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SETTLING CULTURAL PROPERTY DISPUTES

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I. INTRODUCTION

In July 2009, an Italian appeals court upheld a conviction against a prominent antiquities dealer for smuggling and handling stolen artifacts.² The conviction resulted in the defendant receiving an eight-year prison sentence and a fourteen million dollar fine.³

In 2005, a former curator at the Getty Museum was put on trial in Italy for allegedly trafficking in stolen antiquities.⁴ In addition, between 2005 and 2008, at least five prominent American museums

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2. See Dave Itzkoff, *Conviction for Dealer of Stolen Antiques is Upheld*, N.Y. TIMES, July 16, 2009 at C1, available at <http://artsbeat.blogs.nytimes.com/2009/07/16/conviction-for-dealer-of-stolen-antiquities-is-upheld/?scp=1&sq=Conviction%20for%20Dealer%20of%20Stolen%20Antiquities%20is%20Upheld&st=cse> (“[Giacomo Medici] helped sell illegally excavated artifacts to private collectors and art institutions including the Metropolitan Museum of Art, the J. Paul Getty Museum in Los Angeles (“Getty Museum”), and the Museum of Fine Arts (“MFA”) in Boston”).

3. See *id.* (noting that Giacomo Medici was originally convicted in 2004 for aiding individuals in selling stolen artifacts to buyers in United States and acknowledging that Italian appeals court upheld that conviction).

4. See Elisabetta Povoledo, *Trial Resumes for Former Curator*, N.Y. TIMES, Jan. 24, 2009, at C2, available at http://www.nytimes.com/2009/01/24/arts/design/24arts-TRIALRESUMES_BRF.html?scp=1&sq=Trial%20Resumes%20for%20Former%20Curator&st=cse (stating that both Marion True, curator of J. Paul Getty Museum, and Robert Hecht, dealer, were accused “of conspiracy to traffic in antiquities looted from Italian soil”). The case against Marion True finally ended on October 13, 2010, when an Italian court “ruled that the statute of limitations on her alleged crimes had expired.” See Elisabetta Povoledo, *Rome Trial of Ex-Getty Curator Ends*, N.Y. TIMES, Oct. 13, 2010, at C1, available at <http://www.nytimes.com/2010/10/14/arts/design/14true.html?scp=1&sq=Rome%20Trial%20of%20Ex-Getty%20Curator%20Ends&st=cse> (analyzing effect of Marion True’s trial on museum practices in United States).

settled cultural repatriation claims with Italy and Greece by agreeing to return disputed antiquities.⁵

In June 2008, the Association of Art Museum Directors (“the Association”) adopted tighter restrictions on the acquisition of antiquities.⁶ Among other provisions, the Association’s restrictions recommended that “museums normally should not acquire a work unless provenance research substantiates that work was outside its country of probable modern discovery before 1970.”⁷ These provisions evolved after a number of prominent institutions, including the British Museum, the Getty Museum, and the Indianapolis Museum of Art, declared that museums generally should not obtain a work “unless solid proof exists that the object was outside its country of probable modern discovery before 1970.”⁸

On September 25, 2008, the United States Senate adopted the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (“the Convention”) in response to the massive looting that followed the United States’ invasions of Iraq

5. See, e.g., Patty Gerstenblith & Lucille Roussin, *Art and International Cultural Property*, 42 INT’L LAW 729, 734 (2008) (noting that in 2007, Princeton University Art Museum agreed to immediately return four objects to Italy, and in exchange, Italy ceded title to seven objects and agreed to extended loan of four others); Elisabetta Povoledo, *Pact Will Relocate Artifacts to Italy From Cleveland*, N.Y. TIMES, Nov. 19, 2008, at C3, available at <http://www.nytimes.com/2008/11/20/arts/design/20arti.html?scp=1&sq=Pact%20Will%20Relocate%20Artifacts%20to%20Italy%20From%20Cleveland&st=cse> (reporting that Cleveland Museum of Art agreed to return thirteen ancient artifacts and Renaissance cross to Italy in exchange for loan of objects to Cleveland Museum of Art and cooperation on exhibitions and cultural exchanges); Stephen West & Catherine Hickley, *Getty Agrees to Give Italy 40 Disputed Antiquities*, BLOOMBERG (Aug. 1, 2007), <http://www.bloomberg.com/apps/news?pid=newsarchive&refer=home&sid=aLFwXaKfm98M> (indicating that Getty agreed to return forty out of fifty-two disputed items and, in exchange, Italy agreed to “broad cultural collaboration that will include loans of significant art works, joint exhibitions, research and conservation projects”).

6. See ASSOCIATION OF ART MUSEUM DIRECTORS, NEW REPORT ON ACQUISITION OF ARCHAEOLOGICAL MATERIALS AND ANCIENT ART ISSUED BY ASSOCIATION OF ART MUSEUM DIRECTORS (June 4, 2008), <http://www.aamd.org/newsroom/documents/2008ReportAndRelease.pdf> [hereinafter 2008 Report] (announcing new, tighter restrictions on acquisition of antiquities).

