

“THE ART OF FIDUCIARY LEGITIMACY AND THE  
PRICE OF PROCEDURE IN ARBITRATING  
HOLOCAUST-ERA RESTITUTION DISPUTES”

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*This commentary examines the tension between museums’ legal rights to assert procedural defenses and their ethical obligations in Nazi-looted art restitution cases. It argues that arbitration offers a viable path to reconcile museums’ fiduciary duties with moral imperatives for “just and fair” solutions, addressing both reputational and substantive concerns.*

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I. INTRODUCTION

Museums are often critiqued for asserting procedural limitations in litigating Nazi-confiscated art restitution cases.<sup>1</sup> Critics argue that the

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1. See generally Barbara Tyler, *The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted by the Nazis in World War II?* 30 RUTGERS L.J. 441 (1999); Jennifer Anglim Kreder, *The New Battleground of Museum Ethics*

use of technical defenses, such as statutes of limitations and laches, which extinguish claims before they reach the merits, violates museums' ethical duties to reach a "just and fair" solution.<sup>2</sup> When museums are organized as charitable organizations, their charitable status imposes fiduciary duties of care and loyalty on their governing boards, requiring trustees and directors to manage museum assets prudently and uphold their institution's charitable mission. While museums, acting through their boards, have legitimate concerns regarding their fiduciary duties to preserve museum assets, they cannot selectively invoke fiduciary principles to protect economic interests while ignoring their duty to serve the public interest. Arbitration reconciles these competing pressures by permitting flexible application of soft law principles and guidelines while reducing adjudication costs. If trustees were truly concerned with fiduciary compliance, which turns on ensuring procedural legitimacy, museums should submit restitution claims to arbitration to address reputational costs associated with public litigation. As former Special Envoy for Holocaust Issues J. Christian Kennedy noted, the "moral authority" of the Washington Principles and the penalty of "los[ing] one's good name in the art world...is a punishment

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*and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37, 48 (2009). This research has been limited to claims between private parties, specifically foreign private claimants against works accessioned by U.S. museums, as the majority of WWII restitution claims are made against public institutions or nonprofit organizations. See Herrick, Feinstein LLP, *Resolved Stolen Art Claims: Claims For Art Stolen During the Nazi Era and World War II, Including Nazi-looted Art and Trophy Art* (Aug. 6, 2015), (available at <https://www.herrick.com/content/uploads/2016/01/Resolved-Stolen-Art-Claims.pdf>) (in the report, 31 of the 57 claims in the U.S. were listed as against museums); Erin L. Thompson, *Cultural Losses and Cultural Gains: Ethical Dilemmas in WWII-Looted Art Repatriation Claims against Public Institutions*, 33 HASTINGS COMM. & ENT. L.J. 407, 410 (2011); Charles Cronin, *Ethical Quandaries: The Holocaust Expropriated Art Recovery Act and Claims for Works in Public Museums*, 92 ST. JOHN'S L. REV. 509, 515, 539 (2018). For issues presented by foreign defendants, see Kathryn L. Boyd, *International Arbitration and the Future of Holocaust Restitution in the Aftermath of Republic of Hungary v. Simon and Federal Republic of Germany v. Philipp*, KLUWER ARB. BLOG (Mar. 4, 2021), <https://legalblogs.wolterskluwer.com/arbitration-blog/international-arbitration-and-the-future-of-holocaust-restitution-in-the-aftermath-of-republic-of-hungary-v-simon-and-federal-republic-of-germany-v-philipp/>.

2. Christa Roodt, *State Courts or ADR in Nazi-era Art Disputes: A Choice "More Apparent Than Real"?*, 14 CARDOZO J. CONFLICT RESOL. 421, 456 (2013); Jennifer Anglim Kreder, *Guarding the Historical Record from the Nazi-Era Art Litigation Tumbling Toward the Supreme Court*, 159 U. PA. L. REV. 253 (2011); Charles A. Goldstein & Yael Weitz, *Claim by Museums of Public Trusteeship and Their Response to Restitution Claims: A Self-Serving Attempt to Keep Holocaust Looted Art*, 16 ART ANTIQUITY & L. 215 (2011).

more far-reaching, a sentence graver than most legal proceedings could ever hand down”.<sup>3</sup>

## II. BACKGROUND

From 1933 to 1945, systematic looting of art formed part of the Nazi regime’s destruction of Jewish culture.<sup>4</sup> Estimates of artwork looted or sold under duress numbered in the hundreds of thousands.<sup>5</sup> The Allied Powers maintained these transactions would not be legally recognized.<sup>6</sup> Following the war, restitution became an internationally-recognized obligation, outlined in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.<sup>7</sup> However, domestic efforts in enacting restitution laws were fraught from the international dissemination of the works and the lack of documentary evidence tracing their movement.<sup>8</sup> In the late 1990s, with the fall of the Berlin Wall, greater flows of information led to renewed restitution efforts, culminating in the 1998 Washington Conference on Holocaust Era Assets and its Principles on Nazi-Confiscated Art (Washington Principles).<sup>9</sup> Representatives from 44 countries recognized that a “fair and just solution” must be reached with regards to the circumstances of each claim.

