuremberg 1948).

The defendants ruthlessly exploited the people and the material resources of the countries they occupied, in order to strengthen the Nazi-war machine, to depopulate and impoverish the rest of Europe, to enrich themselves and their adherents, and to promote German economic supremacy over Europe.

The defendants engaged in the following acts and practices, among others: . . .

In further development of their plan of criminal exploitation, they destroyed industrial cities, cultural monuments, scientific institutions, and property of all types in the occupied territories to eliminate the possibility of competition with Germany. . . .

These acts were contrary to international conventions, particularly Articles 46 to 56 inclusive of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed and to Article 6(b) of the Charter.¹⁰⁷

Most notably, Rosenberg's conviction marked the first time that an individual had been convicted of a war crime and capital offense for plundering cultural property. This was indicative of the new-found respect and global importance awarded to cultural property.

The scale of the atrocities committed during World War II, especially as it related to the largest displacement of cultural property in history, established a clear need for the reinforcement of international conventions. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict ("First Protocol") responded to this need directly. It also codified the repatriation of cultural property into international law for the first time.¹⁰⁸ The key provisions of the First Protocol are:

Article 2: For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property.

Article 3: The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.

¹⁰⁷ *Id.*

¹⁰⁸ Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property, which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.

Article 4: The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property.¹⁰⁹

When read in conjunction with one another, these articles require nations to safeguard and respect cultural property, subject to a military exception.¹¹⁰

The First Protocol was later supplemented by the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (“Second Protocol”) in 1999. The Second Protocol heavily addressed “military necessity” in the context of the Convention and added individual responsibility for serious violations.¹¹¹ The Second Protocol also established an Intergovernmental Committee tasked with administering the Convention.¹¹²

Following the resurgence of interest in NLA as well as litigation surrounding Wally, the U.S. hosted the Washington Conference on Holocaust-Era Assets in 1998. The U.S. invited important stakeholders—such as government officials, art experts, and museum officials from around the world—to address the resurgence in restitution claims for NLA. Even notable auction houses were invited to sit in on proceedings.¹¹³ By then, more than five decades had passed since the Holocaust. The large stretch of time that had elapsed since initial efforts created new legal challenges for effective restitution, including the diminishment of memory, records, and Holocaust survivors.¹¹⁴ Few countries had ongoing systems for restitution, and even fewer had systems that could address these new challenges. It was clear to all that a new approach was required. Accordingly, the groups worked together to create the Washington Principles on Nazi-

¹⁰⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 2-4, May 14, 1954, entered into force Aug. 7, 1956, 249 U.N.T.S. 240.

¹¹⁰ The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

¹¹¹ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 38 I.L.M. 769.

¹¹² *Id.*

¹¹³ See Harris, *supra* note 100.

¹¹⁴ See Madeleine K. Albright, Sec’y of State, U.S., Keynote Address at the Washington Conference on Holocaust-Era Assets (Nov. 30, 1998).

Confiscated Art (“Washington Principles”). At the time, 44 nations agreed to abide by the Washington Principles. The principles are:

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
5. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
6. Efforts should be made to establish a central registry of such information.
7. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
8. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.
9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.
10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.
11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.¹¹⁵

¹¹⁵ Off. of the Special Envoy for Holocaust Issues, U.S. Dep’t of State, Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/> [<https://perma.cc/D5F8-7TGH>].

These principles were later reaffirmed and expanded in the Terezin Declaration on Holocaust Era Assets and Related Issues (the “Terezin Declaration”). The Terezin Declaration further expanded the objectives of the Washington Principles by encouraging all parties—public, private, or individual—to apply them as well.¹¹⁶ Much like the Washington Principles, the Terezin Declaration touted moral principles but had no legal or binding effect on signatories.¹¹⁷ Its effects were further limited in the U.S. as most museums are not federally-owned but rather private or state and municipal institutions.¹¹⁸ The dilemma is best stated by Ambassador J. Christian Kennedy:

[A]rt restitution in [the United States] has generally involved a private citizen who discovers that an artwork once held by his or her family is now hanging in a museum or private collection . . . While the government can urge institutions to participate voluntarily in programs . . . the government does not have any leverage to force compliance, for one simple reason: With the exception of a few federally owned and operated institutions, museums in the United States tend to be owned and operated privately, or by state or municipal authorities. This leaves no specific role for the federal government in the art restitution process . . . The point that I want to make with you today is the following. The role of the United States Government in art restitution matters is significantly different from the role of many European governments. Our government has not been involved in cases such as those adjudicated by the Dutch Art Restitution Commission, nor has it been involved in direct negotiations with other states as have some European countries.¹¹⁹

¹¹⁶ Terezin Declaration on Holocaust Era Assets and Related Issues, Holocaust Era Assets Conference, June 30, 2009 (“We reaffirm our support of the Washington Conference Principles on Nazi-Confiscated Art and we encourage all parties including public and private institutions and individuals to apply them as well.”).

¹¹⁷ See Washington Principles (“In developing a consensus on **non-binding principles** to assist in resolving issues relating to Nazi-confiscated art, the **Conference recognizes** that among participating nations **there are differing legal systems and that countries act within the context of their own laws.**”) (emphasis in original); see also Terezin Declaration (“...we urge all stakeholders to ensure that their legal systems or alternative processes, **while taking into account the different legal traditions**, facilitate just and fair solutions...”)(emphasis in original).

¹¹⁸ Bert Demarsin, *Let's Not Talk about Terezin: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 BROOK. J. INT'L L. 118, 159 (2011).

¹¹⁹ *Id.* at 159-60 (quoting J. Christian Kennedy, Special Envoy for Holocaust Issues, U.S. Diplomatic Mission to Ger., Remarks at University of Potsdam’s Moses-Mendelssohn Center for European-Jewish Studies Conference: The Role of the United States Government in Art Restitution (Apr. 23, 2007), available at <https://2001-2009.state.gov/p/eur/rls/rm/83392.htm>).

Despite its flaws, the Washington Principles (and by extension, the Terezin Declaration) have had a real impact in the art world. The question of provenance has become a matter of custom—major auction houses conduct thorough research (in some cases through restitution departments they have set up) on prospective consignments; leading museums consider the provenance of any pieces they hope to acquire or even borrow; and entire databases have been created to keep track of objects with Nazi-looted provenance. These international conventions simply require an effective mechanism to properly enforce the social customs they have encouraged.

3.2 European Union & Restitution Committees

Given the unique structure of the European Union (“E.U.”) as a supranational political and economic union consisting of 27 member states, there is little uniform law concerning the restitution of NLA. Some directives and regulations have been issued to regulate the return of looted artwork within a single, internal market. For instance, Directive 2014/60/EU (replacing directive 93/7/EEC) provided guidance to member states on returning cultural objects that had been unlawfully removed from the territories of other member states. Regulation 1215/2012 further allows special jurisdiction for suing persons domiciled in other member states for civil claims for the recovery of cultural property. However, there is no uniform law for restitution; claimants must instead look to national legislation for relief.

Unlike the U.S., litigation is not as common in the E.U. For one, it may be difficult to litigate cases in the E.U. as different member states approach issues like good-faith acquisition or time-bars differently. The lack of a widespread discovery rule also hinders the effectivity of litigation in the E.U. Most NLA claims are instead resolved through national restitution acts or in the case of select E.U. member states, restitution committees. The only E.U. member states that have formed restitution committees following the Washington Principles are Austria, France, Germany, and the Netherlands. Likely owing in part to these committees, these member states are rated as having made major progress in adhering to the Washington Principles.¹²⁰

¹²⁰ Wesley A. Fisher and Ruth J. Weinberger, *Holocaust-Era Looted Cultural Property: A Current Worldwide Overview*, WJRO 7 (Mar. 5, 2024), <https://art.claimscon.org/wp-content/uploads/2024/03/11-March-2024-Holocaust-Era-Looted-Cultural-Property-A-Current-Worldwide-Overview.pdf>.

3.2.1 Austria

Austria was first annexed by Nazi Germany in March 1938. A month later, a referendum on the *Anschluss*, or joining, with Germany showed overwhelming amounts of support—over 99% of Austrian voters¹²¹ approved the annexation.¹²² As is evidenced by this vote, Austria played a complicated role in World War II. They were both a “victim to Hitlerite aggression,”¹²³ as well as a Nazi collaborator. Many Austrians aided in the Nazification of Austria, including the confiscation, and looting of Austrian-Jewish property. This dual role has complicated restitution in some respects as Jewish claimants may have difficulty trusting the restitution system of a country that committed the original harm to begin with.

Restitution efforts in Austria occurred in separate phases. The first phase took place between 1946 and 1949. During this period, Austria passed several laws meant to support restitution efforts. One of the first laws passed was the *Nichtigkeitsgesetz* (Nullification Act) of May 1946. This act voided any legal transactions that occurred because of the German occupation’s efforts to confiscate property.¹²⁴ Shortly after, the government passed a series of consecutive measures known simply as the Restitution acts. These laws were open to non-citizens and were primarily intended to regulate restitution. The first three restitution acts focused heavily on the restitution of immovable private property, with the Third Restitution act uniquely applying to artwork held in private collections. The Restitution Acts were not well-received, with many claimants finding the proceedings unsatisfactory.¹²⁵ Contributing factors included the “range and complexity of the various restitution acts and deadlines and the lack of state assistance for the victims.”¹²⁶ Claimants seeking restitution under these acts needed to know

¹²¹ It is important to note that this referendum was largely used for German propaganda. Between 300,000-400,000 Austrian citizens were prohibited from taking part in the referendum. Many of these citizens included Austrian Jews, Roma, and political opponents. See U.S. HOLOCAUST MEM’L MUSEUM, NAZI *Territorial Aggression: The Anschluss*, HOLOCAUST ENCYCLOPEDIA, <https://encyclopedia.ushmm.org/content/en/article/nazi-territorial-aggression-the-anschluss>.