7. *Id.*

8. See Randy Kennedy, *Museums Set Stricter Guidelines for Acquiring Antiquities*, N.Y. TIMES, June 4, 2008, at A1, available at <http://www.nytimes.com/2008/06/04/arts/design/04coll.html?scp=1&sq=Museums%20Set%20Stricter%20Guidelines%20for%20Acquiring%20Antiquities&st=cse> (indicating that it is also sufficient if work “was legally exported from its probable country of modern discovery after 1970”); see also 2008 Report, *supra* note 6 (noting that 1970 was year United Nations Educational, Scientific, Cultural Organization (“UNESCO”) ratified its Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“UNESCO Convention”).

and Afghanistan.⁹ The Convention mandates that parties to the treaty protect cultural property within their own territory and avoid acts of hostility directed against cultural property.¹⁰

In 2009, the United States entered into an agreement with China that banned the import of a broad group of Chinese antiquities, ranging in date from 75,000 B.C. to 907 A.D., as well as all “monumental sculpture and wall art that is at least 250 years old.”¹¹ In exchange, China “agreed to take greater measures to crack down on looting . . . as well as to facilitate greater cooperation with American museums, including more exhibitions, cultural exchanges and long-term loans of archaeological material.”¹²

In 2009, the Louvre agreed to return five fresco fragments taken from a 3200 year-old tomb in the Valley of the Kings in Egypt.¹³ Notably, this agreement was made after Egypt suspended the Louvre’s excavations in Egypt and threatened to end cooperation for exhibitions.¹⁴ Also, in 2010 an Italian court ruled that the

9. See Steven Lee Myers, *Iraq’s Ancient Ruins Face New Looting*, N.Y. TIMES, June 26, 2010, at A1, available at <http://www.nytimes.com/2010/06/26/world/middle-east/26looting.html?scp=1&sq=Iraq’s%20Ancient%20Ruins%20Face%20New%20Looting&st=cse> (describing chaos following 2003 American invasion and subsequent 2008 reform efforts).

10. See Convention for the Protection of Cultural Property in the Event of Armed Conflict, HAGUE CONVENTION (May 18, 1994), <http://www.icomos.org/hague/> (listing provisions of convention); see also Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT’L L. 169, 176 (2007) (noting that convention was “first international attempt to control the market in artworks and cultural objects”); Neela Banerjee & Micah Garen, *Saving Iraq’s Archaeological Past from Thieves Remains an Uphill Battle*, N.Y. TIMES, Apr. 4, 2004, at A16, available at <http://www.nytimes.com/2004/04/04/world/saving-iraq-s-archaeological-past-from-thieves-remains-an-uphill-battle.html?scp=1&sq=Saving%20Iraq’s%20Archaeological%20Past%20from%20Thieves%20Remains%20an%20Uphill%20Battle&st=cse> (describing looting of Iraqi archeological sites); Meyers, *supra* note 9 (reporting that, in immediate aftermath of 2003 invasion, looters “swarmed over sites across the country, leaving behind moonlike craters where Sumerian, Akkadian, Babylonian and Persian cities once stood”).

11. Benjamin Genocchio, *Deal to Curb Looting in China Worries Museums*, N.Y. TIMES, Mar. 19, 2009, at F29, available at <http://www.nytimes.com/2009/03/19/arts/artsspecial/19IMPORT.html?scp=1&sq=Deal%20to%20Curb%20Looting%20in%20China%20Worries%20Museums&st=cse>.

12. *Id.*

13. See Judy Dempsey, *Egypt Demands on Return of Nefertiti Statue Mar Reopening of Berlin Museum*, N.Y. TIMES, Oct. 19, 2009, at A12, available at <http://query.nytimes.com/gst/fullpage.html?res=9C0CE1DE133DF93AA25753C1A96F9C8B63&scp=2&sq=egypt%20demands%20on%20return%20of%20nefertiti%20statute&st=cse> (stating that France returned antiquities to Egypt after “Egypt threatened to suspend cooperation for exhibitions organized with the Louvre, as well as any work conducted by the Louvre on the Pharaonic necropolis of Saqqara”).

14. See, e.g., Dave Itzkoff, *Egypt and Louvre Resolve Differences*, N.Y. TIMES, Oct. 10, 2009, at C2, available at http://www.nytimes.com/2009/10/10/arts/10arts-EGYPTANDLOUV_BRF.html?scp=1&sq=Egypt%20and%20Louvre%20Resolve%20Differences.

Getty Museum had to return a Hellenistic era bronze statue to the Italian government.¹⁵

As evidenced by the events noted above, in recent years, cultural property disputes have moved from the art pages to the front pages.¹⁶ Therefore, the time is ripe to reconsider the efficacy of pursuing litigation in this area, given the willingness of claimant countries to use aggressive means in pressuring possessors to return disputed antiquities, and the greater willingness of professional organizations and institutions to acknowledge claims.¹⁷ With a view in favor of encouraging out of court resolutions, this article considers the advantages and disadvantages of settlement in cultural property disputes.