Museum organizations promulgated their own professional codes of conduct: the Association of Art Museum Directors (AAMD) issued the Report of the Task Force on the Spoliation of Art During the

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3. J. Christian Kennedy, Special Envoy for Holocaust Issues, Remarks at the University of Potsdam, Germany (Apr. 23, 2007), <https://2001-2009.state.gov/p/eur/rls/rm/83392.htm>.

4. Owen C. Pell, *Using Arbitral Tribunals to Resolve Disputes Relating to Holocaust-Looted Art*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES: PAPERS EMANATING FROM THE SEVENTH PCA INTERNATIONAL LAW SEMINAR, May 23, 2003, 307, 312 (Int’l Bureau of the Permanent Court of Arbitration ed., Kluwer Law Int’l 2004); Kreder, *The New Battleground of Museum Ethics*, *supra* note 1, at 48.

5. Tyler, *supra* note 1, at 442.

6. Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control, in *Foreign Relations of the United States, Diplomatic Papers, 1943, General, Vol. I*, Doc. 456, at 444; Cronin, *supra* note 1, at 513.

7. Pell, *supra* note 4, at 312 – 4; Tyler, *supra* note 1, at 465; Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter 1995 UNIDROIT Convention].

8. Caroline Simson, *Nazi-Looted Art Claimants Face Tough Road to Restitution*, LAW360 (Feb. 14, 2025), <https://www.law360.com/articles/2298375/nazi-looted-art-claimants-face-tough-road-to-restitution>.

9. *Id.* See generally Roodt, *State Courts or ADR*, *supra* note 2.

Nazi/World War II Era in 1998, and the American Association of Museums (AAM) adopted the 1999 Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era.<sup>10</sup> The AAM and AAMD govern museum accreditation, lending legitimacy crucial for securing relationships with donors or other museums.<sup>11</sup>

In 2016, following complaints of museums hiding behind procedural defenses to avoid litigating on the merits, the Holocaust Expropriated Art Recovery Act (HEAR Act) established a uniform federal six-year statute of limitations for Nazi-looted art claims, beginning from the claimant's actual discovery of the artwork.<sup>12</sup> However, the HEAR Act did not create new or stronger legal bases for claims.<sup>13</sup> The HEAR Act is due to expire at the end of 2026, yet a 2025 World Jewish Restitution Organization Report found that U.S. museums hold over 100,000 objects potentially looted during the Holocaust-era.<sup>14</sup> Much has yet to be restituted.

### III. THE LAW AS IT STANDS

The lobbying behind the HEAR Act represents a commonplace critique against museums for prevailing on procedural defenses in Nazi-confiscated art restitution cases. Under U.S. law, ownership of

10. Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945) (Ass'n of Art Museum Dirs. 1998); Douglas Davidson, Special Envoy for Holocaust Issues, Bureau of European and Eurasian Affairs, Remarks at the International Symposium on Alternatives to Litigation in Nazi-Looted Art Disputes (Nov. 27, 2012), <https://2009-2017.state.gov/p/eur/rls/rm/2012/201790.htm>; Unlawful Appropriation of Objects During the Nazi Era, Am. Alliance of Museums, (Nov 1999) (available at <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/unlawful-appropriation-of-objects-during-the-nazi-era/>).

11. Am. All. Museums, <https://www.aam-us.org/> (last visited Dec. 10, 2025); Ass'n of Art Museum Dirs., <https://aamd.org/> (last visited Dec. 10, 2025).

12. Holocaust Expropriated Art Recovery Act of 2016, § 5(a), 22 U.S.C. § 1621 note (Supp. V 2022); Cronin, *supra* note 1, at 515 – 7.

13. *Id.*, at 522; Jennifer Anglim Kreder, *Federal Holocaust-Era Art Cases Filed by Survivors and Heirs Since Austria Returned Klimts to Maria Altmann in 2006*, (Nov. 17, 2021) (available at <https://ssrn.com/abstract=1636295>).

14. HEAR Act, § 5(g), 22 U.S.C. § 1621 note (Supp. V 2022); Press Release, Congresswoman Laurel Lee, *Congresswoman Laurel Lee Introduces Bill to Help Holocaust Survivors and Families Reclaim Stolen Art* (Jun. 27, 2025), <https://laurelee.house.gov/media/press-releases/congresswoman-laurel-lee-introduces-bill-help-holocaust-survivors-and-families>; World Jewish Restitution Org., *Report on the Extent of Provenance Research Regarding Nazi-looted Cultural and Religious Property in U.S. Museums* (Sept. 25, 2025) (available at <https://art.claimscon.org/advocacy/provenance-research-in-u-s-museums/>) (figure includes works created before 1946, acquired after 1932, that changed ownership between 1932 and 1946, and might have been in continental Europe during those dates).

stolen works cannot transfer even to a good faith purchaser unless the applicable statute of limitations has expired.<sup>15</sup> In the absence of a federal right of action governing restitution, claimants of allegedly looted artwork generally seek judicial remedies under state actions of replevin and conversion.<sup>16</sup> These actions are subject to state statutes of limitations, generally barring owners from bringing or succeeding on claims after a certain period of time, varying from state to state, has lapsed.<sup>17</sup> Additionally, the doctrine of laches provides an affirmative defense that allows a (bona fide) purchaser museum to retain works after proving owners' unreasonable delay in bringing a claim and the prejudice resulting from that delay.<sup>18</sup>

Rationales for statutes of limitations include protecting defendants from claims weakened by deteriorating evidence and promoting free trade by providing good title after a certain period has lapsed.<sup>19</sup> Thus, the statute of limitations period illustrates what the law has determined is "just and fair" in restitution claims.

