

Kluwer Arbitration Blog

Germany's Lost Art Arbitration: Towards a Just and Fair Solution for Nazi-Confiscated Art?

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On March 26, 2025, the German Federal Government, the federal states (*Länder*), and municipal organizations [have entered into an agreement](#) to establish arbitral proceedings for claims concerning Nazi-confiscated art. This article endeavors to show the cornerstones of the new arbitration procedure as well as to highlight some possible weak points of this reform.

Lost Art Arbitration – The Next Step Towards Restitution

From 1933 to 1945, thousands of pieces of art were confiscated or sold under duress by those persecuted by the Nazi regime (“Lost Art”). To address this injustice, 43 nations and 13 non-governmental organizations signed the [Washington Conference Principles on Nazi-Confiscated Art](#) in 1998, expressing their intent to take steps “to achieve a just and fair solution” for these cases. As a consequence, Germany created the [Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property](#) (“Advisory Commission”) in 2003.

The Advisory Commission, however, is restricted to the role of a mediator issuing non-binding recommendations. Furthermore, it can only commence proceedings with the consent of both parties. For this reason, it has been criticized as inadequate for the purpose of achieving just and fair solution in Lost Art cases.

On October 9, 2024, the federal government of Germany, the federal states (*Länder*) and municipal organizations have decided to disband the Advisory Commission and to establish an arbitral institution in its place. A binding agreement has been entered into on March 26, 2025 along with the [publication of the arbitration rules and a framework for the arbitrators](#).

Cornerstones of the Reform

The reform aims to improve, facilitate, and quicken the restitution of Nazi-confiscated art. The newly established arbitral tribunals will be able to issue binding arbitral awards pursuant to Sect. 1055 of the German Civil Code of Procedure (“ZPO”).

An arbitral institution will be established at the [German Lost Art Foundation](#) in Magdeburg. The seat of the institution will be Berlin, while the Higher Regional Court of Frankfurt am Main will have jurisdiction with regard to the enforcement of the arbitration agreement, challenges to jurisdiction, etc.

The federal government as well as the federal states will issue standing offers for an arbitration agreement so that claimants can commence arbitral proceedings without further negotiation. It will also be possible for non-state respondents to enter into an arbitration agreement to have their case decided by an arbitral tribunal of the new institution.

Appointment of Arbitrators

Each arbitral tribunal will consist of five arbitrators. Three of them have to be lawyers, while the other two must be historians with particular knowledge about National Socialism. Each party will nominate one lawyer and one historian, who in turn elect an additional lawyer, preferably a German judge, as president of the tribunal.

Parties will, however, be restricted to a list of 36 potential arbitrators, 22 of which lawyers and 14 historians. Six candidates each will be nominated by the federal government, the federal states, and municipal organizations, nine candidates each by the [Jewish Claims Conference](#), and the Central Council of Jews in Germany. Other associations representing victims of Nazi persecution will not be able to nominate candidates.

Arbitral Procedure

The procedure will be governed by the arbitration rules, and, subsidiarily, by the ZPO. Language of the proceedings will be German, but pieces of evidence can also be submitted in other languages. Proceedings will be public only if the parties agree. The arbitral award has to be published, but the parties can demand anonymization. If the respondent is a public institution (as will usually be the case), the arbitral proceedings can only commence after the claimant has unsuccessfully petitioned the institution for restitution.

The Framework for the Arbitrators – A Masked Restitution Law

Besides the possibility of the claimants to start arbitration proceedings unilaterally and with the result of a binding award, arbitration has been chosen for the Lost Art cases because it makes it possible to choose the law applicable to the substance (Sect. 1051 ZPO).

According to German law, most of the lost art cases are by now settled by usucapion or by statute of limitation. Consequently, the arbitral tribunal will not apply substantial German law. Rather, the arbitration rules prescribe the application of a binding framework that has been created along with the arbitral institution. In essence, this framework fulfils the function of a formal law on the restitution of Nazi-confiscated art.

Loss of Art Due to Nazi Persecution

Pursuant to the framework, the claimant must be someone who has lost a work of art in his property due to Nazi persecution. In some cases, persecution is assumed, for example if the claimant was a Jew in the eyes of Nazi racial legislation. In other cases, persecution has to be proven by the claimant. Legal successors of a persecuted person are also entitled to sue.

Furthermore, there must be a connection between the persecution and the loss of the artwork. If the loss was due to the actions of state authority, the connection is usually presumed. If the artwork has been sold by the claimant, the presumption can be refuted if the respondent proves that the claimant has received adequate compensation at his free disposition.

It has to be determined whether the price corresponds to the price that non-persecuted persons would have achieved for comparable pieces of art – which might prove difficult to determine, given the uniqueness of every work of art. If the sale happened after 1935 (the date of the Nuremberg race laws), even more severe conditions apply.

Burden and Standard of Proof

Given that World War II ended 80 years ago, and considering the loss of data due to war, persecution, and expulsion, questions of evidence are particularly important for the decision of Lost Art cases.

The framework aims to help potential claimants by lowering the standard of proof in different ways: along with several presumptions in their favor, some facts have not to be proven to the full conviction of the tribunal but only be more likely than not. This applies, for example, to the question of whether the artwork in question belonged to the claimant at the time of loss. Furthermore, *prima facie* and circumstantial evidence are both admissible.

Open Questions

It is to be welcomed that Germany has finally taken steps to improve the legal situation that the victims of Nazi persecution face. But questions yet remain.

The first matter concerns the costs of the arbitration. The arbitration rules provide that the procedure itself is free for the parties, but each of them must pay their own costs. Given that lawyers tend to stipulate fees with regard to the (often very high) value of the artwork in question, this might force even successful parties to sell the artwork in order to pay their legal fees. At the same time, the compensation that the arbitrators receive from the state are far lower than those common in international arbitration (EUR 12,000 for the president, EUR 10,000 for the other members of the tribunal). In light of that fact, it will require quite some idealism to serve as an arbitrator.

Furthermore, only the federal government and the federal states will issue standing offers for

arbitration. Neither municipalities nor private owners of Lost Art are bound by the reform. It is to be doubted whether they will conclude arbitration agreements on their own, given the clear claimant-friendly inclination of the arbitration rules and framework. This might lead to many cases where the reform will not benefit the victims of persecution.

Lastly, the reform has often been criticized for its lack of transparency. Federal government, federal state and municipal organization have decided to enact the reform by way of an administrative agreement, thus excluding federal and state parliaments from the preparation of the reform. The arbitration rules and framework have only been published after the administrative agreement had been concluded. Considering the ethical, legal, and historical problems posed by Lost Art, it remains to be seen whether the reform should not have been enacted after the participation of the public as well as interested parties.

The above is an abbreviated version of an article published in the SchiedsVZ | German Arbitration Journal, Vol. 23, No. 2 (2025), which is also included on Kluwer Arbitration. See [here](#) for more information on and other contributions to the Journal.

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The graphic features a dark background with vibrant blue and red digital lines and a glowing padlock icon. A gavel is positioned over a circular area containing a circuit board pattern.

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