II. BACKGROUND

A. Illegal Art Trade

Experts have measured the trade in stolen art at between three and six billion dollars per year.¹⁸ According to a 2005 study, approximately eighty to ninety percent of objects on the antiquities market lacked sufficient provenance to establish that they were pur-

20Differences&st=cse (reporting that France agreed to return artifacts only after Egypt stopped cooperating with Louvre); Michael Kimmelman, *When Ancient Artifacts Become Political Pawns*, N.Y. TIMES, Oct. 24, 2009, at A1, available at <http://www.nytimes.com/2009/10/24/arts/design/24abroad.html?scp=1&sq=When%20Ancient%20Artifacts%20Become%20Political%20Pawns&st=cse> (noting that Egypt demanded five fresco fragments back from France twice and indicating that France complied only after Egypt halted Louvre's excavation at Saqqara).

15. See Elisabetta Povoledo, *Getty Must Return Work, Italian Judge Rules*, N.Y. TIMES, Feb. 11, 2010, at C5, available at http://www.nytimes.com/2010/02/12/arts/design/12arts-GETTYMUSTRET_BRF.html?scp=1&sq=getty%20must%20return%20work,%20italian%20judge%20rules&st=cse (concluding that Getty Museum had to return statue to Italy because it had not purchased in good faith).

16. See, e.g., Dempsey, *supra* note 13 (appearing at page A12 of New York Times newspaper); Kimmelman, *supra* note 14 (printing art related article on front page of New York Times newspaper).

17. See Kennedy, *supra* note 8 ("After a year and half of deliberations, the directors of the country's largest art museums will announce new guidelines on Wednesday for how their institutions should collect antiquities, a volatile issue that has led in recent years to international cultural skirmishes and several highly publicized art restitution cases."); see also Povoledo, *supra* note 4, at C3 (noting aggressive means by which Italy pressured Cleveland Museum of Art to return several antiquities that Italy claimed were stolen from its museums).

18. See Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COL. L. REV. 377, 377-78 (1995) (stating estimated range of cost of stolen artwork from 1993); see also Gerstenblith, *supra* note 10, at 169 (noting that "acquisition of antiquities with unknown origins . . . is a well organized big business motivated primarily by profit"); *Stolen Fine Art: Organized Crime's New Commodity?* (National Public Radio broadcast May 31, 2007), available at

chased legally.¹⁹ Individually, several countries suffer staggering losses of artwork each year.²⁰ Estimates of Turkey's loss alone range between one hundred million and two hundred million dollars annually.²¹ A 1988 report found that almost a quarter of a million pieces of artwork were stolen from Italy between 1970 and 1988.²² The illegal art trade in Israel is estimated to cost that country "tens of millions of dollars a year."²³ Art experts have reported that truckloads of looted art regularly pass through Thailand from Cambodia.²⁴ The general consensus is that, in monetary terms, the illicit art trade is second only to the narcotics business.²⁵

19. See S. M. MACKENZIE, GOING, GOING, GONE: REGULATING THE MARKET IN ILLICIT ANTIQUITIES 157-191 (2005) (noting that most antiquities in trade were stolen).

20. For a further discussion of specific countries with high annual levels of artwork theft, see *infra* notes 21-24 and accompanying text.

21. See MACKENZIE, *supra*, note 19, at 77 (indicating that other countries, including Egypt, Greece, and Turkey also have significant problems with stolen antiquities trade).

22. See Sydney M. Drum, DeWeerth v. Baldinger: *Making New York a Haven for Stolen Art?*, 64 N.Y.U. L. REV. 909, 910 n.12 (1989) (asserting that Italy's art thefts equal about forty stolen pieces of artwork per day).

23. See Felice Maranz, *Policing History*, JERUSALEM REPORT, Oct. 6, 1994, at 12 (stating that, despite "multi-million-dollar trade in stolen Israeli antiquities," Israel only has fourteen individuals on streets searching for culprits who steal antiquities).

24. See Looted Cambodian Treasures Come Home Pillage of Articles Remains a Problem, CHI. TRIB., Jan. 5, 1997, at A5 (reporting that entire temple walls in Cambodia have been hacked to pieces by thieves hoping to sell bas-relief sculptures).