In *Toledo Museum of Art v. Ullin*, the court ruled that claims by Martha Nathan's heirs were time-barred because the Toledo Museum had labeled the work as having Nazi-era provenance, which, combined with the fact that Nathan had previously made claims to Nazi-looted art, should have caused reasonably diligent owners to discover the Museum's possession of the work earlier. The Court rejected arguments that adopting the AAM Guidelines constituted a waiver of procedural defenses, concluding that the Guidelines provided only "moral assistance", not legal obligations.<sup>20</sup>

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15. U.C.C. § 2-403(1); Ralph L. Lerner & Judith Bresler, *Theft, Forgery, Authenticity, and Statutes of Limitations*, in ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS & ARTISTS 264, 266 (Practicing Law Inst., 3d ed. 2005).

16. Thompson, *supra* note 1, at 419 – 21. The tort of conversion refers to wrongful interference with property; an action for replevin provides claimants with the remedy of repossession, while conversion allows for claimants to recover monetary damages. RESTATEMENT (SECOND) OF TORTS § 222A (1965) ("conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel"); *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311 N.E.2d 447 (1991); Lerner & Bresler, *supra* note 15, at 267.

17. Lerner & Bresler, *supra* note 15, at 267.

18. *Id.*, at 272 – 73, 279; Alexandra Minkovich, *The Successful Use of Laches in World War II-Era Art Theft Disputes: It's Only a Matter of Time*, 27 COLUM. J.L. & ARTS 349, 350 (2004).

19. *Id.*, at 267; Thompson, *supra* note 1, at 421.

20. *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 808 – 9 (N.D. Ohio 2006); Katharine N. Skinner, *Restituting Nazi-Looted Art: Domestic, Legislative and Binding Intervention to Balance the Interests of Victims and Museums*, 15 VAND. J. ENT. & TECH. L. 673,

Similarly, in *Zuckerman v. Metropolitan Museum of Art*, the court dismissed a claim brought under the statute of limitations specified by the HEAR Act, ruling that the Metropolitan Museum of Art's (the Met) assertion of a laches defense could nonetheless time-bar the claim.<sup>21</sup> The Toledo Museum of Art and Met cases illustrate what critics have deemed as violations by museums of their ethical obligations.

#### IV. MUSEUMS AS FIDUCIARIES

Museums in the U.S. are quasi-public institutions.<sup>22</sup> Generally organized as private nonprofit corporations or charitable trusts, museums receive tax-exempt status under § 501(c)(3) of the Internal Revenue Code.<sup>23</sup> The federal tax code incentivizes private giving on the premise that museums serve educational purposes, constituting an important public "good".<sup>24</sup> In *Museum of Fine Arts v. Seger-Thomschitz*, Seger-Thomschitz argued that the statute of limitations was preempted by federal interests in ensuring tax-exempt entities provided the public benefits necessary to justify their status.<sup>25</sup> Allowing museums to hide behind a favorable statute of limitations undermined the rationale for their tax exemption. The court rejected the argument, reasoning that public interest was adequately protected by alternative mechanisms including the common law fiduciary duties of museum trustees. If fiduciary duties indeed protect the public interest, as the court maintained, then museums must honor those duties in full, not selectively invoke them only when doing so protects their economic interests.

Yet, museums routinely invoke fiduciary duties to justify the very procedural defenses that avoid serving the public interest. Consistent

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702 (2013); Emily A. Graefe, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. REV. 473, 506 (2010).

21. *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186 (2d Cir. 2019), cert. denied, 140 S. Ct. 1269 (2020).

22. Robert C. Lind, Robert M. Jarvis, and Marilyn E. Phelan, *Organizational Structures of Museums*, in ART AND MUSEUM LAW: CASES AND MATERIALS 451 – 69 (2004).

23. Internal Revenue Code, 26 U.S.C. § 501(c)(3); Exemption Requirements, I.R.S., <https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-501c3-organizations> (last visited Aug. 20, 2025); Marilyn E. Phelan, *Governance Principles for Museum Officials and Accounting for Museums*, in MUSEUM LAW: A GUIDE FOR OFFICERS, DIRECTORS, AND COUNSEL 19, 20 – 21 (Rowman & Littlefield, 4d ed. 2014).

24. Stephen Weil, *Tax Policy and Private Giving*, in A CABINET OF CURIOSITIES: INQUIRIES INTO MUSEUMS AND THEIR PROSPECTS 157 (Smithsonian Inst. 1995).

25. *Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010), aff'g 610 F. Supp. 2d 151 (D. Mass. 2009), cert. denied, 562 U.S. 1271, 131 S. Ct. 1612 (2011); Skinner, *supra* note 20, at 691.

with the public role of the museums which they govern, museum trustees and directors owe fiduciary duties of loyalty and care to serve the public interest.<sup>26</sup> The duty of loyalty requires trustees to act in the public's best interests when administering museum assets.<sup>27</sup> The duty of care requires prudent management of those assets, including collections and funds.<sup>28</sup> Trustees satisfy fiduciary obligations by making reasonably prudent judgments or seeking judgment from proper professionals, but are not responsible for poor outcomes which may arise out of those judgments.<sup>29</sup> The business judgment rule protects trustees who use appropriate processes rather than achieve optimal results.<sup>30</sup> Fiduciary compliance therefore requires procedural legitimacy.