¹²² See Michael J. Bazyler, et. al, *Searching for Justice after the Holocaust: Fulfilling the Terezin Declaration and Immovable Property Restitution*, 11 (2019).

¹²³ See Moscow Declaration, 3 BEVANS 789 (Oct. 30, 1943).

¹²⁴ Federal Law of May 15, 1946 concerning the annulment of legal transactions and other legal acts during the German occupation of Austria, Federal Law Gazette No. 106/1946.

¹²⁵ National Fund of the Republic of Austria for Victims of National Socialism, *Media Information* (Sep. 2015), https://www.nationalfonds.org/files/content/documents/nf/Medieninformation_EN_10_09_2015_web.pdf.

¹²⁶ *Id.*

exactly which law applied to their case as they were not adjudicated under a consistent system.¹²⁷ Applicants were also required to know the location of their object—many did not.¹²⁸ These acts ultimately expired between 1952 and 1956.¹²⁹

The second, and current phase, began in 1998 in response to increased public debate surrounding the restitution of Wally. This phase saw the creation of the *Kommission für Provenienz forschung* (Commission for Provenance Research) as well as the creation of the *Österreichischen Historikerkommission* (Austrian Historical Commission)¹³⁰. The government also enacted the *Bundesgesetz über die Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen* (Art Restitution Act). The Art Restitution act of 1998 provided a legal basis for the restitution of objects held by Austria by the newly appointed Committee (“Beirat”).¹³¹

The Beirat does not issue binding decisions, but rather relays recommendations to the federal minister. These decisions are publicly accessible and published online.¹³² The Beirat bases these decisions on pro-active provenance research conducted by the Commission for Provenance Research.¹³³ Since there is no formal application process under this system, there is no deadline for filing claims. Comparatively, the Beirat is currently the most successful of the commissions—of the 401 claims it has adjudicated, over 85% have resulted in a recommendation of restitution.

Not all restitution cases handled by the Beirat have ended well. Most notably, claimant Maria Altmann was largely dissatisfied with the board’s decision regarding her claim for five paintings by Gustav Klimt—the board rejected her petition on the grounds that the paintings had not been coerced, but rather legally donated to the Austrian Gallery. Altmann argued, “the entire commission proceeding was a sham and the outcome was politically pre-ordained.”¹³⁴ Outside of

¹²⁷ Borbala Klacsmann, *We are Working Against the Clock – Interview with Pia Schölnberger, Director of the Austrian Commission for Provenance Research*, EASTERN EUROPEAN HOLOCAUST STUDIES (2024), <https://doi.org/10.1515/eehs-2024-0026>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Annemarie Marck and Eelke Muller, *National Panels Advising on Nazi-Looted Art in Austria, France, the United Kingdom, The Netherlands, and Germany*, in FAIR AND JUST SOLUTIONS? 41, 46.

¹³¹ *Id.*

¹³² *Id.* at 53.

¹³³ Fisher and Weinberger, *supra* note 120, at 22.

¹³⁴ Appellee’s Opposition Brief on Expedited Appeal, *Altmann v. Republic of Austria* (no. 01-56003, U.S. Ct. of Appeals, Ninth Circuit), 8.

the commission, Altmann had little recourse as litigating in Austria under the Restitution act would have required her to pay a filing fee of \$1.8 million.¹³⁵

3.2.2 France

The Nazi regime invaded France in May 1940.¹³⁶ French territory was then divided into two areas, one controlled by Germany in the northwest and another, unoccupied area in the southeast.¹³⁷ This unoccupied area served as the French State for the duration of the war. Jews living in both the German and French sections were subject to anti-Jewish measures, including the confiscation of art and items of cultural interest by the infamous ERR.¹³⁸

Much like Austria, restitution efforts took place in two phases. The first phase began shortly after the end of the war and continued until the mid-1960s, at which point the last case files were closed.¹³⁹ One of the preliminary ordinances issued in November 1944 served to nullify any acts of spoilation undertaken by the Nazi regime.¹⁴⁰ A few months later, France issued an important regulation creating a distinction between transactions made against the will of the owner and transactions made by the original owner.¹⁴¹ Transactions that fell under the first category were automatically rendered null and void.¹⁴² Those that fell under the second category were required to prove that the sale was made under duress.¹⁴³

In addition to enacting related legislation, France also established the *Commission de Récupération Artistique* (“CRA”) and mandated them with recuperating and restituting objects that had been lost during the war.¹⁴⁴ Between 1944 and 1949, the CRA repatriated more than 60,000 works.¹⁴⁵ Of these works, 45,000 were restituted, 13,000 were sold at auction, and the remaining 2,000 were distributed across French national museums.¹⁴⁶ These works were part of a

¹³⁵ Davidson, *supra* note 57, at 98.

¹³⁶ *National Panels Advising on Nazi-Looted Art in Austria, France, the United Kingdom, The Netherlands, and Germany*, *supra* note 130, at 53.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 57.

¹⁴⁰ Report of the Committee on European Law, *Proceedings of the Section of International and Comparative Law*, American Bar Association 107, 107 (Dec. 1945), <http://www.jstor.org/stable/25742710>.

¹⁴¹ *National Panels Advising on Nazi-Looted Art in Austria, France, the United Kingdom, The Netherlands, and Germany*, *supra* note 130, at 57.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

special collection, the *Musées Nationaux Récupération* (MNR), that was available to owners of looted property under a centralized registry.¹⁴⁷ Works within the MNR collection can be exhibited, but not lent to foreign institutions and museums cannot refuse to restitute them to their original owners.¹⁴⁸

The resurgence of interest in NLA during the 1990s led France to begin investigations into the MNR collection. A working group dedicated to tracing heirs of MNR works was created in March 2013.¹⁴⁹ As of April 2018, however, only fifty MNR paintings had been restituted.¹⁵⁰ The investigation into looted art was also supplemented by the establishment of a fact-finding committee, the *Mission d'étude sur la spoliation des Juifs de France de 1940 à 1944* ("Mission Mattéoli"). Along with Mission Mattéoli's establishment in 1997, France responded to their new obligations under the Washington Principles by creating their own independent body to oversee claims by NLA victims.

The *Commission pour l'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation*¹⁵¹ ("CIVS") was established by the French government in 1999. Unlike other committees, CIVS' mandate is not restitution, but rather *compensation*, for objects looted by the Nazi Regime in France. CIVS can only issue non-binding recommendations that must be granted by the Prime Minister. Non-French claimants may apply, and the assessment of claims extends to all plundered property stemming from antisemitic legislation in France.¹⁵² There are no time limits or payment ceilings for claims.¹⁵³

As discussed, the primary intention behind CIVS is compensation. In fact, of the 3,197 claims it has handled since 2014, CIVS has only recommended restitution in four cases.¹⁵⁴ This has proven problematic for some claimants as CIVS only compensates for the estimated value of

¹⁴⁷ *Id.*

¹⁴⁸ Louise Carron, *On Law, Museums and Nazi-era Looted Art in France and the United States*, Center for Art Law (Apr. 16, 2018), <https://itsartlaw.org/2018/04/16/on-law-museums-and-nazi-era-looted-art-in-france-and-the-united-states/>.

¹⁴⁹ *National Panels Advising on Nazi-Looted Art in Austria, France, the United Kingdom, The Netherlands, and Germany*, *supra* note 130, at 58.

¹⁵⁰ *See* Carron, *supra* note 148.

¹⁵¹ In English, the commission for the compensation of victims of dispossession occurring as a result of antisemitic legislation in force during the occupation.

¹⁵² *National Panels Advising on Nazi-Looted Art in Austria, France, the United Kingdom, The Netherlands, and Germany*, *supra* note 130, at 60.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 58.

a looted object at the time it was taken.¹⁵⁵ As many of these pieces have increased greatly in value in recent years, claimants may not feel that they are receiving a just and fair solution. Another issue with the current role of CIVS is that they are unable to oversee claims related to artworks in private collections. Recommendations issued by the CIVS are not publicly available due to strict privacy laws.¹⁵⁶ While CIVS is generous to applicants in some respects, there is still much to be desired. France's Minister of Culture has even acknowledged that the current policy of art restitution is lacking, namely as it is "inefficient and lacking ambition, coordination, leadership, and visibility."¹⁵⁷

3.2.3 The Netherlands

Like France, the Netherlands was invaded by German troops in May 1940.¹⁵⁸ The primary difference between the two occupations was the level of deference awarded to the Netherlands. The Dutch administrative structure remained largely intact, despite much of the government having fled to London.¹⁵⁹ The Nazi Regime did not engage in large-scale confiscations of artworks, and antisemitic measures were gradually introduced to the Netherlands, in contrast to Austria where Aryanization laws were enacted immediately after the *Anschluss*.¹⁶⁰ Most of the property that was appropriated was done so under the guise of legality—the German regime registered most transactions as sales.¹⁶¹ This is not to say that no looting occurred in the occupied Netherlands, but rather to demonstrate the difference in how looting was achieved compared to other occupied nations.

