

L The Formation of Contracts within the separate Cultural Spheres

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The Restitution of Cultural Assets

Concerning the processes of restitution claims in Germany.

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1. Introduction

For some time now the art world has made itself conspicuous through a series of internationally noteworthy auctions. Those works of art that were of particular media interest were those formerly in state possession, but which had found their way onto the free market as a result of restitution claims on the part of their former Jewish owners, and sold for record amounts¹. The art market appears currently to know no bounds. Announcements of imminent "waves of restitutions" further the unrest.

There are no definitive numbers concerning the extent of the loss of cultural assets that disappeared during the 2nd World War (WWII).

For most participants in the art market, in particular museums, galleries, and art dealers, this has given rise to considerable legal and commercial risks with entirely contrary consequences, that is they can be both simultaneously a claimant for restitution and the recipient of such a claim.

Added to this is insecurity borne of a (deliberately) obscure legal situation, which upon close inspection often reveals itself to be driven by a mixture of obscure political interests.

The private individual, who as a rule is the claimant in a case of restitution and is mostly resident abroad, is thus confronted with a far-from-transparent division of responsibility between the various German authorities and institutions dealing with questions of restitution. He often finds himself confronted by a hesitant attitude on the part of the respective museum (caused by the museum's own uncertainty) with whom he is only in indirect contact via his lawyer in any case.

2. Restitution

The question as to the claims for restitution of artefacts, unwillingly given up by their owners, somewhat in the manner of confiscation or forced sale, during the period of Nazi rule, remains to this day without a definitive answer throughout the world.

2.1 Initial Position

While in the aftermath of WWII regulations concerning the return of cultural goods were immediately established in most European countries and in some cases the return of items was to a large extent realised, during the cold war from the end of the 50s this issue disappeared further and further into the background. Only with the breakdown of the socialist state systems in the early 90s did the issue of restitution gain new impetus.

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Despite the publication since then of numerous, commendable investigationsⁱⁱ, the provenance of the stock of the majority of Germany's museums has to this day not been comprehensively researchedⁱⁱⁱ. It is in the interest of the descendants and relatives of those the Nazis persecuted to learn of the fate of the missing cultural items. Added to this, those museums that suffered losses have also been trying to re-obtain their missing works of art. In this case we are dealing in most instances with objects that the Allies took as war booty in the aftermath of WWII^{iv}.

2.2 Definition of Terms

"Beutekunst" Spoils of War/"Raubkunst "Looted Art"

The difference occurs only in German linguistic usage and is used to differentiate between items removed (or whose ownership was revoked) as a result of persecution by the National Socialists (looted art) and those removed from Germany by the allies as spoils of war.

Cultural asset – this term is defined in two international conventions, namely Article 1 of the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict, and in Article 1 of the 1970 UNESCO Convention^v on the Measures for Prohibiting and Preventing the illicit Import, Export, or Transfer of Ownership of Cultural Property.

Irrespective of origin or distribution of property the following are also considered to be cultural assets:

- movable or immovable items of significance for the common heritage of all peoples, such as architectural, artefactual, or historical monuments, be they religious or mundane, archaeological sites, groups of buildings which together constitute a place of historical or artistic interest, works of art, manuscripts, books, and other objects of artistic, historical or archaeological interest, or scientific collections and significant collections of books, archival records, or reproductions of the above mentioned cultural assets;
- Buildings whose main purpose is to serve in the actual preservation or presentation of the so-called movable items, such as museums, larger libraries, archives, and salvage programmes;
- Places, which show cultural assets to a not insignificant extent, and are referred to as "monuments".

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Note: It is clear from the length of the above definition that the signatory states understand the term "cultural assets" very broadly from the point of view of international law. In general, however, the terms "artistic item", "work of art", or "artistic object" are used colloquially, although these are defined very differently. In reality, in the first instance items such as pictures, drawings, designs, engravings amongst others are meant. These, along with books and archival records, constitute the most common items in question when it comes to demands for restitution against museums or similar institutions. This does not mean, however, that a restriction in the meaning of the term "cultural asset" is thereby to be entertained. While it is true that the above mentioned international agreements were indeed first made after the Second World War and had no legal relevance to matters that pertained before that time, the fact that later international agreements, with reference to the period of WWII, apply the term "cultural asset" in the same way without any separate or special definition, it can be assumed that the above mentioned definitions apply here as well.

Restitution – refers to return of property at one time taken away. Of identical meaning are the terms „Rückerstattung“ (ca. reimbursement) and „Rückübertragung“ (ca. refund). In contrast to compensation, restitution does not refer to the setting up of lump sum payments for victims of Nazi persecution, but to the return of concrete items of property.

Victim of Persecution (Verfolgter) – this term, defined in § 1 of the Federal Law for Compensation (Bundesentschädigungsgesetz (BEG)), includes all individuals, who on the basis of race or belief were persecuted. Considered within the definition for political reasons are those victims of persecution who according to § 1 of the Federal Law for Compensation (BEG) are differentiated on the basis of their opposition or resistance to National Socialism, on the basis of a particular world view or artistic or scientific orientation which they represented and which the Nazis rejected.

