UNIVERSITÄT BONN

Rechts- und Staatswissenschaftliche Fakultät
Rechtswissenschaft

RHEINISCHE
FRIEDRICH-WILHELMS-
UNIVERSITÄT BONN

UNIVERSITÄT BONN · Prof. Dr. M. Weller · Adenauerallee 24-42, 53113 Bonn

Prof. Dr. Matthias Weller, Mag.rer.publ.

Alfried Krupp von Bohlen und Halbach-Professur für Bürgerliches Recht, Kunst- u. Kulturgutschutzrecht

Direktor des Instituts für deutsches und internationales Zivilverfahrensrecht

Adenauerallee 24-42
53113 Bonn
Tel. 0228/73-9251
Fax 0228/73-2222
weller@jura.uni-bonn.de

Sekretariat Sabine Bier
Tel. 0228/73-9251
sekretariat.weller@jura.uni-bonn.de

Bonn, 19.03.2024

German "Advisory Commission" to be replaced by an arbitration framework

On Wednesday last week, 13 March 2024, the German Federal Government, the Governments of the Laender and the Representatives of the German Municipalities announced that they agreed on replacing the German "Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property", see here and here (at the moment unfortunately available in German only).

In their Coalition Agreement of 2022 of the current Federal Government, the three governing political parties agreed, on p. 99 (see e.g. here, from the website of the Green Party – the Social Democratic Party, the Green Party and the Liberal Democratic Party all provide for the same document): "We will improve the restitution of Nazi-looted Art by establishing a claim for information ('Auskunftsanspruch'), by excluding time limits for restitution claims ('Verjährung des Herausgabeanspruchs ausschließen'), by striving for a central jurisdiction ('einen zentralen Gerichtsstand anstreben') and by strengthening the 'Advisory Commission' ('die „Beratende Kommission" stärken')." Now all levels of the Federal Republic of Germany have agreed on how improvements with respect to the Advisory Commission will look like.

The German Advisory Commission has so far worked on the basis of non-binding arrangements between the respective levels of sovereign powers within the Federal State, i.e. the "Joint Declaration (Common Statement)" of 1999 to implement the Washington Principles 1998 and the "Accord" of 2003 of all levels of the Federal State to set up the Advisory Commission. From its establishment until its 20th anniversary in 2023, it rendered a little more than 20 recommendations. The low number results from a "principle of subsidiarity" according to which the parties, i.e. claimant and the holding institution are supposed to work on bilateral settlements first, and only if such a bilateral settlement is not achievable, the parties are allowed to submit their case to the Advisory Commission, and they have to do this jointly. Therefore, if one party refuses to consent to go to the Advisory Commission, there is no access. This has been criticized for a long time.

Further, critique was addressed in regard to the rather volatile and unpredictable assessment criteria, on violations of fundamental due process notions as well as on the fact that the recommendations could not be enforced nor be reviewed in an appeal. All of this resulted in a public opinion that things should be improved. Even the Advisory Commission itself issued a "Memorandum", a couple of days before the proceedings for its 20th anniversary had taken place, in which it heavily criticized the state of things, although work on a reform had been already underway. Some observers missed any reflection in this Memorandum on what the Advisory Commission itself could contribute to improve things. Many suggestions in this regard had been on

the table. Therefore, some believed that the Advisory Commission, in essence, asked for its own dissolution.

Be this as it may, now a new approach has been announced to come about, and this is replacing the Advisory Commission by an arbitration framework. In order to evaluate this approach, some basics on arbitration should be recalled:

1. Arbitration is a globally accepted form of alternative dispute resolution. In Articles 10 and 11 of the Washington Principles 1998 as well as the new Washington Principles 2024 ("Best Practices for the Washington Conference Principles on Nazi-Confiscated Art" of 5 March 2024) encourage alternative resolution mechanisms to avoid litigation. Therefore, arbitration is perfectly in line with the spirit of the Washington Principles.

2. Arbitration in Germany takes place on a legislative basis (see sections 1029 et seq. of the German Code of Civil Procedural Law), unlike the current Advisory Commission (a fact that has been criticised).