While exiled in London, the Dutch government enacted emergency laws to prevent the Nazi regime from shipping looted property back to Germany. These laws preemptively rendered all transactions with Nazi officials as null and void.¹⁶² After the war, the Council for the Restoration of Rights (Raad voor het Rechtsherstel) was tasked with restoring property under the emergency laws. By 1945, claims related to art collections were primarily handled by the

¹⁵⁵ Fisher and Weinberger, *supra* note 120, at 45.

¹⁵⁶ *National Panels Advising on Nazi-Looted Art in Austria, France, the United Kingdom, The Netherlands, and Germany*, *supra* note 130, at 62.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 71.

¹⁵⁹ Bazylar, et. al, *supra* note 122, at 292.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Decree for the Restoration of the Rule of Law (Besluit Herstel Rechtsverkeer).

*Stichting Nederlands Kunstbezit*¹⁶³(SNK). As part of their mandate, the SNK hosted exhibitions of recovered items and actively traced former owners of these works.¹⁶⁴ The deadline for submitting claims for restitution ended in the 1950s and works that were not restituted by then were transferred to the Netherlands' National Art Property Collection.¹⁶⁵

The resurgence of interest in restitution led the Netherlands to establish the Dutch Restitution Committee ("DRC") in 2001. In part, this was intended to offer victims of the Holocaust a path to restitution, as Dutch law made it nearly impossible to pursue claims via litigation. The DRC was originally intended to help advise the government regarding NLA claims on works within the national art collection.¹⁶⁶ Since its conception, the DRC's mandate has expanded to include the independent settlement of disputes over NLA held by parties outside of the government.¹⁶⁷ It is one of the few committees to do so.

For many years, the Netherlands and the DRC were perceived as a model for other countries. This quickly changed when the Netherlands implemented two new changes to their restitution process. First, the Netherlands failed to renew or follow-up on the provenance research conducted by the Origins Unknown Agency.¹⁶⁸ As assessed by the Dutch Committee for the Evaluation of the Restitution Policy for Cultural Heritage Objects from the Second World War ("Evaluation committee"), this choice proved problematic as the agency's research had not been completed. Since its termination, no other group has taken up the role of conducting systematic research on the national collection or outreach to potential heirs.¹⁶⁹

The second change occurred in 2012 when the DRC began to incorporate a balancing test into their decision-making.¹⁷⁰ Under this test, the DRC balanced the interests of claimants against the interests of museums. In practice, the DRC would often accord special weight to the interests of the museums as the pieces were deemed to 'mean more' to the museums and the

¹⁶³ In English, the Netherlands Art Property Foundation.

¹⁶⁴ *National Panels Advising on Nazi-Looted Art in Austria, France, the United Kingdom, The Netherlands, and Germany*, *supra* note 130, at 73.

¹⁶⁵ *Id.*

¹⁶⁶ Jet Bussemaker, *Foreword* to FAIR AND JUST SOLUTIONS? ix, ix.

¹⁶⁷ *Id.* at x.

¹⁶⁸ Report of the Dutch Committee for the Evaluation of the Restitution Policy for Cultural Heritage Objects from the Second World War, at 21 (Dec. 2020), https://lootedart.com/web_images/pedf2020/Striving+for+Justice.pdf.

¹⁶⁹ *Id.*

¹⁷⁰ Nina Siegal, *Dutch Panel for Looted Art Claims Must Change Course, Report Finds*, NY TIMES (Dec. 2020), <https://www.nytimes.com/2020/12/07/arts/netherlands-looted-art-report.html>.

public.¹⁷¹ In 2018, the DRC relied upon this reasoning in their denial of a claim for a Wassily Kandinsky “Painting with Houses.”¹⁷² While the question at issue was whether the object had been sold under duress, the DRC focused their ruling on the importance of the object within the museum’s catalogue.¹⁷³ Restitution rates for the DRC have sunk to 34% with the enactment of this new test.¹⁷⁴ This is the lowest restitution rate of all the committees.

3.3 *United States*

At first glance, the U.S. may seem an unlikely venue to pursue a restitution claim. The original theft occurred in countries abroad—which may have their own restitution procedures or panels. Additionally, stakeholders implicated in these cases include foreign individuals, museums, and sovereign states. Intervention necessarily becomes a matter of comity.

There are several reasons, however, why litigants may choose to pursue their claims in American courts. For one, many Jews found refuge in the U.S. both during and after the war.¹⁷⁵ Second, as previously noted, a significant number of works with Nazi-era provenance can be found in American collections today. Reputable museums like the Met and MoMA, who have both been at the center of restitution litigations, publicly list such works on their sites. In addition to works held in public collections, pieces with Nazi-era provenance may be held in private collections or enter into the U.S. through loan agreements with international collectors or museums.

As will be discussed in Chapter 4, these claims may not always see success. Cases that heavily implicate other nations’ laws, history, and individuals can be difficult to bring in the American legal system. In addition to difficulties with subject-matter jurisdiction, American courts may be hesitant to interpret foreign laws or deal with the costs of transporting witnesses and evidence from abroad.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Improving Dutch Restitution Policy*, MONDEX CORP, <https://www.mondexcorp.com/improving-dutch-restitution-policy/>.

¹⁷⁵ Estimates vary, but it is believed that between 180,000 and 220,000 persecuted individuals immigrated to the U.S. from Europe between 1933 and 1945. Comparatively, the U.S. accepted more refugees than any other country at the time. *Americans and the Holocaust: How Many Refugees Came to the United States from 1933-1945?* U.S. HOLOCAUST MEM’L MUSEUM, <https://exhibitions.ushmm.org/americans-and-the-holocaust/how-many-refugees-came-to-the-united-states-from-1933-1945> (last visited Dec. 6, 2022).

In response to US-based litigation by private parties seeking restitution over NLA, courts have relied on two federal acts: the Foreign Sovereign Immunities Act of 1976 and the Holocaust Expropriated Art Recovery Act of 2016.

3.3.1 Foreign Sovereign Immunities Act of 1976 (“FSIA”)

The first, is the Foreign Sovereign Immunities Act of 1976 (“FSIA”). The FSIA immunizes foreign states from the jurisdiction of U.S. courts unless the state’s action falls under one of the statute’s specific exceptions.¹⁷⁶ The primary exception relied upon in the resolution of NLA claims against foreign states and/or foreign state-owned museums is commonly referred to as the expropriations exception. The expropriations exception allows for suits where the property at issue was taken in violation of international law and that property is either i) present in the U.S. “in connection with a commercial activity carried on in the United States by the foreign state” or ii) that property is “owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.”¹⁷⁷ Note that the primary requirements for the exception to apply are: rights in property are at issue, the property is present in the U.S., it has been taken in violation of international law, and the presence of the property is due to a commercial activity engaged in by the foreign party. Here, foreign-owned museums and institutions are considered agents of the state, and therefore, subject to this exception.

A recent ruling by the Supreme Court in *Federal Republic of Germany v. Philipp*, 592 U.S. ___ (2021) has limited this exception to a sovereign’s taking of a *foreign* nationals property.¹⁷⁸ In *Philipp*, claimants filed suit in the U.S. for the restitution of their families’ collection of Guelph treasure. The Guelph treasure had belonged to German Jewish art dealers who had been forced to sell their collection under duress for less than market value to the Nazi-controlled state of Prussia.¹⁷⁹ The claimants argued that this sale constituted a taking in violation of international law and therefore, they could sue Germany under the expropriations exception to the FSIA.¹⁸⁰ As Prussia was under German control at the time, the sale constituted a *domestic* taking—Germany

¹⁷⁶ 28 U.S.C. §§ 1602–1611 (2000 & Supp. 2005).

¹⁷⁷ 28 U.S.C. § 1605(a)(3).

¹⁷⁸ See *Federal Republic of Germany v. Philipp*, 592 U.S. ___ (2021) .

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

appropriated the property from German nationals. Domestic takings, while still legally wrong, are not in violation of international law and as a result, may not serve as a basis for the expropriations exception.

In the alternative, claimants may also rely on the commercial exception to the FSIA. Under this exception, litigants argue that the use of the property at issue equates to a commercial activity having effect within the U.S.¹⁸¹ As the primary actor is engaging in a commercial activity, they are unable to invoke sovereign immunity for activities that are not uniquely sovereign.¹⁸²

3.3.2 Holocaust Expropriated Art Recovery Act of 2016 (“HEAR”)

The second piece of legislation relied upon is the Holocaust Expropriated Art Recovery Act of 2016 (“HEAR”). This statute established a federally mandated, minimum six-year statute of limitations for claimants with a possessory interest in “artwork or other property that was lost during the covered period” of January 1, 1933, to December 31, 1945.¹⁸³ The new statute of limitations would begin to run after the claimant’s *actual discovery* of “the identity and location of the artwork or other property.”¹⁸⁴ HEAR is widely considered to be a claimant-friendly statute as it revived claims previously dismissed as untimely and extended the rights of claimants. HEAR also introduced a more relaxed standard of knowledge compared to the discovery rule previously utilized by some states. Under the discovery rule, the statute of limitations would begin to run when the claimant “knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings.”¹⁸⁵ In contrast, HEAR bases accrual on “actual knowledge” or “actual knowledge of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance to amount to actual knowledge thereof.”¹⁸⁶

Prior to the enactment of HEAR, most museums tended to rely on statute of limitations defenses to avoid having to litigate restitution claims. An analysis of federal cases involving prominent museums like the Detroit Institute of Arts, the MoMA, and the Museum of Fine Arts

¹⁸¹ 28 U.S.C. § 1605(a)(2).