„Loss of Property as a result of Persecution“ (verfolgungsbedingter Vermögensverlust) (also „Revocation (of ownership) as a result of Persecution“ (verfolgungsbedingter Entzug) – this term in § 1 Para. 6 of the Law of Property (Vermögensgesetz (VermG)) incorporates the terminology employed by the Allied Law of Compensation which dealt with various forms of loss of property: that is forced sale, expropriation and other forms of loss, such as of those objects that were left behind upon the expulsion or deportation of victims of persecution. Whatever the circumstances, the loss needed to have been caused by the persecution of the claimant.

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3. Claims for restitution under public law in Germany

It is true that according to German law many grounds exist for claims for restitution of cultural assets the ownership of which was revoked as a result of persecution, however it is to be anticipated that such claims are at present hard to meet through the courts.

The usual difference between claims under public law and those under civil law, and the one adopted here, is relevant only in so far as the two have differing jurisdictions and matters are consequently dealt with either by the administrative or civil courts.

Furthermore, claims under public law must further be differentiated depending on whether the item in question is located within the old or new federal states..

3.1 In the new Federal States

So far as the new federal states are concerned, claims for restitution fall under the remit of **The Law of Property** of the 29th September 1990. As a supplement to the Agreement of Unification (uniting the two Germanys), it was a component of the inter-state agreement, and has applied as Federal Law within a specific geographical area since the 3rd of October 1990.

It was enacted because the compensation regulations of the western Allies had not been applied in the Soviet sector and later GDR, and comparable regulations had not been established there. Consequently, in this part of Germany a material undoing of Nazi injustice had not to a significant extent taken place.

According to § 1 Para. 6, The Law of Property (VermG) also incorporated retrospectively claims issued by persecuted citizens and associations in the period from the 30th January 1933 to the 8th May 1945

In particular, claims issued by Jewish victims of persecution fall within this remit. For this group of the population, the federal administrative court accepted as persecution, the situation from as early as the 30th January 1933^{vi}.

§ 3 of the Law of Property (VermG) regulates the basic claim for a return of property. For the legitimate claimant difficulties arise, however, if the claim for restitution had not been made to the relevant office within the time limit set by law, of the 30th of June 1993 (for movable property)^{vii}.

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Applications made after the deadline are ineffective. The legitimate claimant is therefore denied his claim. The majority of the cases made under the Law of Property should in the meantime have been dealt with. To this extent, the practical relevance of the Law of Property so far as claims of this sort are concerned is limited to those made before the 30th June 1993.

Note: According to § 2 Para. 1 of the Law of Property (VermG) the descendant organisations of the Allied Compensation laws entitled to register property claims on behalf of those affected or their descendants. Where they did not do this, then the „Conference on Jewish Material Claims against Germany Inc“ (JCC) were entitled to make application. Where legitimate Jewish claimants made no claim, the descendant organizations or the JCC counted as their legal heirs, with the result that any recompense went to them. Given the background, that numerous Jewish claimants had not registered their claims before the deadline set by the Law of Property (VermG), so-called global registration was undertaken by the JCC in order to secure restitution claims, so far as possible. The JCC established a so-called “Goodwill Fund” for those claimants and their heirs who first registered their claims after the deadline had passed. The claimants thereby obtained from the JCC a part of the value of their restituted property. The deadline for making an application for claims against the Goodwill Fund has been extend by the JCC on numerous occasions, most recently to the 31st March, 2004. In principle, therefore, claims against the JCC are now void.

Tip: Piecemeal applications will indeed still be made, and it is therefore very much worthwhile making contact with the JCC.

3.2 In the old Federal States

The Law of Property has not provided the basis for any new claims for compensation in the old Federal States. Here the regulations governing legal compensation enacted following WWII continue to apply. Of greatest relevance in this context, therefore, are the Federal Law on Compensation and the Federal Law on Reparations. Both also had application deadlines that have long since elapsed. The continuation or reopening of a closed legal case is impossible on the basis of legal precedent^{viii}. In principle that also applies to those comparisons dealt with under the former procedures. The increase in value of the Art object alone is not a basis for any legal right to reopen a case^{ix}.

Only in special cases, according to the Federal Court, is an additional assertion of claims to restitution due to German reunification worthy of consideration. If so, this includes property claims made in the new Federal States.

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Admittedly, the deadlines of the Law of Property apply here too. In practice the usage is limited to claims that have already been made.

4. Claims for restitution under civil law in Germany

Because of the difficulties of making claims on the basis of the Law of Property already outlined, and in the context of the current heated discussions on the legal process of restitution, or demands for the return of Ernst-Ludwig Kirchner's „Berlin Streetscene“ or the Hans Sachs' poster collection, the issue as to whether or not such claims can be met through the application of civil law is being increasingly discussed.