3. At the same time, this legislative basis allows the parties a lot of freedom to design their proceedings individually. This is a positive feature for the very distinct proceedings on the restitution of Nazi-looted art, as such proceedings certainly require a special design, in order to address the expectations and needs of the claimants.

4. Since an arbitration framework can be implemented on the basis of existing legislation, there is no need for any specific parliamentary legislation like a "Restitution Act" or the like. Rather, it can be implemented very quickly. Current developments both in Israel and Switzerland show how difficult and time-consuming it may be to set up a restitution framework through Parliaments.

5. In many respects, arbitration is equivalent to state court proceedings. In particular, due process guarantees apply, the arbitral award is equivalent to a state court judgment, and the arbitral award will be reviewed by state courts in setting-aside proceedings. These proceedings are limited to – broadly speaking – public policy violations, but serious violations of e.g. due process would be sufficient to set aside the award.

6. After recognition by state courts, the arbitral award can be enforced like a state court judgment, and usually the award is considered res judicata, even by foreign courts. Therefore, after rendering the award, perhaps even as soon as the arbitration agreement is concluded, no subsequent state court proceedings between the same parties on the same subject-matter are admissible, not even in foreign jurisdictions.

7. A particular feature of arbitration is that the parties may choose non-state rules as applicable law. Under German arbitration law, they may even direct the arbitral tribunal to decide "ex aequo et bono", for example on "moral" grounds. This hardly ever happens in international arbitration practice, for good reasons, but it shows again that the legal framework for arbitration is remarkably flexible, and this might well be beneficial for designing a convincing set-up for proceedings on the restitution of Nazi-looted art.

8. Arbitration usually requires consent by both parties to go to arbitration ("arbitration agreement"). Mandatory arbitration, imposed on the parties by legislation, is widely regarded as highly problematic in terms of constitutional guarantees of access to state court proceedings. Rather than rely on mandatory arbitration, all current public owners

could declare to the general public that they offer to go into arbitration as soon as a claimant accepts the offer (*offerta ad incertas personas*; "standing offer").

9. Germany should therefore set up an arbitral institution that (1) provides for templates for such standing offers, (2) a public registry that shows which current owners have bound themselves already, (3) a tailor-made set of arbitration rules, (4) a tailor-made assessment framework. Such an arbitral institution would administer all the proceedings and could function as a kind of central jurisdiction, although under the arbitration model, it is the arbitral tribunals, rather than the administering arbitral institution, that makes decisions.

10. Speaking of arbitral tribunals, a crucial point under any kind of arbitration framework will be choosing suitable arbitrators. In the specific field of Nazi-looted art, I would believe that a closed list would be preferable. The pool of arbitrators must be large enough to give the parties sufficient choices.

11. Awards should be made public. Despite the widespread practice of confidentiality in general arbitration, the specific subject matter of Nazi-looted art requires transparency for all involved: the claimant, the respondent, the Jewish world, the non-Jewish world. On the crucial issue of transparency in this matter see my previous post here.

12. Obviously, special models of cost-bearing and remunerations of the arbitrators must be set up. All costs should be borne by the State, as before.

One might even think about extending this framework to other contexts of injustice such as the colonial contexts. Obviously, other pools of arbitrators would have to be created, as well as other assessment frameworks. However, the overall framework for arbitration would work perfectly well for such other contexts as well. One day, one might even think of an internationalisation of such a framework, e.g. on a European or even global level. Since the cases are inherently cross-border, a cross-border dispute resolution framework would make perfect sense to me.

Last but not least, nothing prevents the German legislator from passing additional legislation: In relation to private current owners, there will have to be parliamentary legislation anyway, in light of constitutional property guarantees that can only be overcome by such parliamentary legislation. Nothing within the arbitration framework considered by the Governments stops or impedes the German legislator in any way from working further on statutory claims in regard to privately held property. The parties would then simply have a choice between state court litigation and arbitration.

Overall, it seems that the arbitration framework brings a lot of potential for improving the current set-up. As always, success will depend on the details of implementation. This is what the Governments have declared they will be working on promptly from now on, with the hope of presenting the results by the end of 2024.