¹⁸² O’Donnell, *supra* note 17, at 51.

¹⁸³ See Holocaust Expropriated Art Recovery (HEAR) Act, Pub. L. No. 114-308, § 4(3), 130 STAT. 1526 (2016).

¹⁸⁴ *Id.* § 5.

¹⁸⁵ *O’Keeffe v. Snyder*, 416 A.2d 862, 493 (N.J. 1980).

¹⁸⁶ HEAR Act § 4.

in Boston further supports this claim.¹⁸⁷ HEAR is currently set to expire on January 1, 2027—at which point, the governing statute of limitation over Nazi-looted cases will revert to state statutes.¹⁸⁸ This reversion will make it extremely difficult for claimants to bring NLA cases in the U.S. Claimants seeking restitution of property after the sunset date will likely be forced to seek recourse outside of litigation.

3.4 Museum Guidelines

Given the private status of many museums in the U.S., these museums can determine their own processes for resolving NLA claims with no direct government regulation. These museums turn to guidelines and principles published by the leading museum associations to formulate on their policies. While European museums are generally subject to regulation by their national authorities, they too may turn to the International Council of Museums for additional guidance.

3.4.1 The Association of Art Museum Directors (AAMD)

In 1998, the AAMD published the *Report of the AAMD Task Force on the Spoilation of Art during the Nazi/World War II Era (1933-1945)* as guidance for members responding to NLA claims.¹⁸⁹ Namely, these guidelines are intended to help resolve NLA claims while “reconciling the interests of individuals who were dispossessed of works of art...with the fiduciary and legal obligations and responsibilities of art museums.”¹⁹⁰ The guidelines urge members to review the provenance of works within their existing collections to determine if “any were unlawfully confiscated during the Nazi/World War II era and never restituted.” Members are expected to take “all reasonable steps” to determine provenance, including contacting “established archives, databases, art dealers, auction houses, donors, art historians and other scholars and researchers.” It is highly recommended that member’s publicize all information relating to the Nazi/World War

¹⁸⁷ *Report Concerning Current Approaches of United States Museums to Holocaust-Era Art Claim*, WJRO 14 (June 25, 2015), <https://wjro.org.il/wp-content/uploads/2015/12/ReportMuseums.pdf>.

¹⁸⁸ *Id.*

¹⁸⁹ O’Donnell, *supra* note 17, at 44.

¹⁹⁰ *Report of the AAMD Task Force on the Spoilation of Art during the Nazi/World War II Era (1933-1945)*, AAMD (Jun. 4, 1998), <https://aamd.org/sites/default/files/document/Report%20on%20the%20Spoilation%20of%20Nazi%20Era%20Art.pdf>.

II era provenance of works within their collection.¹⁹¹ For new acquisitions, there is an emphasis on verifying the provenance of objects during the Nazi/World War II era.¹⁹² Members are only encouraged to proceed with such acquisitions “[i]n the absence of evidence of unlawful confiscation.”¹⁹³ The AAMD also encourage museums to review provenance for incoming loans and to “not borrow works of art known to have been illegally confiscated during the Nazi/World War II era and not restituted unless the matter has been otherwise resolved.”¹⁹⁴ When works *are* found to have Nazi-looted provenance, members are encouraged to “resolve the matter in an equitable, appropriate, and mutually agreeable manner.”¹⁹⁵ In lieu of litigation, the AAMD guidelines recommend the use of ADR mechanisms, such as mediation, to resolve NLA claims.¹⁹⁶

3.4.2 American Association of Museums (AAM)

Shortly after the AAMD’s 1998 report, the AAM published their own *Guidelines Concerning the Unlawful Appropriation of Objects during the Nazi Era*. The guidelines incorporate much of the same principles as the AAMDs; member museums are encouraged to carefully review the provenance of works within their existing collections and that of any new acquisitions.¹⁹⁷ NLA claims are to be considered on their own merits and members are urged to utilize ADR mechanisms when appropriate.¹⁹⁸ Given their fiduciary obligations to the public, members are advised to take action “*only* after the completion of appropriate steps and careful consideration.”¹⁹⁹ The AAM’s guidelines also call attention to a museum’s “ethical responsibility to consider the status of [loans] as well as the possibility of claims being brought against a loaned object in their custody.”²⁰⁰

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *See id.*

¹⁹⁷ *Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era*, AAM (Nov. 1999, amended Apr. 2001), https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/aam_guidelines.pdf.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* (emphasis added).

²⁰⁰ *Id.*

3.4.3 International Council of Museums (ICOM)

In early 1999, ICOM issued its *Recommendations concerning the Return of Works of Art Belonging to Jewish Owners*. Per the recommendations, members were encouraged to “actively investigate and identify all acquisitions of a museum, especially those acquired during or just after the Second World War.”²⁰¹ ICOM also recommended that any information relevant to such research and the identification of objects by their rightful heirs should be made accessible.²⁰² Where “legitimate ownership” could be clearly established, ICOM recommended members “actively address the return of [these objects].”²⁰³ More broadly, the *ICOM Code of Ethics for Museums* recommends against the acquisition of any objects for which valid title cannot be established. To do so, members are subject to a high standard of due diligence that requires the establishment of a *full history* for each object, from production to discovery.²⁰⁴ This standard applies to all acquisitions and loans.²⁰⁵

3.4.4 Effects

Despite the good intention behind these guidelines, their impact is often limited by their membership and non-binding character. For instance, only a minority of museums within the U.S. are members of the AAMD.²⁰⁶ More importantly, the guidelines only instruct members as to what they *should* do, but not what they *must* do.

Just seven years after the U.S.’ endorsement of the Washington Principles, a survey was conducted by the World Jewish Restitution Organization (“WJRO”) across 332 U.S. art museums to track the progress museums had made towards dealing with NLA issues. Of the museums who attested to conducting provenance research: 52% had completed research on less than half of their relevant items. An additional 33% failed to provide any information regarding the extent of work they had completed.²⁰⁷ Only one-third of respondents indicated that they had conducted provenance research on loans to their museums.²⁰⁸ Beyond the U.S., museums in other countries

²⁰¹ *Recommendations concerning the Return of Works of Art Belonging to Jewish Owner*, ICOM (1999), <https://www.lootedartcommission.com/OXSHQE36019>.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ ICOM, *Code of Ethics for Museums*, <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf>.

²⁰⁵ *Id.*

²⁰⁶ O’Donnell, *supra* note 17, at 52.

²⁰⁷ *Nazi-Era Stolen Art and U.S. Museums: A Survey*, WJRO 1 (Jul. 25, 2006), <https://art.claimscon.org/wp-content/uploads/2014/04/U.S.-Museum-Survey-report-07-25-06.pdf>.

²⁰⁸ *Id.*

also engaged in unproductive behavior. Many ignored the need for provenance research and as a result, failed to require it as standard museum practice.²⁰⁹ Twenty-five years after the Washington Principles, only seven countries were deemed to have made “major progress in implementing the Washington Conference Principles” compared to the twenty-four who had made little to no progress.²¹⁰

²⁰⁹ Fisher and Weinberger, *supra* note 120, at 7.

²¹⁰ *Id.*

Chapter 4

Legal difficulties related to restitution claims

*“They delay, delay, delay, hoping I will die... But I will do them the pleasure of staying alive.”*²¹¹

Given the difficulty litigants face in presenting restitution cases in the E.U.—such as issues with time bars, discovery, and differing laws across member states —this discussion will focus exclusively on legal difficulties claimants face in U.S. courts. Despite pre-existing structures and processes for restitution, claimants may opt to pursue restitution via litigation. Opting for litigation can benefit claimants in a few different ways. For one, claimants may be unwilling to enter negotiations with someone they perceive as having aided or benefitted in the crime committed against their family, and so litigation may be the preferable option. Second, litigation is one of the few mechanisms that results in binding, fully enforceable decisions. Third, litigation can be, and often is, utilized as a means of pressuring opponents into settlement.

In addition to general inconveniences like financial cost and duration, there are a few unique difficulties that these litigants may face. These include the Act of State doctrine, international comity, the political questions doctrine, the statute of limitations, and the defense of laches. The success and prevalence of these principles and defenses often prevents individuals from litigating on the merits of their claim.

The Act of State doctrine requires U.S. courts to respect the independence of sovereign states by refraining from passing judgement on acts committed by the sovereign government within their own territory.²¹² However, courts may essentially disregard the Act of State doctrine when inquiry would not “embarrass or hinder the executive in its conduct of foreign relations.”²¹³ The principle of international comity similarly “requires recognition of foreign actions, decrees, and proceedings that do not conflict with [domestic] interests or policies.”²¹⁴ . Here, courts consider a balance of respective forums and international policy to determine if abstention is required. Even if a conflict between law or policy does exist, courts may opt against dismissal if it would not be warranted based on U.S. policies. Much like the previous principles, the Political Questions doctrine further limits the power of federal courts by barring them from

²¹¹ Anne-Marie O’Connor, *Maria Altmann dies at 94; won fight for return of Klimt portrait seized by Nazis* (Feb. 8, 2011, 12:00 AM), <https://www.latimes.com/local/obituaries/la-xpm-2011-feb-08-la-me-maria-altmann-20110208-story.html>.