For the following discussion of legal questions it is to be noted that **no current approved and tested adjudication or legal praxis exists.**

4.1 Procedural Risks

It must indeed be assumed that in the near future these cases will be dealt with in the civil courts. The relevant legal issues will be summarily portrayed in the following. Noteworthy procedural risks exist for all parties concerned.

For the plaintiff the first risk to mention is the cost of legal action.

According to German civil procedure the extent of court fees and lawyer costs is based on the value of the goods in dispute (this amounts to, for example, an outlay of ca. 50,000.00 Euros for the initial legal action over a piece of art worth one million Euros). Whoever loses bears the entire costs, including the legal fees of the opponent.

Even if an application proves to be successful and the defendant has to bear the procedural costs, it is possible that the plaintiff may nevertheless be liable for the costs, that is when the costs against the defendant cannot be enforced, § 22 of the Law Regulating Court Costs (Gerichtskostengesetz (GKG)).

Tip: Should the application deal with several pieces of art, whose restitution is being demanded, the risk of incurring excessive costs can be minimised if initially process is begun for the work of art with the least value. Should this application prove successful, on the basis of that judgement, items of higher value can be similarly claimed. One may assume that the defendant will agree to an out-of-court settlement under these circumstances, making further legal process unnecessary.

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The plaintiff must also take into financial consideration the **length** of the legal process. The process can take several years for a decision to be made in the highest courts.

However, the defendant in a claim for restitution cannot feel any measure of security either, despite the current unclear legal position for the plaintiff. There are a raft of reasons for these claims.

Therefore, there is a not-to-be-underestimated **risk of losing** the case for the defendant with the resulting **loss of the piece of art**. Precisely for institutions or private individuals who have not sufficiently accounted for the provenance of their objects, this can have serious to fatal financial consequences.

Tip: The simplest method still to counter these risks is to clarify the provenance of the pieces of art in one's possession. The possible costs used to this achieve this end are likely all but negligible when compared to the material loss caused by a successful claim for restitution, particularly for collections or individual items of high value. It is also not the case that every wish for the return of some item is concluded immediately, for the claimant, who is almost always legally represented, is well aware of the legal uncertainty of achieving his desire for restitution. In any case, the legal and practical situation should be comprehensively checked in each instance, and not simply for those elite pieces of a collection possibly subject to a claim for restitution.

4.2 The exclusion of claims under civil law

Claims under civil law could possibly be excluded by the regulations concerning restitution under public law. Following a decision of the Federal Court in the 1950s the regulations concerning restitution under public law are special laws that exclude the civil law regulations^x. There are though, admittedly, considerable doubts as to whether these precedents still apply in the current legal climate.

4.3 Claims on the basis of ownership

According to § 985 of the Civil Code (Bürgerliches Gesetzbuch (BGB)) the owner can demand the return of an item from its possessor, that is the person with whom the object is located. That means, the original owner must continue to be the owner of the art work in question. He cannot have lost the item in the meantime, therefore, for instance via forced sale, forced expropriation, or as a result of fleeing, where possession was given up, or via the acquisition „in good faith“, perhaps by prescription, through a third party.

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According to § 935 Para. 1 of the Civil Code (BGB) the owner does not lose ownership of an art work if it has been stolen from him, has been lost, or otherwise has gone missing, be it disposed of in a public auction.

As yet not clear, however, is whether on the basis of the still-applicable principles laid down by the Allies for the restitution of objects, the loss of an art work as a result of persecution, as in the cases considered here, would mean that, exceptionally, the usual protection of the buyer as a result of his „purchasing in good faith“ at a public auction should no longer apply.

That implies that the regulations designed to protect the one acquiring in good faith are to be disregarded in the case of restitution (Article 1 Para. 3 REAO, Article 1 Para. 2 USReg, Article 1 Para. 3 BrReg). Mind you, the strict exclusion of the rules for „in-good-faith“ acquisition have already been abandoned in the Law on Property (VermG).

„Gone Missing“

Something counts as having gone missing when the owner has lost possession of it without (not necessarily against) his will. Mind you, errors, deception, threat, and void legal transactions are not, in principle circumstances for an involuntary loss^{xi}.

Even an art work taken away as a result of an act of sovereignty, such as confiscation, say, only counts as having gone missing, if the act of sovereignty is legally void. This should, in any case, regularly be the situation for confiscations of Jewish property made by the National Socialists.

It must be emphasised that not every „loss due to persecution“ according to public law is also at the same time an „item gone missing“ in the sense meant by civil law. Thus, even forced sales themselves, immoral as they were and according to §§ 134 and 138 of the Civil Code (BGB) thereby void, can still lead to loss of property. It is likely that here too we have not heard the last word from the civil courts.

Acquisition Abroad

A loss of ownership can also occur in that the art work is sold on or acquired abroad. In this case according to German international private law the so-called lex-resitae-rule (Art. 43 Para. 1 EGBGB) applies to the acquisition of property.