25. See Leah E. Eisen, *The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World*, 81 J. CRIM. L. & CRIMINOLOGY 1067, 1068 (1991) ("By some estimates, the illegal trade in art has become over a \$1 billion industry. Indeed the thriving black market in artworks is surpassed only by the international illicit drug trade."); see also Borodkin, *supra* note 18, at 377 (noting that, in context of international crime, illegal art trade is second only to illegal weapons and drug trafficking); Drum, *supra* note 22, at 909 ("In dollars, art thievery is estimated to be the second biggest international criminal activity after narcotics."); Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2452 (1994) (stating that in 1990, art theft was second most profitable crime in world). Connections have been found between participants in the illegal drug trade and participants in the illegal art trade. See Hugh Pope, *Turks Undertake a Herculean Task for Art's Sake: Ankara Wants to Reclaim a Wealth of 'Stolen' Greek and Roman Antiquities that are Now Abroad, Writes Hugh Pope in Istanbul*, THE INDEP., Apr. 6, 1994, at 11, available at <http://www.independent.co.uk/news/world/turks-undertake-a-herculean-task-for-arts-sake-ankara-wants-to-reclaim-a-wealth-of-stolen-greek-and-roman-antiquities-that-are-now-abroad-writes-hugh-pope-in-istanbul-1368157.html> (referencing link between drugs and smuggled archaeological objects); see also Gerstenblith, *supra* note 10, at 181 (indicating connection between cylinder seals and stolen antiquities); Jenny Doole, *Looting in Lebanon*, CULTURE WITHOUT CONTEXT (McDonald Inst. For Archeological Res., U. of Cambridge, Cambridge, Eng.), Spring 1999, available at <http://www.mcdonald.cam.ac.uk/projects/iarc/culturewithoutcontext/issue4/news.htm> (reporting that Spanish police broke up art smuggling ring that had planned to exchange stolen

While the details surrounding art thefts are often mysterious, the motivations behind such thefts are not.²⁶ The high mark-up for illicitly acquired antiquities, which can be a hundredfold or more, the publicity generated by the auction houses regarding the massive sums paid for art, and the low recovery rate of objects, which has been estimated at less than ten percent, all contribute to the proliferation of the stolen antiquities trade.²⁷ An additional motivating factor is that convictions for trafficking in stolen art usually result in comparatively light sentences.²⁸ For example, in 2003, a journalist was convicted of violating customs law when he smuggled three cylinder seals stolen from an Iraqi Museum into the United States.²⁹ The journalist was subsequently sentenced to six months of house arrest and two years of probation.³⁰ In a second case de-

art for cocaine). The illegal art trade has also been linked to the funding of terrorist groups. See Joel Leyden, *Swift-Find: Terrorism Funded by Stolen Property*, ISRAEL NEWS AGENCY, Oct. 16, 2005, at 1, available at <http://www.israelnewsagency.com/terrorismstolenpropertyswiftfindregistry881016.html> (indicating that using proceeds from stolen artwork to fund terrorist organizations is not novel).

26. For a further discussion of the motivation for art theft, see *infra* notes 27-28 and accompanying text.

27. See Drum, *supra* note 22, at 932 (suggesting courts should adopt due diligence standard to reduce motivation to steal antiquities); see also Eisen, *supra* note 25, at 1067 (arguing that individuals who sell antiquities are motivated by “exorbitant sales prices” of antiquities); Claudia Fox, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U.J. INT’L L. & POL’Y 225, 226 (1993) (stating that illegal art trade is motivated by high value of artwork, “low recovery rate” of stolen artwork, and minimal amount of arrests); Stephen L. Foutty, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Fine Arts, Inc.: Entrenchment of the Due Diligence Requirement in Replevin Actions for Stone Art*, 43 VAND. L. REV. 1839, 1839-1840 (1990) (citing specific cases of artworks that have sold for millions of dollars); Andrea E. Hayworth, *Stolen Artwork: Deciding Ownership is No Pretty Pictures*, 43 DUKE L.J. 337, 339 (1993) (indicating that art theft is driven by extremely high prices that art collectors will pay for masterpieces).

28. See Borodkin, *supra* note 18, at 377 n.18 (noting that, while Americans receive mandatory prison sentences for drug related crimes, American tourist caught trying to smuggle pre-Columbian artifacts valued at over \$200,000 was fined \$1,000, given suspended sentence and ordered to perform two hundred hours of community service); see also Gerald Cadogan, *Long Hunt for the Raiders of the Lost Art*, FINANCIAL TIMES, Nov. 16, 1991, at 1 (noting that as of 1991, maximum fine under British law for using metal detector on sites scheduled for official excavation was only two hundred pounds, which is approximately three hundred fifty dollars); Maranz, *supra* note 23 (reporting that harshest penalty ever imposed for illegally trafficking in antiquities was seventeen month prison sentence and noting that ordinarily, punishment is monetary fine of few hundred shekels).

29. See Press Release, U.S. Immigration and Customs Enforcement, Cultural Antiquity Returned to Iraqi Government after ICE Investigation (Jan. 18, 2005) (on file with author) [hereinafter ICE Press Release] (detailing Joseph’s Braude’s arrest for stealing three cylinder seals from Iraq and noting his punishment for crime).