Fiduciary duties are often implicated in acts of deaccessioning, or the permanent removal of objects from museums' collections.<sup>31</sup> As restitution necessarily deaccessions works from the public domain, museum trustees may breach their duty of loyalty in authorizing improper restitution.<sup>32</sup> The duty of care to preserve museum assets may also be breached because the value of trust property held decreases and significant financial resources are often spent on researching provenance and defending against litigation.<sup>33</sup> Failure to maintain operating expenses can constitute a breach of fiduciary duties, threatening the very purpose served by the establishment of the museum.<sup>34</sup> Museum trustees may

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26. Goldstein & Weitz, *supra* note 2. This paper does not address the distinction between the charitable corporation and trust structures as its varying effect on standards for fiduciary compliance is not relevant to the assertion that the boards of either form of museum are subject to procedural legitimacy. For a greater discussion, see Jennifer L. White, *When it's OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041, 1049 – 1051 (1996) (discussing the debate over applicable fiduciary standards for museum directors).

27. White, *supra* note 26, at 1052 – 1053.

28. *Id.*; Patty Gerstenblith, *The Fiduciary Duties of Museum Trustees*, 8 COLUM. J. ART & L. 175 (1983).

29. White, *supra* note 26, at 1053; Daniel Fincham, *Deaccession of Art and the Public Trust*, 16 ART ANTIQUITY & L. 1, 16 (2011); Steven L. Katz, *Museum Trusteeship: The Fiduciary Ethic Applied*, 16 J. ARTS MGMT. & L. 57, 68 (1987).

30. *Id.*; *Cheff v. Mathes*, 199 A.2d 548, 555 (Del. 1964).

31. Marie C. Malero & Ildiko Pogány DeAngelis, *The Disposal of Objects: Deaccessioning*, in A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 248, 259 (Smithsonian Books 2012).

32. Daniel Range, *Deaccessioning and Its Costs in the Holocaust Art Context: The United States and Great Britain*, 39 TEX. INT'L L.J. 655, 658 (2004).

33. *Id.*, at 664; Graefe, *supra* note 20, at 498.

34. White, *supra* note 26, at 1060; *Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010), *aff'g* 610 F. Supp. 2d 151 (D. Mass. 2009), *cert. denied*, 562 U.S. 1271, 131 S. Ct. 1612 (2011).

thus have duties to defend the museum against claims threatening deaccessioning.<sup>35</sup>

Aside from direct expenditures, public disputes about unpopular deaccessions carry reputational risk, potentially decreasing attendance revenue or donations.<sup>36</sup> In the restitution context, however, “claims invert the typical deaccession framework” and “public opinion turns largely in favor of the deaccession.”<sup>37</sup> One critique found that “restitution tactics are almost like blackmail because museums are so afraid of the bad publicity, they feel they have no choice.”<sup>38</sup> On the other hand, good publicity for successful restitution fails to relieve museums of financial loss of the trust property.<sup>39</sup>

“Ethics can be expensive,” and “legal arguments against deaccession may very well be appropriated by the museum in order to avoid confronting the Holocaust claim.”<sup>40</sup> Thus, arguments against litigating on the merits are generally financial. Literature supporting museums’ positions generally stands on financial considerations, asserting fiduciary duties may obligate invoking procedural defenses to prevent “unnecessarily devoting trust assets to avoidable litigation.”<sup>41</sup> The current litigation framework is unfit to handle the complexity of interests at play in restitution claims.<sup>42</sup> Judicial solutions have been subject to much criticism for failing to strike an adequate balance of what is “just and fair.”<sup>43</sup> Further, a successful framework requires acknowledging

35. Graefe, *supra* note 20, at 499.

36. Range, *supra* note 32, at 658; James R. Goldstein, *Deaccession: Not Such a Dirty Word*, 15 CARDOZO ARTS & ENT. L.J. 213, 226 (1997).

37. *Id.*

38. John Follain, *Trader of the Lost Art*, LONDON SUNDAY TIMES (Sep. 24, 2006), [https://www.thetimes.com/comment/register/article/trader-of-the-lost-art-w59g8mhpzfb?gaa\\_at=eafs&gaa\\_n=AWetsqeP0Ny-tqlRfVGqOdeRgzNyt5ZAYZp5yWb5Fut-wvy226ZR7ODhOVsf0JFDKRw7g%3D&gaa\\_ts=69361bf1&gaa\\_sig=IsmcSZM5ne13qDWXooQHW6IPMG\\_vmxO3lf1kC-yOh6wNVVp9NvexRjxRL4jBRgFGvG6nKcO6sirdb4SeucAMIQ%3D%3D](https://www.thetimes.com/comment/register/article/trader-of-the-lost-art-w59g8mhpzfb?gaa_at=eafs&gaa_n=AWetsqeP0Ny-tqlRfVGqOdeRgzNyt5ZAYZp5yWb5Fut-wvy226ZR7ODhOVsf0JFDKRw7g%3D&gaa_ts=69361bf1&gaa_sig=IsmcSZM5ne13qDWXooQHW6IPMG_vmxO3lf1kC-yOh6wNVVp9NvexRjxRL4jBRgFGvG6nKcO6sirdb4SeucAMIQ%3D%3D).