²¹² *See Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445, at 26.

²¹³ *Id.* at 29.

²¹⁴ *Id.* at 31.

ruling on political questions. Political questions are best understood as those that belong exclusively to the purview of another branch of the government. As previously discussed, the statute of limitations is currently not a bar to NLA claims due to Congress' enactment of the HEAR Act. The doctrine of laches, however, can still serve as a bar to claims. Laches is a fact-intensive question that focuses on whether the claimant unreasonably delayed asserting a claim to the prejudice of the current possessor of the object.

The strength of these barriers to litigation is self-evident. To date, no court has issued a ruling—on a full record—regarding the merits of a restitution claim; namely, whether the opposing museum is the rightful owner or whether the claimant has thoroughly proved that the object belongs to them.²¹⁵ Ultimately, even if claimants can successfully bring a suit for restitution, litigation may cause more harm than not. Long-standing disputes like Wally consume countless resources as they drag on. The publicity surrounding disputes tarnishes reputations and hardens attitudes all-around. Consider the following excerpt from a speech given by Ambassador Kennedy on the role of the U.S. government in art restitution:

In this particular case we believe it would have been helpful had the two parties proceeded in the manner envisioned by the Washington Principles. Instead the parties have had heavy legal bills, the claimant has experienced a long delay and the institution holding the object has incurred considerable embarrassment because of its unwillingness to engage with the claimant. We will continue to urge the parties to find a forum where the issue can be resolved. As it is, this case is a prime example of what happens when a Holocaust-related art restitution case winds up in the courts, rather than being handled through direct negotiations.²¹⁶

For these reasons, even if litigation is available, claimants are likely better suited going through alternative dispute resolution.

²¹⁵ *Report Concerning Current Approaches of United States Museums to Holocaust-Era Art Claim*, *supra* note 187.

²¹⁶ J. Christian Kennedy, Special Envoy for Holocaust Issues, U.S. Diplomatic Mission to Ger., Remarks at University of Potsdam's Moses-Mendelssohn Center for European-Jewish Studies Conference: *The Role of the United States Government in Art Restitution* (Apr. 23, 2007), available at <https://2001-2009.state.gov/p/eur/rls/rm/83392.htm>.

Chapter 5

Alternative Dispute Resolution Mechanisms

*“I think we have begun to lay the foundation for a twenty-first century in which conflict resolution and alternative dispute processes will not be at the fringe of the legal system but will be at the center of international dispute resolution.”*²¹⁷

As discussion has shown, there is little opportunity to receive an assessment on the merits of a NLA claim when pursuing litigation, both within and outside the U.S. Restitution committees across E.U. member states also fall short of providing claimants with the just and fair solution promised under the Washington Principles. In lieu of pursuing restitution claims through these formal and ineffective processes, it is recommended that NLA claimants instead turn to alternative dispute resolution (“ADR”) mechanisms. ADR mechanisms are flexible in nature and often more time and cost efficient than litigation. ADR mechanisms can also be, and are often, utilized concurrently with litigation.

The prevailing consensus among large stakeholders like academics, states, and museums is that ADR mechanisms are best suited for restitution claims relating to Nazi-looted objects. Internationally, several agreements and conventions have encouraged the use of ADR to achieve just and fair solutions. Recall that the Washington Principles explicitly encourage nations to adopt “alternative dispute resolution mechanisms for resolving ownership issues.” Within the U.S., Congress has explicitly stated that “the private resolution of claims by parties involved, on the merits and through the use of [ADR] ...will yield just and fair resolutions in a more efficient and predictable manner [than litigation].”²¹⁸ Museums also support the use of ADR due to its efficiency and their preference for discretion—the AAM and AAMD each separately advocate for the use of ADR mechanisms to resolve restitution claims.²¹⁹

5.1 Common Forms of ADR

While the term “alternative dispute resolution” encompasses all forms outside of litigation, the most common forms are negotiation, mediation, and arbitration.

²¹⁷ Stuart Eizenstat, International Advocate for Peace Award Acceptance Speech, <https://static1.squarespace.com/static/60a5863870f56068b0f097cd/t/60a7180491d8ee2f55184374/1621563396607/143-154+%281%29.pdf>.

²¹⁸ HEAR Act § 2(8).

²¹⁹ See AAM guidelines; see also AAMD guidelines.

Table 1: Differences in Mechanisms

	Negotiation	Mediation	Arbitration
Confidentiality	*Yes, in some cases	Yes	Yes
Control	Parties retain full control	Parties control final decision; mediator manages process	Parties craft rules and structure; arbitrator imposes decision
Enforceability	Enforceable as contract	Enforceable as contract	Fully-binding
International Enforcement?	JDX specific	*Largely JDX specific	Yes — NY Convention
Risk	If agreement is not reached, may result in litigation	If agreement is not reached, may result in litigation	Award is final

5.1.1 Negotiation & Mediation

Negotiation is best characterized as an informal process in which parties voluntarily engage in the “deliberation, discussion, or conference upon the terms of a proposed agreement.”²²⁰ Parties can enlist the services of legal or other counsel but are not required to do so. Any decisions reached through negotiation are enforceable as contracts. The nature of negotiation necessarily encourages parties to reach win-win situations, wherein both parties needs and interests are creatively and mutually met as they are not constrained by law.²²¹ Negotiation serves as the basis for all other forms of alternative dispute resolution. For instance, in arbitration parties negotiate over how they want to structure the process.

If parties are having difficulty achieving a joint resolution, they may request the aid of a neutral third-party or mediator to help facilitate a negotiation.²²² This third-party need not be a lawyer or judge. Mediators help facilitate dialogue, identify conflicting and shared interests, and

²²⁰ Negotiation, Black's Law Dictionary (10th ed., 2014).

²²¹ Marc-André Renold, *Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigation*, EUR. PARL. POLICY DEPARTMENT FOR CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS, 37 (2016), [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL_STU\(2016\)556947_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL_STU(2016)556947_EN.pdf).

²²² Marc-André Renold and Alessandro Chechi, *Just and Fair Solutions: An Analysis of International Practice and Trends*, in JUST AND FAIR SOLUTIONS? 187, 191.

can suggest arrangements for agreements.²²³ They are not, however, intended to impose a decision.²²⁴ As a rule, mediations are generally kept confidential.²²⁵

Resolutions in mediation are generally enforceable as contracts. Under the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention"), some mediated settlement agreements *may* be enforceable outside of the jurisdiction in which they were created.²²⁶ To qualify for enforcement under the Singapore Convention, agreements must be mediated, international, and commercial. The convention specifically excludes agreements “[c]oncluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes” or “[r]elating to family, inheritance or employment law.”²²⁷ The Singapore Convention may strengthen the viability of mediation for some NLA claims as parties would be able to enforce their agreements internationally without first having to resort to enforcement via contract litigation. Given its recent emergence, however, it may take some years for the Singapore Convention to realize its true potential. As of May 2024, 57 countries have signed the convention and 14 have ratified it. Most notably, neither the U.S. nor the U.K. have ratified the convention, although both have indicated their public commitment to its use. The E.U. has yet to ratify or sign on to the Convention.

Both negotiation and mediation offer relatively informal means of dispute resolution for parties willing and hoping to find a mutual solution. Currently, negotiation is the more frequently used mechanism for resolving NLA claims.²²⁸ Most notably, negotiation was utilized to reach a settlement in Wally. The use of mediation has increased in recent years with the advent of special mediation initiatives such as Art Resolve²²⁹ and the ICOM-WIPO Art & Cultural Heritage

²²³ See Andrea Doneff and Abraham P. Ordover, *Alternatives to Litigation: Mediation, Arbitration, & the Art of Dispute Resolution*, 13 (3d ed. 2014).

²²⁴ *Id.*

²²⁵ See Renold and Chechi, *supra* note 222, at 191.

²²⁶ The United Nations Convention on International Settlement Agreements Resulting from Mediation [hereinafter Singapore Convention on Mediation] https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements (last visited May 4 2024).

²²⁷ Singapore Convention on Mediation, Art. 1(2).

²²⁸ *Id.* at 190.

²²⁹ Art Resolve, *Home*, <https://artresolve.org/>.

Mediation.²³⁰ As discussed, auction houses like Christie's and Sotheby's offer to act as intermediaries in NLA disputes they come across. Their unique knowledge on art valuation as well as restitution claims enables them to facilitate dialogue between parties—they help parties understand the other's position and contextualize information, where needed.²³¹ Christie's and Sotheby's do not charge for their restitution services but may earn a commission or fee from the subsequent sale of the work.²³² While the service they offer most closely resembles mediation, these auction houses can derive benefits that complicates their neutrality.

Despite the prominent use of mediation and negotiation in the resolution of NLA claims, these methods may not be appropriate for all disputes. For instance, neither mechanism can issue binding decisions or address circumstances in which more discovery is required. Negotiation and mediation are structured to encourage collaborative resolutions, even between parties with complex histories and intense emotions. However, these methods may not always suffice. Due to the intensely painful and sensitive nature of these claims for victims, as well as the typically indirect culpability of NLA-possessors, parties may be unable to reach a resolution on their own, even if they both desire to do so. In these cases, arbitration may serve as a useful alternative. While parties inherently adopt a more adversarial stance in arbitration, their shared goal of resolution can still be preserved. Parties can work together to select the structure they believe will best result in a just and fair solution.