This rule implies that the question as to whether or not a successful acquisition of property has taken place is determined by the laws of the country in which the item was located at the time when the change of ownership took place.

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A work of art was confiscated in Germany from a Jewish collector in 1939 and subsequently sold on in Switzerland and is now back in Germany once more. The relevant German courts must in this case check if the sale in Switzerland was legitimate according to Swiss law. Were this to be the case, the one who acquired the work of art would have legitimate ownership of it, although under German law a different decision might have been met had the object stayed in Germany.

Acquisition by Prescription

The loss of ownership can also occur when the one who acquired the work of art has been in possession of it in good faith for a period of 10 years (§ 937 BGB). It follows that the original owner must therefore prove during the course of a legal process that the one in whose possession the object is did not come by it in good faith or later learned that he is not entitled to ownership.

Fortunately, it should be the case that this is relatively easy to prove since the experts in the Art Market are required to maintain a very high standard of probity.

4.4 The possessor's counter-rights

Should the owner of a work of art have remained the owner despite losing possession, the current possessor can still reject restitution if the owner failed to make his claim on time. This is the possessor's right whether or not he acquired the object in bad faith.

Note:

The rules contained within public and civil law concerning time limits serve thereby to prioritise after a certain time peace under the law over and above the interests of unravelling illegitimate legal relationships. It can therefore come to pass that the one who came into possession of a work of art in bad faith may be allowed to keep it, solely on the basis that the owner failed to make his claim to restitution on time (because, for example he only later got to know of the work of art's location)^{xii}.

Statute of Limitations

A restitution claim falls under the statute of limitations after 30 years, according to § 197 Para. 1 No. 1 of the Civil Code (BGB). The period of limitations starts when the claim could first be made, that is at the point when it was possible to assert a claim by suing. In the case of loss due to persecution the earliest point was after state power had been taken over by the Allies on the 8th of May, 1945. Restitution claims, in this instance, were therefore limited by statute from the mid 70s on.

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Note: It is still a matter of debate as to whether or not the statute of limitations was delayed because the owner was prevented from asserting his rights by an „act of God“ (unforeseen circumstance), which would include a cessation of the possibility of legal action (§ 206 of the Civil Code (BGB)). This opinion has no practical relevance, however, since a „cessation of the possibility of legal action“ cannot be relied upon to occur either in the former FRG or in the GDR.

Relinquishing Counter-Rights

The statute of limitations does not automatically prevent the right to claim restitution. Either voluntarily or not, the possessor relinquishes the right to insist on the application of the statute of limitations and is then obliged to return the artwork.

Note: The so-called Call for the Statute of Limitations must be made by the defendant at the very latest during the hearing. The possessor should not therefore rely on the court taking this into consideration or approving it for him automatically.

The relinquishing of the Call for the Statute of Limitations is of particular relevance for public federal institutions and for those of the Länder and the national associations of local authorities.

In the „Statement by the Federal Government, the Länder (Federal States) and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially from Jewish property“ of the 14th December 1999, it is specifically stated, **„that works of art that have been identified as Nazi-looted property and can be attributed to specific claimants are returned, upon individual examination, to the legitimate former owners or their heirs, respectively. “**

Allowing for the moment that this Declaration has a legally binding character so far as public institutions are concerned, and there is much to support this view, the relinquishing of the statute of limitations is thereby necessarily included. If it were otherwise the public institution would set itself up in opposition to the declaration.

Note: So far the question of the legally binding character of this declaration has not yet been determined by the courts. What already speaks for a legally binding character is the circumstance that the opposite, that it has no legally binding character, has not been explicitly mentioned. The principle also exists here that declarations of will are to be interpreted in the way that the recipient would understand it if appraised objectively (§ 133 of the Civil Code (BGB)). Any lack of clarity is the responsibility of the one doing the explaining.

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Forfeiture of Counter-Rights

Despite the claim to restitution being subject to the statute of limitations, the possessor, whether under public or private law, is impeded by his need to call for the statute if he has forfeited his counter-rights under the principle of utmost good faith (§ 242 of the Civil Code (BGB)). A rigorous approach means it is necessary to take these decisions case by case. Criteria for forfeiture can be, for example, illegal acquisition, inconsistent behaviour, or non-permitted use of the law^{xiii}.

Note: Case by case checking must take into consideration that § 242 of the Civil Code (BGB) is a general "emergency-break" clause for states of affairs where the legal situation cannot be reconciled with the principles of legal order. The demands for establishing a state of forfeiture are consequently high. Therefore a correction of the legal situation via § 242 of the Civil Code (BGB) would only be successful under exceptional circumstances.