39. Range, *supra* note 32, at 665.

40. *Id.*

41. See generally Simon J. Frankel & Ethan Forrest, *Museums’ Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitations in Response to Nazi-Era Art Restitution Claims—A Defense*, 23 DEPAUL J. ART, TECH. & INTELL. PROP. L. 279 (2013); Range, *supra* note 32.

42. Benjamin E. Pollock, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 HOUS. L. REV. 193, 226 (2005).

43. See generally Ashton Hawkins, Richard A. Rothman & David B. Goldstein, *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49 (1995).

competing fiduciary considerations museums face in deaccessioning.<sup>44</sup> Well in the company of other scholarship, this paper proposes that submitting restitution claims to arbitration would best address these concerns.

## V. INTEREST IN ARBITRATION

This proposal is brought against a backdrop of increasing interest in arbitration as a form of dispute resolution for cultural heritage-related claims. Article 8(2) of the 1995 UNIDROIT Convention provides for arbitration, but is inapplicable to Nazi-confiscated art due to its statutory limitations provisions.<sup>45</sup> Article 11 of the Washington Principles themselves urged states to develop ADR mechanisms for Holocaust-era looted art.<sup>46</sup> Following the Washington Conference, the subsequent Vilnius International Forum on Holocaust Era Looted Cultural Assets made little progress beyond emphasizing the need for nations to implement ADR processes.<sup>47</sup> Some states did so, with the creation of the Austrian, Swiss and French mechanisms (1999), the UK Spoliation Advisory Panel (2000), the Dutch Restitutions Committee (2001), and Germany's Beratende Kommission (2003).<sup>48</sup>

Germany's Beratende Kommission was initially limited to non-binding mediation; in 20 years it issued only 23 recommendations.<sup>49</sup> Criticism that the existing framework failed to provide a "fair and just solution" prompted Germany's Minister of State for Culture and the Media to champion reform favoring unilateral access to binding arbitration, allowing claimants to compel federally-owned German museums to submit to the jurisdiction of arbitral tribunals.<sup>50</sup> Within the U.S.,

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44. Range, *supra* note 32, at 656.

45. Roodt, *State Courts or ADR*, *supra* note 2, at 442.

46. Washington Conference Principles on Nazi-Confiscated Art, U.S. Dep't of State (Dec. 3, 1998), <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art>.

47. Range, *supra* note 32, at 669; Graefe, *supra* note 20, at 504.

48. Evelien Campfens, *Nazi-Looted Art: A Note in Favour of Clear Standards and Neutral Procedures*, 22 ART ANTIQUITY & L. 315, 332 (2017).

49. Stephan Wilske & Konstantin Schönleber, *Germany's Lost Art Arbitration: Towards a Just and Fair Solution for Nazi-Confiscated Art?*, KLUWER ARB. BLOG (May 23, 2025), <https://legalblogs.wolterskluwer.com/arbitration-blog/germanys-lost-art-arbitration-towards-a-just-and-fair-solution-for-nazi-confiscated-art/>.

50. *Id.*; Catherine Hickley, *German Culture Minister Implements Changes to Ease Restitution of Nazi-Looted Art*, THE ART NEWSPAPER (Jan. 3, 2024), <https://www.theartnewspaper.com/2024/01/03/german-culture-minister-implements-changes-to-ease-restitution-of-nazi-looted-art>; Catherine Hickley, *Germany Approves Tribunal to Decide Nazi-*

calls for similar binding mechanisms have been made.<sup>51</sup> U.S. Special Envoy for Holocaust Issues, Douglas Davidson suggested that museums' public duties, informed by ethical codes, effectively created a duty to favor ADR over litigation.<sup>52</sup> Indeed, the 1998 AAMD Report strongly recommended the creation of a mechanism for alternative dispute resolution.<sup>53</sup>

Proposals for the creation of an international tribunal face difficulties reconciling differing civil and common law traditions on substantive treatment of the bona fide purchaser or the definition of duress, or rules of procedure governing discovery.<sup>54</sup> Given the time pressures of Nazi-looted art claims, including the HEAR Act's impending expiry, anticipating international agreement is unrealistic.<sup>55</sup> Domestic binding mechanisms are equally unfeasible, as U.S. museums differ organizationally from most civil jurisdictions.<sup>56</sup> Under the new German reform, for example, only museums owned by the state must issue standing offers to arbitrate.<sup>57</sup> Comparatively, the merely quasi-public structure of most museums in the United States means that

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*Looted Art Claims*, N.Y. TIMES (Jan. 9, 2025), <https://www.nytimes.com/2025/01/09/arts/germany-nazi-looted-art-restitution-panel.html>.

51. See generally Pell, *supra* note 4; Jennifer Anglim Kreder, *Reconciling Individual and Group Justice With the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal*, 73 BROOKLYN L. REV. 155 (2007), <https://ssrn.com/abstract=982658>; Rebecca Keim, *Filling the Gap Between Morality and Jurisprudence: The Use of Binding Arbitration to Resolve Claims of Restitution Regarding Nazi-Stolen Art*, 3 PEPP. DISP. RESOL. L.J. 295 (2003).