5.1.2 Arbitration

Arbitration is used widely throughout the corporate world and is often the principal method of resolving international disputes.²³³ Parties in arbitration agree to submit their disputes to a neutral third-party. This agreement can occur either prior to, or after, the onset of a dispute. Through agreement with one another, parties can select “one or more arbitrators, the applicable law and the rules of evidence to be applied.”²³⁴ Parties may also agree to any limits on discovery.

²³⁰ *Art and Cultural Heritage Mediation: An alternative litigation resolution method adapted to art and cultural heritage fields*, ICOM (Jul. 12, 2011), https://icom.museum/wp-content/uploads/2018/07/110701_DP_Mediation_EN.pdf.

²³¹ Dugot, Congressional Panel Testimony, *supra* note 61.

²³² Monica Dugot, International Director of Restitution, Christie's, Address at the Holocaust Art Looting and Restitution Symposium (June 23, 2011) https://www.obs-traffic.museum/sites/default/files/ressources/files/Dugot_Art_Market_Perspective.pdf.

²³³ Renold and Chechi, *supra* note 222, at 193.

²³⁴ *Id.*

Selected arbitrators are generally considered experts in the field of the dispute they are overseeing. If parties prefer a more diverse range of expertise, they may also elect for an arbitration panel.

The arbitration process offers a relatively more formal yet flexible path forward for parties. In contrast to negotiation and mediation, arbitration renders fully binding decisions that are internationally²³⁵ enforceable. Proceedings are confidential and occur independent of national courts. However, as arbitrators with relevant experience rule on the matter, arbitrations still offer parties a sense of institutional credibility—these decisions are grounded in the knowledge and credibility of experienced practitioners. As Chapter 6 will discuss, despite its apparent effectivity, arbitration is rarely utilized in resolving NLA claims.

5.2 Special Considerations required by NLA Claims

Generally, disputes may be categorized as revolving around rights, power, and/or interests.²³⁶ Legal disputes are most commonly based on rights arguments—the idea that one has rights under the law that can be defended in a courtroom.²³⁷ Power-based disputes occur where one party wields power (whether economic or political) over the other.²³⁸ A union calling a strike on an employer or industry to have their demands met is one example of a power-based dispute.²³⁹ A power-based dispute can also occur within a courtroom when the stronger economic party uses their financial resources to outlast or deter its opponent.²⁴⁰ Finally, an interest-based dispute is one that focuses on each party’s needs and interests.²⁴¹ Rather than negotiation based on who meets certain legal criteria or who has the most bargaining power, this approach considers how parties may come together to find the most mutually beneficial resolution.

Depending on the kind of approach relied upon, some forms of ADR mechanisms may be more appropriate than others. For instance, rights-based disputes may require the kind of binding decisions issued in arbitration to enact real change. On the other hand, interest-based disputes may benefit from mediation as they are able to explore different options under the supervision of a neutral mediator. NLA claims, however, require the incorporation of all three elements.

²³⁵ 1958 New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards.

²³⁶ See Doneff and Ordoover, *supra* note 223, at 2-3.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

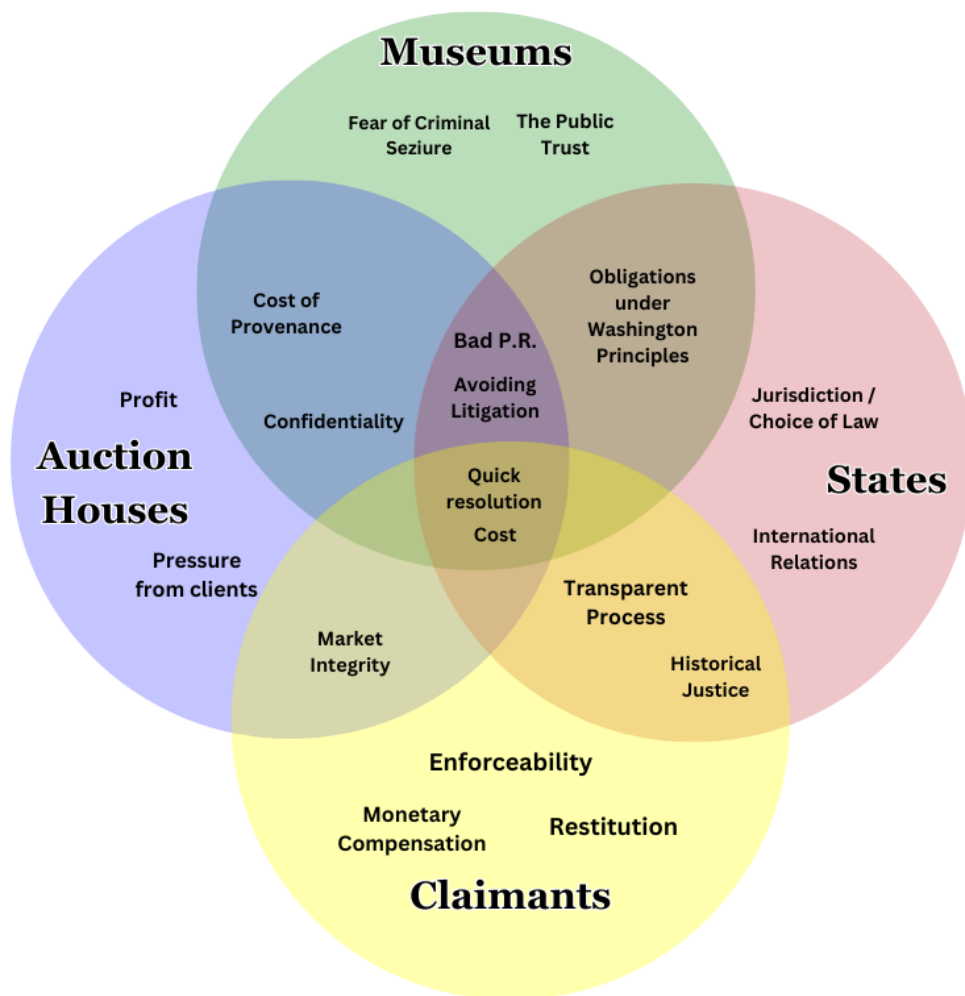
²⁴⁰ *Id.*

²⁴¹ *Id.*

Legally, restitution is rooted in the idea that something was taken from someone with a possessory interest and so they have a right to be restored. However, what often occurs in these cases is that the other party (be it a museum or sovereign state) has more resources at their disposal and is better posed to influence the outcome.

Resolving NLA claims further requires a careful understanding of the different needs and interests at hand. As previously discussed, claimants hold interests which may vary depending on the circumstance—some may desire material restitution or compensation, and others may be more interested in righting a historical wrong. Claimants may also be concerned that a restitution process lacks transparency or fails to provide them with due process—for these claimants, the ability to maintain control over the restitution process is key. In contrast, large stakeholders like museums and auction houses may be more concerned over attracting bad publicity via public proceedings. Auction houses, uniquely, may face pressure from their clients to not assist or be associated with the sale of NLA. Museums may have to balance their obligations under both the Washington Principles and the doctrine of Public Trust. Sovereign States may have much larger issues to consider like comity and the applicability of national law. Perhaps most important of all, claimants who lived through the Holocaust require a mechanism that can provide them with justice, sooner rather than later.

Figure 1: Comparison of Interests and Concerns by Different Stakeholders



When first comparing the different interests and concerns posed by stakeholders, it can appear as if there is no dispute resolution mechanism that all would agree upon on. In truth, no single resolution method will fulfill *every* stakeholder's interest and concerns. However, the overlap of interest that exists between parties may help us understand which method is best able to meet their needs.

All three mentioned forms of ADR allow parties control over the restitution process, at varying levels. Negotiation and mediation are relatively low-cost and quick alternatives to litigation. Depending on the level of discovery allowed, as well as other factors like the cost of certain arbitrators, arbitration can also serve as a more efficient alternative to litigation. However, only mediation and arbitration offer the level of confidentiality preferred by large stakeholders seeking to keep their collections and reputations unsullied. Both options can provide claimants with restitution or monetary compensation, but only arbitration can currently ensure the level of

enforceability needed by claimants with property in different jurisdictions. However, this may change in time with the continued adoption of the Singapore Convention. Additionally, if parties are unable to reach an agreement under negotiation or mediation, parties may end up litigation their claims. Arbitration is the only mechanism, that once agreed upon, results in a truly binding decision.

Chapter 6

Arbitration as a Solution for the Restitution of Looted Artworks

*“We are finally seeing an end, and I hope a happy end. I am very pleased that things can be solved in a friendly and peaceful way.”*²⁴²

6.1 Benefits

Arbitration offers claimants the best of both worlds: it combines the major advantages of other alternative dispute resolutions with the certainty of litigation. Arbitration awards are fully-binding like court holdings but also internationally enforceable. For claimants bringing claims in one jurisdiction for the restitution of an object located in another, the enforceability of a decision is vital. Instead of relying on expert testimony—which often feeds into a battle of the witnesses—arbitration enables parties to select arbitrators with experience and knowledge in the disputed area. The selection of expert arbitrators is particularly useful for the resolution of NLA claims as they often implicate the laws of other jurisdictions. While parties may select arbitrators from a specific jurisdiction for their expertise, they are by no means bound by national law. This allows them to contemplate the wide array of non-legal matters implicated in NLA claims, including emotional, political, moral, and ethical questions. It also helps resolve conflicts stakeholders may have over the applicable law.