30. See *id.* (releasing sentence of journalist-smuggler).

cided in 2003, an antiquities dealer was sentenced to a thirty-three month sentence for violating the National Stolen Property Act (“NSPA”).³¹ The aforementioned antiquities dealer violated the NSPA by stealing the head of an Egyptian pharaoh mummy, purchased by the dealer’s partner for six thousand dollars, and subsequently sold for one point two million dollars.³²

B. Why Consider Settlement?

In the United States, the vast majority of civil cases, including cultural property disputes, settle out of court.³³ Given the complexity of the issues, it is not surprising that cultural property litigation is generally very expensive.³⁴ The possessor involved in a dispute over Mycenaean gold admitted that part of his motivation for settling the matter was “to avoid the substantial expenses of litigation.”³⁵ Moreover, because of the heavy dockets in many jurisdictions and

31. See *United States v. Schultz*, 333 F. 3d 393, 398, 412 (2d Cir. 2003) (noting that Second Circuit affirmed sentence of thirty-three months for dealer convicted of stealing three limestone stelae); see also Barry Meir & Martin Gottlieb, *LOOT: Along the Antiquities Trail; An Illicit Journey Out of Egypt, Only a Few Questions Asked*, N.Y. TIMES, Feb. 23, 2004, at A1, available at <http://www.nytimes.com/2004/02/23/world/loot-along-antiquities-trail-illicit-journey-egypt-only-few-questions-asked.html?scp=1&sq=loot:%20along%20the%20antiquities%20trail&st=cse> (detailing convictions for stolen antiquities).

32. See Meir & Gottlieb, *supra* note 31, at A1 (explaining how Mr. Tokeley-Parray was able to steal enormous pharaoh’s head).

33. See Yaroslav Sochynsky, *How to Approach a Client About Mediation*, 214 N.Y.L.J. 26, 29 (1995) (noting advantages of settling cases out of court and encouraging individuals to use mediation in settling disputes); see also Borodkin, *supra* note 18, at 403 (commenting that “numerous antiquities suits” settle before final judicial disposition); Clemency C. Coggins, *A Licit International Traffic in Ancient Art: Let There Be Light!*, 4 INT’L J. OF CULTURAL PROP. 61, 75 (1995) (noting that significant number of prominent disputes over cultural property are resolved out of court).

34. See William D. Montalbano, *Turkey Retrieves its Riches: Tired of Seeing Its Heritage Stolen Away, This Cradle of Ancient Wonders Scours the World for Purloined Pieces, Then Uses a \$50-Million Carrot and Stick to Bring Them Home*, L.A. TIMES, Apr. 27, 1994, at A1 (noting willingness of Republic of Turkey to pursue litigation over stolen art); see also William H. Honan, *Lately, More Antiquities Can Go Home Again*, N.Y. TIMES, Jan. 25, 1993, at C11, available at <http://www.nytimes.com/1993/01/25/arts/lately-more-antiquities-can-go-home-again.html?scp=1&sq=Lately%20More%20Antiquities%20Can%20Go%20Home%20Again&st=cse> (“A legal bill of \$250,000 in such cases is not unusual.”).

35. See Rita Reif, *Greece and Gallery Settle*, N.Y. TIMES, Dec. 31, 1993, at C2, available at <http://www.nytimes.com/1993/12/31/arts/greece-and-gallery-settle.html?scp=1&sq=Greece%20and%20Gallery%20Settle&st=cse> (noting that Michael Ward Gallery of Manhattan decided to make gift out of disputed jewelry instead of incurring high costs of litigation); see also Richard Perez-Pena, *Suit Over Chagall Watercolor is Settled Day After Trial Starts*, N.Y. TIMES, Dec. 29, 1993, at B3, available at <http://www.nytimes.com/1993/12/29/nyregion/suit-over-chagall-watercolor-is-settled-day-after-trial-starts.html?scp=1&sq=Suit%20Over%20Chagall%20Watercolor%20is%20Settled%20Day%20After%20Trial%20Starts&st=cse> (quoting pos-

the discovery intensive nature of cultural property disputes, it may be years before these cases reach trial.³⁶ Unless the court process is stayed pending negotiations, and there is no ultimate resolution, out of court resolutions reduce costs and shorten the process.³⁷ In one instance involving a title dispute over a Chagall, the parties settled on the second day of trial.³⁸ In another case, a statue of Buddha was returned to the government of Myanmar only weeks before the scheduled hearing.³⁹ Even at such late dates, however, the parties likely saved thousands of dollars in court costs and fees.

Another key advantage of settlement is that it provides a known outcome to both parties, thereby avoiding the risk inherent in court decisions.⁴⁰ No matter how strong a case, trial constitutes a gamble, particularly if a jury is deciding the case.⁴¹ The “known quantity”

essor’s lawyer for proposition that “the time, expense and uncertainty of a trial and inevitable appeals pushed everyone toward settlement”).

36. See *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1153 (2d Cir. 1982) (noting that dispute over ownership of two Durer paintings was filed in 1969 and decided in 1981); see also *O’Keeffe v. Snyder*, 83 N.J. 478, 484-487 (1980) (indicating that, prior to reaching out of court settlement, parties spent four years in litigation); *Republic of Turk. v. Metro. Museum of Art*, 762 F. Supp. 44, 44-47 (S.D.N.Y. 1990) (stating that it took three years to brief and determine single issue and noting that case subsequently settled); Sharman Stein, *Buddha Statue Incites Art War*, CHI. TRIB., Dec. 27, 1994, at 1, available at http://articles.chicagotribune.com/1994-12-27/news/9412270075_1_myanmar-statue-buddha/2 (noting that art recovery cases “are often difficult and protracted”).