52. Davidson, *supra* note 10; Frankel, *supra* note 41, at 297. See Stuart E. Eizenstat, Head of the U.S. Delegation to the Prague Holocaust Era Asset Conference, Bureau of European and Eurasian Affairs, Open Plenary Session Remarks (Jun. 28, 2009), <https://2009-2017.state.gov/p/eur/rls/rm/2009/126158.htm> (Former Ambassador Stuart Eizenstat, Special Representative of the President and Secretary of State on Holocaust Issues during the Clinton administration, urged the creation of an alternative dispute resolution mechanisms in line with the Washington Principles).

53. AAMD Report, *supra* note 10.

54. See generally Pell, *supra* note 4; Roodt, *State Courts or ADR*, *supra* note 2; Campfens, *supra* note 48, at 334. See also Federica Violi & Antonio Cappuccio, *The Court of Arbitration for Art (CAfA): A Conversation with Bert Demarsin*, LAWART (2023), [https://www.lawart.it/Article/Archive/index\\_html?id=72&idn=4&idi=-1&idu=-1](https://www.lawart.it/Article/Archive/index_html?id=72&idn=4&idi=-1&idu=-1) (addressing difficulties that stand in the way of comprehensive binding agreements for the international community).

55. Roodt, *State Courts or ADR*, *supra* note 2, at 443.

56. See generally Pollock, *supra* note 42; Jessica Mullery, *Fulfilling the Washington Principles: A Proposal for Arbitration Panels to Resolve Holocaust-Era Art Claims*, 11 CARDOZO J. CONFLICT RESOL. 643, 654–5 (2010).

57. Hickley, *supra* note 50.

government intervention is limited, occurring largely only through economic incentivization.<sup>58</sup>

Ad hoc arbitration, characterized by the requirement for consent of the parties, should be considered.<sup>59</sup> As restitution claims do not arise out of existing contracts, an arbitral tribunal's jurisdiction requires museum consent ex post facto, after a claim has arisen.<sup>60</sup> Given the availability of technical defenses and their success in extinguishing litigation, museums prima facie may not appear willing to resolving disputes by alternative methods.<sup>61</sup> This paper proposes that museums have an interest in consenting to arbitration as certain features help prevent reputational risk associated with public breaches of fiduciary duties while lowering costs of adjudicating on the merits.

## VI. WHY MUSEUMS SHOULD CONSENT

If museum boards were truly concerned with their fiduciary duties, consenting to arbitration offers an ethical alternative to asserting procedural defenses in litigation. Museums cannot selectively invoke fiduciary principles to protect economic interests while ignoring broader duties toward institutional legitimacy and public trust.

### A. *The Duty of Loyalty Requires Procedural Legitimacy*

The duty of loyalty requires maintaining institutional legitimacy and public trust, essential assets enabling museums to fulfill their educational and cultural missions.<sup>62</sup> When museums use procedural defenses to avoid adjudicating Holocaust-era restitution claims on their merits, they may undermine this legitimacy by violating the professional ethical standards they adopted. Where AAM and AAMD Guidelines commit museums to “fair and just” resolutions, such behavior may undermine relationships of trust developed with donors and other institutions.<sup>63</sup> Following *Museum of Fine Arts v. Seger-Thomschitz*,<sup>64</sup> museums systematically avoiding litigating on the merits arguably fail to serve the charitable purpose justifying their IRC § 501(c)(3) tax

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58. Lind et al., *supra* note 22, at 451 – 7.

59. Christa Roodt, *Private International Law, Art and Cultural Heritage* 151, 201 (Edward Elgar Publishing 2015).

60. Isabelle Fellrath Gazzini, *Cultural Property Disputes: The Role of Arbitration in Resolving Non-Contractual Disputes* 124 (Transnational Publishers 2004).

61. Roodt, *State Courts or ADR*, *supra* note 2, at 456, 462 (“Soft law will not reverse the preference for court action when procedural advantages tempt the possessor”)

62. See generally White, *supra* note 26; Gerstenblith, *supra* note 28.

63. AAMD Report, *supra* note 10; AAM Guidelines, *supra* note 10.

benefits.<sup>64</sup> When museums appear to hide behind technicalities, they erode their relationship with the public, manifesting in decreased donations and diminished attendance.<sup>65</sup> Additionally, the educational value of a collection asset may be undermined when its unclear provenance raises questions about the museum's commitment to its ethical standards.<sup>66</sup>

### B. *The Duty of Care Encompasses Reputational Capital*

When museums use their duties to preserve collections and avoid costly litigation as justification, they narrow the scope of how museum assets may be defined, ignoring the fact that reputational capital itself is a museum asset requiring protection. Referring to Kennedy's quote on the penalty of "los[ing] one's good name in the art world," donations, grants, attendance revenue, the willingness of other institutions to lend works, and AAM/AAMD accreditation are conditioned on museum reputation.<sup>67</sup> Where significant negative publicity is generated, museums may cost themselves more in lost donations and attendance than works are worth, especially considering the long-term health of the institution.

## VII. FEATURES OF ARBITRATION

### A. *Flexibility, Expertise and the Perceived Neutrality of the Arbitral Forum*

Arbitration's flexibility manifests in various forms.<sup>68</sup> Parties may decide their own procedural rules, including alternative discovery or disclosure.<sup>69</sup> Parties may vary the applicable law to include greater consideration of soft law guidelines or the ability of an arbitrator to decide *ex aequo et bono* or as *amiable compositeur*, on the basis of fairness. To accommodate the wide discretion afforded to arbitrators, parties are free to choose specialist arbitrators familiar with the principle of fairness in restitution. Finally, parties may choose to keep proceedings and awards confidential.