Another benefit to arbitration is the privacy and confidentiality it offers parties. For large stakeholders like museums and auction houses, confidentiality is of the utmost importance. This is especially true when resolving claims related to NLA as they tend to attract unwanted, negative publicity for the stakeholder. Finally, arbitration is more time efficient and less costly than litigation. This benefit can make a huge difference in the resolution of NLA claims. After all, each day that passes is another day that information necessary for effective restitution—such as evidence, records, and even Holocaust survivors—disappears. Unlike restitution committees, or even litigation, arbitration allows claimants to pursue claims against private collectors or institutions.

In the context of the unique issues and interests presented by NLA claims, the benefits of arbitration compared to other forms of dispute resolution position it as the ideal form of resolution.

²⁴² Laura Wides, *Nazi Art Theft Case to Arbitration*, CBS (May 19, 2005, 6:28 AM), <https://www.cbsnews.com/news/nazi-art-theft-case-to-arbitration/>.

6.2 Potential Drawbacks

In understanding the efficacy of arbitration as the primary method of resolution for NLA claims, it is also important to acknowledge its shortcomings. Arbitration is a creature of contract; it occurs most naturally between parties with a preexisting contractual relationship. The challenge with introducing arbitration into the resolution of NLA claims, is that parties rarely begin in a position that requires them to arbitrate. As a result, arbitration for NLA claimants becomes a voluntary process—if both parties are not willing to enter arbitration, then there is no conversation to be had.

While the confidentiality of arbitration may serve as a benefit to some stakeholders, it may also act contrary to the desires of others. For instance, claimants who are not necessarily seeking material restitution may depend on the publicity surrounding litigation to bring attention to their cause. This can help claimants achieve moral restitution via public acknowledgement of the wrong they have suffered. In the context of NLA claims, confidentiality may be problematic as some individuals perceive the restitution of Nazi-looted objects to “concern a public matter—cultural heritage of mankind.”²⁴³

Despite being commonly considered as more efficient and cost-effective than litigation, some arbitrations may prove otherwise. Recent trends in arbitration—like allowing full discovery—has dramatically increased the cost and duration of these proceedings.²⁴⁴ By opting for arbitration, claimants forfeit some procedural rights. For one, they are unable to request a jury trial or appeal the arbitration. Secondly, the lack of case precedent may be a drawback for NLA claims as future claimants do not derive any certainty from previous decisions. Setting precedence is often vital for sensitive issues like NLA as it works to further progress towards an overarching goal. Perhaps the largest drawback to arbitration, however, is the rarity of its application to NLA claims. It is difficult to encourage parties to enter a process that is alien to their dispute.

²⁴³ Elizabeth Varner, *Arbitrating Cultural Property Disputes*, 13 CARDOZO J. OF CONFLICT RESOLUTION 477, 488, (May 1, 2012), <https://culturalheritagelaw.org/resources/Documents/Arbitrating%20Cultural%20Property%20Disputes.pdf>.

²⁴⁴ Doneff and Ordoover, *supra* note 223, at 157.

6.3 Arbitration in Action

It is easy to contemplate the benefits and challenges associated with the arbitration of NLA in theory, but to truly understand its applicability we analyze how it has been used previously and how it may be used in the future.

6.3.1 *The Republic of Austria v. Altmann*

To date, arbitration has only been used to resolve an NLA claim once—in the case of *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). Maria Altmann née Bloch-Bauer was born in Vienna, Austria in 1914.²⁴⁵ Harrowing circumstances forced Altmann to leave Vienna shortly after the *Anschluss* in 1938 and resettle in California—where she would remain for the duration of her life. Like many other Austrian Jews at the time, Altmann’s family—including, her uncle Ferdinand Bloch-Bauer—fell victim to German Aryanization laws and rampant looting.²⁴⁶ Included in the objects taken from Altmann’s uncle was a set of 6 paintings by Viennese artist, Gustav Klimt. Altmann’s aunt, Adele Bloch-Bauer, had maintained a close relationship with Klimt prior to her death and as a result, two of the looted paintings were commissioned portraits of Adele.²⁴⁷

Shortly after the war, Altmann’s brother, Robert Bentley, sought the restitution of these paintings under Austria’s Nullification Act of 1946.²⁴⁸ Bentley retained the services of lawyer Dr. Gustav Rinesch to aid him in this effort.²⁴⁹ Dr. Rinesch, in turn, contacted the Austrian Gallery to request the restitution of three paintings they had located but was falsely informed that they had been donated to the Gallery by Adele.²⁵⁰ While Adele had requested Ferdinand donate the paintings after *his* death, ownership remained with Ferdinand who was under no legal obligation to do so.²⁵¹ After Ferdinand’s death, the paintings automatically passed to his heirs—Robert Bentley, Maria Altmann, and a second niece.²⁵² This fact would not become known to the family until 1998, when a journalist researching the Gallery’s collection discovered a series of damning

²⁴⁵ *Republic of Austria v. Altman*, 541 U.S. 677, 681 (2004).

²⁴⁶ *Id.*

²⁴⁷ Shira Shapiro, *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 WILLIAM MITCHELL L. REV. 1147, 1161 (2008).

²⁴⁸ *Altmann*, *supra* note 245, at 683.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 682.

²⁵² *Id.*

documents.²⁵³ According to the documents, the Gallery had known all along that Altmann's family had never donated the paintings.²⁵⁴

Armed with this knowledge, Altmann filed for restitution before the Beirat. The Beirat rejected Altmann's petition on the grounds that Adele's will was evidence that the paintings had been legally donated.²⁵⁵ In Altmann's words, "the entire commission proceeding was a sham."²⁵⁶

Altmann then tried to resolve the matter via private arbitration.²⁵⁷ The state of Austria refused, and as ADR is necessarily voluntary, Altmann was forced to seek other paths forward.²⁵⁸ The prohibitive cost of litigation in Austria further pushed Altmann to file suit in U.S. federal court.²⁵⁹ Altmann would spend the following four years making her way through federal courts, all the way up to the Supreme Court.²⁶⁰ In a landmark decision, the Supreme Court allowed Altmann to proceed with her suit against Austria in the basis of the FSIA's expropriation exception.²⁶¹ From there, Altmann and her counsel entered mediation with Austria.²⁶² This mediation ultimately ended with parties agreeing to resolve the matter through a binding arbitration in lieu of continued U.S. litigation.²⁶³

The ad hoc arbitration took place in September 2005 in Vienna before three Austrian arbitrators, two professors and one practicing lawyer.²⁶⁴ According to Altmann's lawyer, Randol Schoenberg, the one-day hearing consisted mostly of facts with very little law discussed.²⁶⁵ By January 2006, just four months later, the decades long dispute had finally come to an end with Altmann receiving full restitution.²⁶⁶

The road to arbitration was anything but easy for Altmann, and by the end of it, Altmann was not even certain she wanted to resolve the matter through arbitration.²⁶⁷ However,

²⁵³ *Id.* at 684.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Appellee's Opposition Brief on Expedited Appeal, *Altmann v. Republic of Austria* (no. 01-56003, U.S. Ct. of Appeals, Ninth Circuit), 8.

²⁵⁷ Davidson, *supra* note 57, at 98.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *See generally, Altman.*

²⁶² Wides, *supra* note 242.

²⁶³ *Id.*

²⁶⁴ Alison Frankel, *The Case of the Stolen Klimts*, AMERICAN LAWYER (Nov. 1, 2006, 12:00 AM), <https://www.law.com/americanlawyer/almID/1161853518627/>.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

Schoenberg believed at the time that arbitration would best suit Altmann as Austria would likely continue to litigate the matter for as long as possible.²⁶⁸ In this scenario, Altmann would have had to pay an enormous amount of legal fees and due to her age, she might not have been around to see the restitution of her paintings. Arbitration offered an ideal solution for both parties here: Altmann was restituted her property in an efficient manner and the Republic of Austria was able to argue the matter in their home jurisdiction. Pursuing her claim in arbitration also allowed Altman and Schoenberg to rely on the facts and merit of her claim, as opposed to just the law which may not have fallen in her favor.

6.3.2 Court of Arbitration for Art

The Court of Arbitration for Art (“CAfA”) is a specialized tribunal that was founded in 2018 as a joint initiative by the Netherlands Arbitration Institute and Authentication in Art.²⁶⁹ The tribunal was originally created to address disputes over art authenticity but has since expanded its scope to include all forms of visual art disputes.²⁷⁰ In addition to arbitration, CAfA also offers mediation services.²⁷¹

The CAfA tribunal functions much like traditional arbitration tribunals: there is limited discovery; parties can largely customize the rules; proceedings are private and confidential; and awards are fully-binding and fully enforceable.²⁷² Parties can choose up to three-person arbitrator panels from a wide selection of pre-approved, international art law practitioners.²⁷³

There are some unique features to CAfA, however, that render it especially responsive to art disputes. While arbitral proceedings remain private, CAfA arbitrators will publish written opinions explaining their decisions.²⁷⁴ Parties will also remain confidential, but the artwork, itself, will be revealed to ensure market understanding and acceptance.²⁷⁵ This level of transparency is largely unavailable in other forms of relief, and particularly important to NLA claims as it can function as a guide to future claimants. To ensure discovery remains reasonable,

²⁶⁸ *Id.*

²⁶⁹ *About Us*, CAfA https://www.cafa.world/cafa/about_us/.