37. See Yuval Sinai, *The Downside of Preclusion: Some Behavioural and Economic Effects of Cause of Action Estoppel in Civil Actions*, 56 MCGILL L.J. 673, 700 (2011) (discussing benefits and savings associated with out-of-court settlement).

38. See Richard Perez-Pena, *Stolen Chagall; An Art Museum and a Collector Reach a Quiet Compromise*, N.Y. TIMES, Jan. 2, 1994, at 2 (noting trial between Guggenheim museum and elderly woman over stolen Chagall painting ended in settlement on second day); see also Bibas, *supra* note 25, at 2461 n.137 (noting that by time it was settled, case had been remanded to trial court by court of appeals for determination of laches issue and suit was already five years old).

39. See Stein, *supra* note 36 (stating that just before going to court, art collector relinquished claim to Buddha statue, allowing Myanmar to repossess treasure).

40. See Fred O. Goldberg, *Enforcement of Settlements*, 85 FLA. B.J. 30, 31 (2011) (stating settlement eliminates uncertain result “presented by trial on the merits”).

41. See Robert K. Paterson, *Bolivian Textiles in Canada*, 2 INT’L J. OF CULTURAL PROP. 359, 359-66 (1993) (discussing *R. v. Yorke*, [1991] 368 S.C.C. 2573 (Can.), and noting that possessor of stolen textiles successfully challenged admissibility of crucial evidence in criminal possession case on grounds that evidence had been unlawfully seized from his residence). Even in actions where a party has a better substantive case, the matter may be lost on other legal grounds. See *id.* (indicating admissibility of evidence was of consequence in case). See Borodkin, *supra* note 18, at 403-04 (suggesting that German government may have agreed to settle dispute over Quedlingburg treasure, which had been removed from Germany by American soldier during World War II, “to avoid raising the spectre of Nazi Germany before a Texas jury”).

advantage of settlement is preserved even when a case settles “on the courthouse steps.”⁴²

In addition, unlike a judicial resolution, settlement does not require findings of fault or wrongdoing on the part of either litigant.⁴³ Thus, settling parties avoid adverse findings that could stigmatize them and provide troubling precedent.⁴⁴ Moreover, settlement avoids unwanted publicity, as the parties can determine that settlement terms remain confidential. For example, a museum possessor might not want to advertise an expenditure of large sums on antiquities of dubious provenance; since most museums are public institutions, this information could give rise to charges of a breach of fiduciary duty on the part of trustees.⁴⁵ By agreeing to return the Lydian Hoard to the Republic of Turkey while admitting “no fault” on its side, the Metropolitan Museum of Art effectively ended a six-year old suit without subjecting its acquisition policies to judicial scrutiny.⁴⁶ Similarly, the Norton Simon Foundation settled a suit filed by the Indian government for the return of a bronze statue of Nataraja before its eponymous founder was required to elaborate on a damaging statement he made to a journalist about the work.⁴⁷ Confidentiality clauses can also protect the identity and privacy of individuals who have donated disputed objects to muse-

42. See Goldberg, *supra* note 40, at 31 (noting that settlement eliminates uncertainty).

43. See Susan Bickelhaupt, *MFA, College Settles Dispute Over Breastplate*, BOSTON GLOBE, Apr. 10, 1992, at 33 (explaining that college exchanged title to stolen artifact for undisclosed payment).

44. See Borodkin, *supra* note 18, at 403 (“Unpredictability and fear of prejudice in the courts render some settlements little better than ransoms.”). Because of the fact-specific nature of art recovery cases, precedent may not carry as much weight as compared with other types of commercial litigation. On the other hand, at least one commentator has argued that, because of the lack of judicial precedent in cultural repatriation cases, individual settlements further frustrate “attempts to create persuasive authority” and “in the aggregate perpetuate the ineffectiveness of the current scheme.” See *id.* (describing jurisprudential problems created by settlement).

45. See Gerstenblith *supra* note 10, at 194 (discussing potential violation of fiduciary obligation for wasting museum assets on artifacts that are returned).

46. See Thomas Maier, *The Met Digs In*, NEWSDAY, May 23, 1995, at B36 (stating museum admitted no fault through settlement, though director implied artifacts were likely acquired with knowledge of “controversial” origins).