5. The regulations of "legally non-binding claims"

In Germany, beside the legal restitution claims, there exist three^{xiv} relevant so-called or putative „legally non-binding" regulations which should, if need be, be able to provide the basis for a claim to restitution on moral or ethical grounds. These are the following declarations:

- The Washington Declaration of the 3rd of December 1998
- The 14th December 1999 declaration of the Federal Government, the States and Leading Communal Organisations concerning the retrieval and restitution of cultural assets taken under Nazi-Germany's terms of persecution, in particular assets of Jewish ownership
- Guide (Handout Document) of February 2001^{xv}

5.1 Legally Binding Character^{xvi}

The widely held opinion that if they are formulated as, or intended to be, „legally non-binding" then no legally binding decision can follow, must be treated with caution. So-called „legally non-binding" declarations, also referred to readily as „soft law" have nevertheless established themselves within the context of commercial international law and have thereby been able to develop a legally binding character. What is correct about the current opinion is that with the interpretation of these Declarations, one is not permitted to contradict the declared wills of the parties involved that they do not wish to create a legally binding situation.

What is overlooked, however, is that the rules underpinning (international) contract law, nonetheless find a usage, namely in:

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- The Regulations of the „Courtoisie“,
- general principles of law, such as the principles of utmost good faith and the interdiction of acting in opposition to one's own intentions (venire contra factum proprium).

That means, the signatory nations to these „ non-binding“ declarations must reckon with the fact that,

- if they act against the Declaration, other nations will do the same to them.
- that national and international courts employ these „non-binding“ declarations to assist in their deliberations
- that a legally binding character exists on the basis of established or customary right. It is usually sufficient if other nations accept the legally binding status.

Note: For German claimants in France, Great Britain, and the USA it could be relevant that in these countries according to Part 6, Article 3, Paragraph 1 of the Transitional Agreement of the 5th of May, 1955, which is, by the way, still valid except for the third, fourth, and fifth parts, claims and suits from German state and private individuals (including institutions deemed legally to be private individuals) are not permitted, because of loss or removal of property due to war. In the light of the Washington Declaration this rule is hard to stick in its absolute form. If Germany rejects any application of the Washington principles, it can hardly call upon them in these countries.

5.2 The Washington Declaration of the 3rd December,1998

„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,“ according to the text of the declaration the 42 signatory nations^{xvii} agreed on 10 principles. With reference to the question of how to deal with restitution claims, point 8 generalises:

„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.“

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That means:

1. The Washington Declaration is only concerned with works of Art confiscated by the Nazis. Any forced sales or other removal of objects as a result of persecution according to German law are not covered.
2. The return of works of art is not specifically mentioned. The wish is for „*a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case*“.
3. The principles of the declaration can also be used by courts to assist in their interpretations and deliberations in the context of civil action against private individuals

Tip: Even if for the parties involved all options for a settlement of dispute have theoretically been kept open, usually in practice the issue mostly reduces itself to the question: Restitution, YES or NO? In order to facilitate the reconciliation of opposing positions mediation by a neutral third party, recognised by both sides (not necessarily an entire commission), is available, particularly for international disputes. This has worked well in commercial praxis. This is not yet arbitration, rather mediation.

5.3 Statement by the Federal Government, the Länder (federal states) and the national associations of local authorities on the tracing and return of Nazi-looted art, especially from Jewish property of the 14th December 1999.

On the occasion of the Washington Declaration the willingness "*to look for and identify further Nazi-confiscated cultural property in so far as the legal and factual possibilities allow and, if necessary, take the necessary steps in order to find an equitable and fair solution,*" was "further" strengthened.

This Declaration goes well beyond the Washington Declaration, since not only works of art confiscated by the National Socialists but all "Loss of Property as a result of Nazi-Persecution" is allowed for (cf. „Guide (Handout Document)“ below).

The Declaration also goes well beyond the Washington Declaration in regards to the legal consequences, since on the issue of restitution it states explicitly: „*The Federal Government, the Länder and the national associations of local authorities will bring their influence to bear in the responsible bodies of the relevant statutory institutions that works of art that have been identified as Nazi-looted-property and can be attributed to specific claimants are returned, upon individual examination, to the legitimate former owners or their heirs, respectively. This examination includes a match with material compensation already provided.* “

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Admittedly the Declaration only deals with public institutions and cannot be called upon by private institutions or individuals. The latter must continue to use the Washington Declaration.

The intention of this declaration was strengthened by means of the "Call of the Federal Government, the Laender and the national associations of local authorities" of the 27th of January, 2005.

5.4 Guide (Handout Document)

For the implementation of the Statement by the Federal Government, the Laender (federal states) and the national associations of local authorities of the 14th December, 1999 the so-called „Guide (Handout Document)“ was released in February, 2001. The explanations therein contained were designed as orientation, *“which should give help to institutions preserving cultural goods with their efforts to identify Nazi-looted cultural property and the preparation of decisions as to their possible return.”*

In the checking, whether or not a desire for restitution was due to a „loss caused by Nazi persecution“ in the tradition of the German laws of restitution, they draw on the definitions and rules of presumption (the division of the burden of proof) used in the regulations of restitution of the western Allies and the judgements made there under.

In this way the Federal Government, the Laender (federal states) and the national associations of local authorities broaden the concrete subject matter of the Washington Declaration still further than that achieved by the Declaration of the 14th of December, 1999.