²⁷⁰ Mike Fox, *Alumnus Spearheads New Art Arbitration Court*, U. of Virginia (Jul. 23, 2018), <https://www.law.virginia.edu/news/201807/alumnus-spearheads-new-art-arbitration-court>.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ Judith Prowda, *The Art of Art Authentication and a Global Alternative to Dispute Resolution*, 13 NY Dispute Resolution Lawyer 14, 18 (2020).

²⁷⁵ *Id.*

CAfA appoints a technical process advisor as an overseer.²⁷⁶ As a result, CAfA is not susceptible to the intrusion of unwieldy discovery that may sometimes render arbitrations as costly and time intensive as litigation. One of CAfA's defining features is the court's existing caches of pre-approved practitioners and expert witnesses. For claims involving provenance, such as NLA claims, persons from the expert pool may be appointed by the tribunal as neutral experts or technical advisors. These individuals are professionals in their respective fields and able to understand the nuances of NLA in a way that courts and commissions may not.

As of January 1, 2019, parties have been able to submit disputes to CAfA arbitration—CAfA has not yet ruled on or issued any decisions relating to NLA claims. While CAfA is still in its nascency, and further examination will be required after it begins to hear NLA disputes, its unique take on traditional arbitration makes it a veritable option for NLA claimants.

²⁷⁶ *Id.*

Chapter 7

Conclusion

*“I call these paintings that were not returned, ‘the last prisoners of WWII,’”*²⁷⁷

This year marks the 25th anniversary of the Washington Principles and their adoption by over 44 nations. The impact of these principles has been profound. Prior to the enactment of the Washington Principles, claimants had few opportunities for restitution and thousands of Nazi-looted objects lay hidden in plain sight across museums and auction house floors. The Washington Principles codified standards for restitution efforts and placed serious, social pressure on third parties like museums and auction houses to establish provenance programs. An entire profession dedicated to provenance has since developed. In response to their newfound obligations under the principles, nations passed new restitution laws and, in some cases, created entire committees dedicated to resolving NLA claims.

There is still much more work needed, however, to ‘free the last prisoners of WWII’.²⁷⁸ NLA claims are inherently complex: they implicate laws and stakeholders from various jurisdictions and their resolution necessitates the consideration of merit, not just law. The complicated history surrounding many of these claims further emphasizes the need for a flexible restitution process. The current legal system has proven incapable of providing claimants with just and fair solutions under these circumstances. Additional mechanisms for restitution like national committees or legislation have also failed to provide resolutions based on merit and the desires of parties.

Not all claims may be suited to the same resolution mechanisms. Some claims may be easily resolved through negotiation if they involve relatively straightforward facts and little nuance. Others may require the aid of a neutral third-party via mediation that can help parties better understand their claims and available options. Some claims, however, may require a more formal process through which complicated histories or relationships can be addressed. In the case of *Altmann*, arbitration was the best ADR mechanism as it provided a timely resolution while addressing a complex history (namely, as it related to objects that been ‘recovered’, but intentionally withheld from their owners). For these claims, stakeholders should consider

²⁷⁷ Isabel Wilkinson, *Remembering Maria Altmann, Holocaust Hero Who Won Back Klimt Paintings*, DAILY BEAST (Jul. 13, 2017, 12:48 PM), <https://www.thedailybeast.com/remembering-maria-altmann-holocaust-hero-who-won-back-klimt-paintings>.

²⁷⁸ *Id.*

arbitration as a more suitable alternative. Arbitration can provide common ground for stakeholders interested in quick and cost-effective resolution, but unable to bridge gaps in their differences. Arbitration also offers security through binding and fully enforceable decisions. As the Singapore Convention on Mediation has not yet been fully adopted, especially by the E.U., claimants dealing with multi-jurisdictional issues and property will benefit from the scope of arbitration.

Some individuals may view the voluntary nature of arbitration as a major deterrent. As evidenced by the impact of the Washington Principles, however, part of what makes restitution possible is the fact that parties are engaging of their own volition. When parties are unwilling to engage in restitution efforts, they will do everything in their power to avoid it—including spending years and millions of dollars arguing nuances in court. It is through acknowledging one’s role in perpetuating, and actively engaging in the righting of that wrong, that real restitution is found. There is a reason that stakeholders from all over the world encouraged parties to adopt “alternative dispute resolution mechanisms for resolving ownership issues.”²⁷⁹ The next 25 years offer an important opportunity for stakeholders and claimants to continue to build on the legacy and efficacy of the Washington Principles.

²⁷⁹ Washington Conference Principles on Nazi-Confiscated Art, *supra* note 115.

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German Abstract

Dieses Jahr markiert den 25. Jahrestag der Washingtoner Prinzipien und ihrer Annahme durch über 44 Nationen. Diese Grundsätze bildeten einen Rahmen für Bemühungen zur Rückgabe von NS-Raubkunst auf der ganzen Welt und übten großen sozialen Druck auf Dritte wie Museen und Auktionshäuser aus, Provenienzprogramme einzurichten. Auch wenn die Wirkung dieser Prinzipien tiefgreifend ist, gibt es noch viel zu tun. Anspruchsberechtigte, die Gerechtigkeit suchen, reichen bis heute weiterhin Rückerstattungsansprüche ein. Das derzeitige Rechtssystem ist nicht in der Lage, diesem Bedarf gerecht zu werden. Wenn man sich an inländische Gerichte in den Vereinigten Staaten wendet, ergeben sich Fragen zur Zuständigkeit, zu Rechtskonflikten, zu mangelnden Verteidigungsmöglichkeiten und zu Verjährungsfristen. Nur wenige Klagen finden vor Gericht Erfolg, und diejenigen, denen dies gelingt, können jahrelang in einem Rechtsstreit verstrickt sein. Innerhalb der Europäischen Union sind Rückstellungsgremien häufig auf Ansprüche beschränkt, die staatliche Museen betreffen, und können daher keine Ansprüche lösen, die Privatsammlungen betreffen. Anspruchsberechtigte können nach nationalem Recht eine Rückerstattung beantragen, werden jedoch häufig durch unerschwingliche Kosten wie Anmeldegebühren oder Lagergebühren zusätzlich von der Gerechtigkeit ausgeschlossen.

Angesichts der Probleme, die mit der Durchsetzung von Gerechtigkeit durch formelle Mittel verbunden sind, ist es für Opfer von NS-Raubzügen besser geeignet, sich an alternative Streitbeilegungsmechanismen zu wenden. Diese Mechanismen, einschließlich Verhandlung, Mediation und Schiedsverfahren, bieten unterschiedliche Grade an Formalität und Durchsetzbarkeit. Im Zusammenhang mit NS-Raubkunst ist die Schlichtung der Mechanismus, der den Bedürfnissen aller prominenten Interessenvertreter am besten gerecht wird. Es bietet ein von Museen und anderen Sammlern bevorzugtes Maß an Vertraulichkeit, die Möglichkeit, fachkundige Schiedsrichter zu ernennen, und vollständig durchsetzbare Auszeichnungen.

Trotz ihres Potenzials hat die Schiedsgerichtsbarkeit bei Restitutionsbemühungen kaum Verwendung gefunden. In diesem Artikel führe ich eine tiefergehende Analyse der Bedürfnisse und Interessen der Beteiligten durch und beziehe sie dabei auf den Einsatz der Schiedsgerichtsbarkeit im Fall Republik Österreich gegen Altmann, 541 U.S. 677 (2004) und die kürzliche Schaffung des Court of Arbitration for Art ein, um das Potenzial der Schiedsgerichtsbarkeit in Fällen der Rückgabe von NS-Raubkunst zu betonen.

English Abstract

This year marks the 25th anniversary of the Washington Principles and their adoption by over 44 nations. These Principles provided a framework for Nazi-looted art restitution efforts across the globe and placed serious social pressure on third parties like museums and auction houses to establish provenance programs. While the impact of these principles has been profound, there is still much more that needs to be done. Claimants seeking justice continue to file restitution claims to this day. The current legal system is unable to meet this need. Turning to domestic courts within the United States brings up issues of jurisdiction, conflicts of law, laches defenses, and statute of limitations bars. Few claims find success through the courts, and those that do may be trapped in litigation for years. Within the European Union, restitution panels are often limited to claims involving state-owned museums, and therefore cannot resolve claims involving private collections. Claimants can apply for restitution under national legislation but are often further barred from justice by prohibitive costs such as filing fees or storage charges.

Given the issues connected with pursuing justice through formal means, victims of Nazi-looting are better suited turning to alternative dispute resolution mechanisms. These mechanisms, including negotiation, mediation, and arbitration, offer varying levels of formality and enforceability. In the context of Nazi-looted art, arbitration is the mechanism that best fulfills the needs of every prominent stakeholder. It offers a level of confidentiality preferred by museums and other collectors, the opportunity to appoint expert arbitrators, and fully enforceable awards.

Despite its potential, arbitration has seen little use in restitution efforts. In this paper, I conduct a deeper analysis of stakeholder needs and interests, along with the use of arbitration in the *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) and the recent creation of the Court of Arbitration for Art, to further emphasize arbitration's potential in Nazi-looted art restitution cases.