47. See Eric Pace, *Norton Simon, Businessman and Collector, Dies at 86*, N.Y. TIMES, June 4, 1993, at A22 (describing incriminating statements that may have prompted settlement). In 1973, Mr. Simon was quoted saying, with respect to the statue that “[y]es, it was smuggled. I spent between \$15 million and \$16 million over the last two years on Asian art, and most of it was smuggled.” *Id.* See also Borodkin, *supra* note 18, at 404 (noting that Chicago Museum of Art’s decision to return the Phanomrung lintel to Thailand, and Brooklyn Museum’s decision to relinquish its claim to garland sarcophagus may have been prompted by desire to “avoid embarrassment”).

ums. In turn, claimant countries might not want information about poor security or delays in enforcing claims to become public. The publicity attendant to a protracted trial could also negatively impact the work at issue by reducing it to an object of curiosity.⁴⁸

Another consideration for institutional possessors is the need to maintain their integrity and reputation in the art world and in the community.⁴⁹ These concerns were explicitly acknowledged by the Association's 2008 Report, which noted that "[a]rt museums play a dynamic, central role in the artistic and cultural life of their communities and the nation."⁵⁰ While arranging for the return of a stolen votive plaque that had been offered to him by a dealer, a curator at the Metropolitan Museum of Art commented that "it's good for [art-producing countries] to see the art-importing countries returning things."⁵¹

In addition to avoiding the disadvantages of adverse publicity and heavy trial costs, settlement offers the advantage of greater flex-

48. See Susan Bickelhaupt, *Controversy May Add to Pectoral's Draw at MFA*, BOSTON GLOBE, Sept. 10, 1992, at 90 (noting that crowds seemed to be drawn to exhibit of Egyptian pectoral "that became known for its controversy as much as its value as a historic piece of jewelry").

49. See Michele A. Miller, *Looting and the Antiquities Market*, 4 ATHENA REVIEW 18 (2007) (noting that threat of unfavorable media coverage, as well as fear of damaging relationships with source countries, has led museums to "re-evaluate their acquisition policies"); see also William H. Honan, *A 1465 Bell, War Booty, to Go Back to Okinawa*, N.Y. TIMES, Apr. 6, 1991, at 12 (reporting Virginia Military Institute's decision to return Dai Sen Zen-ji, a rare, bronze bell that had been removed from Buddhist monastery, to Okinawa to foster goodwill between America and Japan).

50. See 2008 Report, *supra* note 6 (asserting importance of high moral standards in art acquisition policies).

51. See Steven Erlanger, *Stolen Plaque is Returned to a Bangkok Museum*, N.Y. TIMES, Feb. 9, 1989, at C17 (announcing return of plaque in formal ceremony). The dealer, who remained anonymous throughout the transaction, absorbed the loss for the plaque after the curator recognized it as a well-known piece that had been stolen from the James H.W. Thompson Foundation collection in Bangkok. See *id.* (describing circumstances under which piece was discovered as stolen and returned). See also Prakesh Chandra, *Diplomatic Pouch Wide Open to Smuggling in India*, CHRISTIAN SCI. MONITOR, July 7, 1981, at 8 (reporting Boston MFA's return of 11th Century statue of Vishnu that had been stolen from Calcutta Museum). See generally LEONARD D. DUBOFF, THE DESKBOOK OF ART LAW 71-73 (Donald P. Arnava ed., 1st ed. 1977) (recounting transport of Afo-A-Kom, a wood carving of spiritual significance, to New York gallery under "cloudy" circumstances and its subsequent return to Cameroon after public protest and press attention); William H. Honan, *With Stolen Treasures, Generosity Has Its Price*, N.Y. TIMES, Mar. 1, 1992, at 6 (noting that American ex-soldier "picked up" 14th century manuscript while stationed in Germany, returned manuscript without asking for compensation, and grateful German government honored donor at ceremony held for object's return); *College is Returning Statue to Okinawa*, N.Y. TIMES, Nov. 5, 1994, at 18 (reporting that Rollins College decided to return statue of Japanese philosopher, illicitly removed during World War II, to Okinawa).

ibility with respect to the outcome. For example, the claimant and possessor could agree to the return of the object in exchange for a long-term loan, which is not an option that a court could formulate.⁵² By allowing for “joint venture” solutions, out of court settlements can lesson acrimony between the two parties and smooth the way for a future relationship. It is in the best interest of museums and universities that sponsor excavations abroad and special exhibits at home to remain on good terms with government claimants, because access to sites and objects is crucial for archaeologists, curators, and scholars.⁵³ In deciding to return fresco fragments to Egypt, Alan Shestack, then director of the Boston MFA, noted that he did not want to “jeopardize” the Museum’s relationship with Egypt, particularly as cooperation from Cairo enabled the MFA to sponsor archeological digs.⁵⁴ In 2008, the Getty Museum presented an exhibition of the works of Baroque sculptor and architect Gianlorenzo Bernini that included rare loans from Italian museums. One commentator opined that the loans were “implicit thanks” for the Getty’s agreement the year before to return a number of disputed antiquities to Italy.⁵⁵ Even where the possessor is a private individual, he or she may have business interests in a claimant coun-

52. See *infra* notes 53-112 and accompanying text for a further discussion of settlement possibilities.

53. See Alexander Stille, *The Getty’s Aphrodite: Fruit of an Illegal Dig*, NAT’L L. J., Nov. 14, 1988, at 33 (commenting on dispute between Getty Museum and Italian government regarding ownership of statue). Francesco Sizzini, then Deputy Minister of Culture for Italy, noted that, as a museum specializing in Greek and Roman antiquities, the Getty Museum could not afford to lose the cooperation of the Italian government regarding excavations and exhibition loans. See *id.* (explaining significance of relationship with Italian government); see also Pope, *supra* note 25 (citing statement by Engin Ozgen of the Turkish Ministry of Culture that, in exchange for return of objects, Turkey was “ready to give exhibitions and excavation permits”).