A „loss caused by Nazi persecution“ is thereby defined, if

1. the plaintiff himself, or his legal forerunner was persecuted for racist, political, or religious reasons or for his worldview in the period from the 30th of January, 1933 to the 8th of May, 1945.

For this the plaintiff must

- present his full eligibility by means of inheritance certificates and powers of attorney,
- show evidence of his individual persecution by the Nazis, for Jewish people the assumption is that a collective persecution took place from the 30th of January, 1933.

2. within this time period a loss of property took place due to forced sale, expropriation, or in some other way.

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Forced Sale

1. There is a basic assumption in favour of those persecuted by the Nazis during this period of unjustified expropriation.
2. This assumption can only be overturned by proving that
 - the person persecuted received a reasonable purchase price made on the basis of comparison with the objective market price of works of art at that time, and
 - were able to dispose of it freely. In this context the tightening of regulations against the Jewish people from 1938 needs to be considered, as these regularly prevented the free disposal of goods.
 - As to purchases after the 15th of September, 1935 (the "Nuremberg Laws" came into legal effect), the forced nature of the sales is additionally to be disproved only when the persecuted individual would have sold the work of art without the Nazis being in charge, or that the one acquiring it took special measures to respect the property interests of the one persecuted

Expropriation

The general rules of proof apply, whereby the claimant has to prove the forced expropriation. Thus, in the case of the removal of so-called "degenerate art", the causal connection between persecution and expropriation may not exist, because here the situation with regard to persecution was not necessarily the cause of it.

Other Means

Under this heading other situations of loss such as forced auctions due to insolvency, relinquishing of possession or gifts are counted. The assumption of removal applies to the giving up of possession, but not to the forced auction. As to gifts the basic assumption is that a trust was established, be it though that the especially close relationship of the participants in question might lead to a different evaluation.

Tip: This representation is but a rough and ready checklist. Due to the large number of adjudications on the individual questions as to "losses caused by Nazi persecution" it is strongly to be advised that a professional be employed.

Note: Comparably rigid checklists with regard to claims for restitution on the basis of the Washington Declaration are not known in the other signatory nations. Even the restitution regulations of recent time, such as the Law of Property, contain more flexible rules, for instance where it concerns protection due to good faith.

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As a result of the existing uncertainties in practice, it must therefore be explicitly noted that the „Guide (Handout Document)“ is only to be understood (and used) as a help and orientation guide. If it were otherwise, there would be a binding obligation on the part of public institutions themselves, also in the case of claims under civil law.

With this background, the declared lack of binding quality of the Washington Declaration would be quite possibly judged to be illegitimate. Given that this is not desirable, it would make sense to formulate the regulations of the „Guide (Handout Document)“ more flexibly by having a final judgement made on the basis of a consideration of all the circumstances of the individual case in question, that ends the proof of the restitution claim, as already recommended by the Washington Declaration.

Also in respect of the legal ramifications, according to the Washington Declaration flexibility should be preserved. Returning is not always the only solution to a loss caused by Nazi persecution. A reimbursement has also proven to be a suitable means of bringing a restitution case to a peaceful conclusion.

This does not need necessarily to be calculated on the basis of the current value of the object of art, but according to the long tradition of restitution law, the value of the work of art at the time of its loss can be a starting point for negotiation.

Following the disputed restitution of the Kirchner painting “Berlin Street Scene” a working group made up of representatives of the Federation of Laender, the Laender themselves, and the local authorities is tasked with reworking the Guide (Handout Document). If it continues to use the current checklist, it is up to the public institutions to counteract the self-binding obligation by comprehensive use of their competence to undertake detailed examination.

Whether the necessary uniform practice can be guaranteed remains in question.

Tip: The Guide (Handout Document) not only contains voluminous tips on research of the state of affairs, but also provides a model agreement in case restitution occurs. It is to be recommended, however, that the model agreement be altered to suit each individual case.

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6. Legal Process

First of all the institution that possesses the work of art needs to be contacted.

Tip: It is more and more a fact that it is hard for public institutions to deal with lawyers, especially if they come from the USA and threaten to sue. It is to be strongly recommended here to create a level playing field either by also employing a representative or by only negotiating directly with the claimants. The latter variant is possibly cheaper, but less practicable. It is worth noting on this matter that because the likelihood is high that the judgements in question made by the German courts will not be recognised in the USA, suing there could prove itself to be little more than a "blunt sword" of the claimants. In this way they would not be enforceable and are juridically worthless.

Should the location of the work of art not be known questions to the museums throughout the nation can be forwarded by the Foreign Office, the Representatives of the Federal Government for Culture and Media, or the Coordination Centre of the Federation and of the Laender, depending on the case. The chances of success of such research have proven to be small in the past.

6.1 Civil Courts

Only in the case of the assertion of restitution claims on the basis of civil law, is a direct route to the courts possible.