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64. *Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010).

65. Range, *supra* note 32, at 658; Goldstein, *supra* note 36, at 226.

66. Charly Wilder, *When a Visit to the Museum Becomes an Ethical Dilemma*, N.Y. TIMES (Feb. 14, 2023) <https://www.nytimes.com/2023/02/14/travel/museums-stolen-art.html> (last updated Jun. 20, 2023).

67. Kennedy, *supra* note 3.

68. Roodt, *State Courts or ADR*, *supra* note 2, at 440.

69. *Id.*

Courts' acceptance of procedural defenses indicates a greater judicial unwillingness to assess the merits of the claim.<sup>70</sup> Courts have also noted that the lack of legislation simply pushes the delineation of what is "just and fair" from the executive to the courts.<sup>71</sup> The U.S. approach largely leaves that determination to professional institutions, such as the AAM, through ethical guidelines and professional codes.<sup>72</sup>

Unlike state judges bound by forum conflict-of-laws rules, international arbitrators derive authority from the consent of the parties, and thus are free to determine the applicable law on the basis of the parties' agreement.<sup>73</sup> Arbitrators need not adjudicate based on any given law but may proceed on the basis of general principles of international law or industry standards found in *lex mercatoria*, thus accommodating the soft law instruments primarily guiding restitution in the U.S., including the Washington Principles or AAM/AAMD Guidelines, which otherwise lack legally binding force.<sup>74</sup> Particularly, the 1995 UNIDROIT Convention constituted exactly the *lex mercatoria* appropriate for cultural property transactions, being derived from trade usage and recognized as international law.<sup>75</sup> In arbitration, parties may agree for tribunals to determine awards solely on the basis of what is "just and fair" based on the principles of *ex aequo et bono* or *amiable compositeur*, implementing the guiding Washington Principles.<sup>76</sup> Arbitrators would not be strictly bound by state statutes of limitations. Thus, not only would consenting to arbitration address the main critique of asserting procedural defenses, but also help museum trustees satisfy their fiduciary duties by following their professional and ethical standards of conduct.

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70. Campfens, *supra* note 48, at 325.

71. *Von Saber v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2010); see also Skinner, *supra* note 20, at 704 (discussing the necessity for federal legislature to weigh the policy decisions).

72. Mullery, *supra* note 56, at 659.

73. Gazzini, *supra* note 60, at 96–9.

74. Roodt, *State Courts or ADR*, *supra* note 2, at 430–31; *Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010), *aff'g* 610 F. Supp. 2d 151 (D. Mass. 2009), cert. denied, 562 U.S. 1271, 131 S. Ct. 1612 (2011); Law here is defined as a set of rules which are exhaustive, meaning any issues may be resolved by reference to the rules themselves and need not require reference to any external sources. See generally Franco Ferrari & Linda J. Silberman, *Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong*, in CONFLICT OF LAWS IN INTERNATIONAL COMMERCIAL ARBITRATION 371, 394 (Franco Ferrari & Stefan Kröll eds., 2d ed. 2019).

75. Gazzini, *supra* note 60, at 103.

76. Roodt, *State Courts or ADR*, *supra* note 2, at 440.

The flexibility to appoint arbitrators familiar with the historical complexities of restitution cases would also assist in the determination of “just and fair.” A common critique of litigation finds that courts lack the specialist expertise required to adjudicate restitution disputes.<sup>77</sup> By submitting claims to specialist arbitrators better acquainted with the contours of the art industry, museum trustees satisfy their duty of care, qualified by the business judgment rule, to reach informed judgments on the merits. The flexibility of arbitral awards can accommodate creative solutions commonly seen in settlements.<sup>78</sup>

Using arbitration processes, including consideration of soft law principles and arbitrator expertise, would reinforce the perception of neutrality.<sup>79</sup> Though dependent on the perceived impartiality of the appointed arbitrators, the public conception of arbitration as a neutral forum may derive simply from the act of adjudicating on the merits.<sup>80</sup> On its face, arbitration affords greater consideration to the principle of “just and fair,” insulating museums from reputational risk and resulting economic harm.

#### B. *Cost, Control, and Confidentiality*

While arbitration is not guaranteed to be speedier or more cost-effective than litigation, certain features nonetheless prove advantageous over litigation.<sup>81</sup> The flexible nature of arbitration lowers costs by streamlining disputes. Determining alternative standards may lower associated legal costs. Expert arbitrators familiarize themselves with the facts may reach conclusions on the merits of the claim faster than judges.<sup>82</sup>

Arising from the contractual nature of arbitration and the widespread system of enforcement of arbitral awards afforded by the New York Convention today, the binding nature of arbitral awards preserves the finality of disputes.<sup>83</sup> Additionally, the grounds for appealing an

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77. Keim, *supra* note 51, at 309, 313; Alan G. Artner, *Ethics and Art Museums Struggle For Correct Response to Stolen Art Claims*, CHI. TRIB., Aug. 16, 1998.

78. See Nathan Murphy, *Splitting Images: Shared-Value Settlements in Nazi-Era Art Restitution Claims*, 3 FLA. ENT. L. REV. 41 (2009), for greater discussion of types of settlements.