6.2 Administrative legal process

If the claim is based on the regulations of the Law of Property, first of all the Federal office for Central Services and unresolved Property Matters (Bundesamt für Zentrale Dienste und offene Vermögensfragen) is responsible. Only in the event of a negative decision is the route open to the Administrative Courts.

Given that the deadlines according to the Law of Property have already long since passed, a new application would not be permissible.

Tip: Admittedly, it is possible that the JCC with its global application also registered claims of which the beneficiary only later became aware. It is, in any case, useful to ask either the Federal Office for the Regulation of Unresolved Property Matters (Bundesamt zur Regelung offener Vermögensfragen) or the JCC whether or not claims regarding the work of art in question were made.

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6.3 Limbach Commission

Where the parties involved are in agreement, the so-called "Limbach Commission" can be called upon. This Commission met and was constituted on the 13th of July, 2003. Their objective is to offer recommendations in disputed cases of restitution, which admittedly do not have a legally binding character. Ex officio research is not undertaken. In practice the Commission has not as yet established itself. So far only two cases have been decided upon. The public institutions will not regularly be interested in the Commission's invocations, for they themselves have already had to undertake wide-ranging research as a result of the strict checklists. It is not to be expected that an extension of the Commission's competence is forthcoming given the current climate in domestic political affairs. A cessation of its activities is also not to be expected on the basis of the state of foreign affairs.

7. List of Addresses

Foreign Office (Auswärtiges Amt)

Werderscher Markt 1, 10117 Berlin
Tel: 030/5000-0, Telefax: -3402
Website: www.auswaertiges-amt.de

Representatives of the Federal Government for Culture and Media (Beauftragter der Bundesregierung für Kultur und Medien)

(Seat of the Minister of State for Culture, Herr Bernd Neumann)
Bundeskanzleramt
Willy-Brandt-Str. 1, 10557 Berlin

Seat of the Authorities in Berlin (Dienstszitz der Behörde in Berlin)

Stresemannstr. 94
10963 Berlin
Telefon: 0 18 88 / 681 38-37, Telefax: -21
e-mail: Poststelle@bkm.bmi.bund.de

Press Centre for the Representatives of the Federal Government for Culture and Media (Pressestelle des Beauftragten der Bundesregierung für Kultur und Medien)

Presse- und Informationsamt der Bundesregierung
Referat „Kultur und Medien/Pressearbeit für BKM“
Telefon: 0 18 88 / 272 32-81, Telefax: -59
e-mail: Pressestelle-BKM@bpa.bund.de

Federal Office for Central Services and Unresolved Property Matters (Bundesamt für Zentrale Dienste und offene Vermögensfragen)

Seat in Berlin
DGZ-Ring 12, 13086 Berlin
(Postanschrift: 11055 Berlin)

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Telefon: 030 / 18 70 30-0, Telefax: -1140

e-mail: poststelle@badv.bund.de

website: www.badv.bund.de

Note: further seats are in Bad Homburg v. d. H., Bonn, Chemnitz, Cottbus, Erfurt, Frankfurt (Oder), Gera, Leipzig, Magdeburg, Neubrandenburg and Rostock

Conference on Jewish Material Claims against Germany, Inc.

Claims Conference Successor Organisation

Sophienstraße 26, 60487 Frankfurt am Main

Telefon: 069 / 97 07 08-0, Telefax: -11

e-mail: claims.nachfolge@claims-frankfurt.de

Coordination Centre of the Federation and of the Laender

(simultaneously the Secretariat of the Limbach-Kommission)

Turmschanzenstr. 32, 39114 Magdeburg

Telefon des Leiters:

Dr. Michael Franz: 03 91 / 567-3891

Dr. Andrea Baresel-Brand 03 91 / 567-3893

Telefax: 03 91 / 567-38 99

website: www.lostart.de

8. Further Reading

„Kunst im Konflikt. Kriegsfolgen und Kooperationsfelder in Europa“, thematic volume of the journal „Osteuropa“, Vol 1-2/2006. Edited by Manfred Sapper, Claudia von Selle, Volker Weichsel, Berliner Wissenschaftsverlag, ISBN 3-8305-1043-8

Recommend for an overview in the German language of the historical and legal questions with regard to restitution. Well-known historians and lawyers piece together a current, and for the first time, a complete picture of the European situation with regard to this theme.

„Raub und Restitution“

Edited by Constantin Goschler und Philipp Ther, Fischer Taschenbuch Verlag, 2003, ISBN 3-596-15738-2

This slim book supplements the standard work „Kunst im Konflikt“ with further expert historical contributions from East and West Europe.

„Kollektive Rechte in der Wiedergutmachung von Systemunrecht“

Herbert Küpper, Peter Lang, Europäischer Verlag der Wissenschaften, Band 52, 2003, ISBN 3-631-51271-6

L The Formation of Contracts within the separate Cultural Spheres

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A heavyweight in the juridical representation of questions of restitution, the author is permitted the unwieldy title on the basis that the work derives from his Habilitation. Legal knowledge is required.

„Rückerstattung nach den Gesetzen der Alliierten Mächte“,
Published by Federal Ministry for Finances together with Walter Schwarz, 1974, Beck Verlag,
ISBN 3 406 03665 1.

A classic from the year 1974, still relevant today, for Schwarz outlines the historical development of the Allied laws on restitution.

9. Useful Links

www.theartnewspaper.com

www.ifkur.de

www.LostArt.de

www.artlost.com

10. Legal Sources

10.1 International Agreements

Regulations concerning the Laws and Customs of War on Land. The Hague, 18th October, 1907

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of the 14th May, 1954

UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of the 14th November 1970

Transitions Agreement of the 5th May, 1955

10.2 Allied Law

Law No. 59 of the 10th November, 1947 of the Military Government of Germany
US Sector

Law No. 59 of the 12th May, 1949 of the Military Government of Germany, British Sector

Decree No. 120 of the 10th November, 1947 of the Military Government of Germany
– French Sector

Ordinance BK/O (49) 180 of the 26th July, 1949 of the Allied Command in Berlin

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10.3 German Laws

Federal Law on Compensation (Bundesentschädigungsgesetz) of the 18th September, 1953

Federal Law on Restitution (Bundesrückerstattungsgesetz) of the 19th July, 1957

Law of Property (Vermögensgesetz) of the 29th September, 1990

Civil Code (Bürgerliches Gesetzbuch) of the 18th August, 1896

10.4 Declarations

The Washington Declaration of the 3rd December 1998

Joint Declaration of the Federal Government, the States and the Leading Communal Organisations of the 14th December 1999

Guide (Handout Document) of February 2001

The Vilnius Declaration of October 2000

Resolution of the European Parliament of the 17th December, 2003 (2002/2114(INI))

10.5 Notes / Sources

ⁱ Thus the painting „Berlin Street Scene“ by Ernst Ludwig Kirchner was auctioned for 29.76 million Euros following its return from the Brücke-Museum; the five Klimt paintings restituted from the Wiener Belvedere together raised around 250 million Euros.

ⁱⁱ See here the bibliography at www.lostart.de

ⁱⁱⁱ All the same, according to reports in the Frankfurter Allgemeinen Zeitung of the 6th March, 2007 money from the State Ministry for Culture for the intensification of research into provenance for the museums is forthcoming.

^{iv} So far, the term „Beutekunst“ has been used almost exclusively to refer to those items of art that were taken from Germany by the Red Army. The question as to whether and how many objects of art were taken by the western Allies has not been comprehensively researched.

^v The definition used here is that employed in Article 1 of the Hague Convention of 1954.

The definition used in the UNESCO Convention is similarly broad. On the 18th of March, 2007, the UNESCO Convention was finally ratified in Germany after 37 years delay.

^{vi} BVerwG VIZ 1999, 24.

^{vii} This deadline was ratified by the Federal Administrative Court, BVerw-GE 101,39.

^{viii} BGH VIZ 1995, 644

^{ix} BGH VIZ 1995, 644, BGH Z 123, 76 (82)

^x BGH NJW 1953, 1909 f

^{xi} Palandt 63. Aufl. § 935 RN 6; RG 101, 225; BGH Z 4,10; KG OLG 15, 356

^{xii} Noteworthy here is the decision of the High Court in London on the 9th September, 1998 concerning the return of a painting by Joachim Wtewael to the Schlossmuseum of Gotha. The English judges decided that it was not in the public interest if a person who had acquired an object in bad faith was favoured simply as a result of the passing of a deadline. Cf. High Court (England and Wales), City of Gotha and Federal Republik of Germany/ Sotheby's and Cobert Finance S.A., Case No 1993 C and 1997 G

^{xiii} The situation of the claimant can also play a role here, for instance some French judges of the Cour d'Appel de Paris decided on the 2nd of June, 1999 in the case of Gentili di Guisepe that it can be illegal in individual cases to apply the statute of limitations if the circumstances of the case in question calls for it.

^{xiv} Less relevant in practice is the Vilnius Declaration and the Resolution of the European Parliament, for they do not contain a wider ranging set of regulations and are therefore excluded from our discussions here.

^{xv} All three declarations can be found at www.lostart.de.

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^{xvi} On this, see in comprehensive detail, von Selle in Themenheft „Osteuropa“ 1,2/2006 „Kunst im Konflikt. Kriegsfolgen und Kooperationsfelder in Europa“ pp. 383-387.

^{xvii} These are Albania, Argentina, Australia, Belarus, Belgium, Bosnia-Herzegovina, Brasil, Bulgaria, Denmark, Germany, Estonia, Finland, France, Greece, Great Britain, Israel, Italy, Canada, Croatia, Latvia, Lithuania, Luxemburg, Macedonia, The Netherlanda, Norway, Austria, Poland, Portugal, Rumania, Russia, The Slovak Republik, Sweden, Switzerland, Slovenia, Spain, Czech Republic, Turkey, Ukraine, Hungary, Uruguay, USA, and Cyprus.