79. Gazzini, *supra* note 60, at 104.

80. For arbitrator impartiality, see Catherine A. Rogers, *The Arrival of the “Have-Nots” in International Arbitration*, 8 NEV. L.J. 341 (2007); Catherine A. Rogers, *Reconceptualizing the Party-Appointed Arbitrator and the Meaning of Impartiality*, 64 HARV. INT’L L.J. 137 (2023).

81. Gazzini, *supra* note 60, at 109.

82. Roodt, *Private International Law*, *supra* note 59, at 155.

83. Gazzini, *supra* note 60, at 79 – 81.

arbitral award are greatly limited compared to the rights of appeal in litigation. These features bring disputes to an earlier conclusion through arbitration rather than by litigation.<sup>84</sup>

Restitution claims are often tried in the press, increasing reputational risk and associated economic costs for museums.<sup>85</sup> Media coverage often cements parties into opposing viewpoints, bringing parties further away from settlement, generally regarded as the cheapest method of dispute resolution.<sup>86</sup> Arbitration offers a less adversarial forum.<sup>87</sup> Though restitution claims are characterized by information asymmetries, arbitration's private nature may increase the willingness of parties to disclose documents, and greater information sharing, in turn, may increase the likelihood of settlement.<sup>88</sup>

Arbitration is private but not necessarily confidential.<sup>89</sup> Parties must explicitly agree to keep documents disclosed during discovery or the terms of the arbitral award confidential.<sup>90</sup> However, the degree of confidentiality in arbitration still exceeds that of court proceedings due to the inherent lack of media coverage in arbitration and the absence of any general practice of publishing awards.<sup>91</sup> While disputes over arbitral awards may end up in litigation (and the press) in certain instances, the avenues for reviewing an arbitrator's decision are limited, decreasing the confidence and frequency of parties in pursuing judicial review.<sup>92</sup>

Given the particular sensitivity of post-conflict restitution disputes, both sides often have interest in confidentiality. Museums wish to protect against negative public exposure, which may arise even when they possess valid claims. Individual claimants may not wish for sensitive details of their lives to be scrutinized through documents made publicly available during litigation.<sup>93</sup> Other claimants may wish to use public exposure as a tactic to pressure museums into settlement. Hence

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84. For example, the Schoeps line of cases lasted over five decades. *See, Museum of Modern Art v. Schoeps*, 549 F. Supp. 2d 543 (S.D.N.Y. 2008); *Schoeps v. Andrew Lloyd Webber Art Found.*, No. 116768/06, 2007 WL 4098215 (N.Y. Sup. Ct. Nov. 19, 2007); *Schoeps v. Museum of Modern Art*, (594 F. Supp. 2d 461 (S.D.N.Y. 2009).

85. Artner, *supra* note 77, quoting James Wood, Director of the Art Institute of Chicago.

86. *Id.*; Roodt, *State Courts or ADR*, *supra* note 2, at 454.

87. Keim, *supra* note 51, at 313.

88. Roodt, *State Courts or ADR*, *supra* note 2, at 440, 455; Gazzini, *supra* note 60, at 57 – 58.

89. *Eso Australia Resources Ltd. v. Plowman* (1995) 183 CLR 10.

90. *Id.*

91. Gazzini, *supra* note 60, at 78.

92. Gazzini, *supra* note 60, at 106.

93. Keim, *supra* note 51, at 313.

a trade-off is proposed: confidentiality may be bargained for in an arbitration agreement in exchange for a concession by museums to adjudicate claims on the merits.

Procedural legitimacy protects trustees from breaches of fiduciary duties. If museums are genuinely concerned about fiduciary obligations, they should consent to arbitration. By allowing for application of the AAM Guidelines, arbitration allows museums to comply with the ethical principles they have adopted. Through the flexibility to appoint arbitrators, museums will have obtained advice from decision-makers with the relevant expertise to determine restitution claims. Yet, the cost-effective features of arbitration allow trustees to balance economic considerations. Thus, arbitration allows trustees to satisfy both their duty of loyalty, by honoring ethical commitments and maintaining public trust, and their duty of care, by using prudent processes and protecting reputational capital.

#### VIII. CONCLUSION

Museums and claimants share common goals of “just and fair solutions.” Museums may feel equally uncomfortable holding Nazi-looted artwork; as the former Met director stated, “[n]one of us wants to have demonstrably stigmatized works of art hanging on our walls.”<sup>94</sup> As part of their fiduciary duties, museum boards owe a duty of care to manage museum assets for public trust.<sup>95</sup> Arbitration provides a mechanism for balancing competing considerations trustees face in addressing restitution disputes by preventing claims from being adjudicated in two undesirable arenas: dismissal on procedural grounds and adjudication in the media.

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94. Kurt Siehr, *Resolution of Disputes in International Art Trade, Third Annual Conference of the Venice Court of National and International Arbitration: Venice, Italy (September 29-30, 2000) Conference Reports*, 10 INT'L J. CULTURAL PROP. 122 (2001); Judith H. Dobrzynski, *Museums Call for System to Address Nazi Booty*, N.Y. TIMES, Feb. 5, 1998; Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes over Title*, 31 N.Y.U. J. INT'L L. & POL. 15 (1998).

95. Gerstenblith, *supra* note 28.