54. See Christine Temin, *The MFA and the Politics of Plunder*, BOSTON GLOBE, Jan. 4, 1989, at 37 (noting return of paintings was smart political move as cooperation has enabled MFA to sponsor digs). The Museum also assessed less altruistic factors in deciding to return the painting fragments, including the fact that the works did not substantively add to the Museum’s holdings and were not of good quality. See *id.* (noting works looked like “children’s mud pies”).

55. Arthur Lubow, *Bernini’s Genius*, SMITHSONIAN, Oct. 2008, at 78. In 2009, the Getty Museum announced that it had established a partnership with the Museo Archeologico Nazionale in Florence to exhibit works from that museum; while not directly tied to its 2007 settlement agreement with Italy, the arrangement between the two institutions may not have been possible without it. See *id.* (identifying relationship between recent settlement agreement and Museo Archeologico Nazionale exhibit); see also Dave Itzkoff, *Getty in Partnership with Museum in Florence*, N.Y. TIMES, March 25, 2009, at C2 (announcing partnership between museums).

try and wish to avoid a bitter court battle and maintain goodwill with that country's government.⁵⁶

The settlement process also allows parties to focus on common interests.⁵⁷ Usually both parties to cultural property litigation seek the preservation of the work at issue and the dissemination of scientific, historical, and art historical information about art and antiquities generally.⁵⁸ In most instances, even individual possessors would probably agree with claimant countries that the preservation of archaeological zones, which are frequently plundered to feed the illicit art market, is an important goal.⁵⁹

III. SETTLEMENT POSSIBILITIES

Deciding on a settlement goal depends on the facts of a particular case and the desires of the client. As with all litigation, the law of the jurisdiction involved will impact the viability of any agreement.⁶⁰ The following scenarios are meant to suggest the range of possibilities that clients and counsel should consider when settling art recovery disputes. Since the majority of recent cases involve

56. See Renate Robey, *Auroran May Return Sword to Okinawa as a Symbol of Peace*, DENVER POST, Dec. 14, 1995, at B-2 (stating American citizen found and took old sword while stationed at Okinawa during World War II, and desired to return the sword as gesture of goodwill in 1995). The donor commented that he did not feel that the sword had the same significance to him as "it would have to a Japanese family." See *id.* (explaining rationale for return of sword).

57. See Maier, *supra* note 46, at B36 (noting both parties in dispute over ownership of Afghan sculpture currently in Metropolitan agreed that, because of unstable political situation in Afghanistan, sculpture was "best kept at the Metropolitan" for time being).

58. But see *After a Court Fight, Old Totems Return to Alaskan Village*, N.Y. TIMES, Oct. 17, 1994, at B10 [hereinafter *Alaskan Village*] (showing parties' interests are not always mutual, particularly in cases concerning works that have strong spiritual connection with claimant). For example, in 1994, an Alaskan totem that was slated for donation to the Museum of Natural History was returned to the Klukwan village from which it was stolen, even though it was likely to be housed in a "leaky, dark cement building where the carvings could deteriorate." See *id.* (discussing potential fate of returned totem).

59. See Cadogan, *supra* note 28, at 1 (noting that unauthorized digs can ruin historical context of sites); Alexander Stille, *Was This Statue Stolen*, NAT'L L.J., Nov. 14, 1988, at 1 (quoting Thomas Hoving, former director of Metropolitan Museum of Art, for proposition that "[e]very time a museum buys a multi-million-dollar object that has been smuggled, 60 more metal detectors are sold in places like Sicily and Turkey"); Drum, *supra* note 22, at 910 n.12 (noting that looting of Pre-Columbian sites constituted "genuine emergency" with respect to looters' destruction of crucial information); Karl E. Meyer, *For a National Art Registry*, N.Y. TIMES, July 30, 1986, at A22 ("Responsible curators have no desire to encourage plunder that destroys the archaeological record and sows resentment abroad.").

60. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS: LAW OF THE STATE CHOSEN BY THE PARTIES § 187 (2011) (discussing how jurisdiction can impact parties' agreement).

claims against institutions, the possessor in the hypothetical is a museum. Most, although not all, of the suggestions cited below have been used to resolve actual cases.

A. Illustration

In 1964, Country A adopted a law declaring all archaeological sites and their contents property of the State. Country A has a rich and long history, and is home to numerous unexcavated sites that it does not have the resources to properly police. In 1976, a farmer in Country A (the “claimant”) inadvertently came across a Bronze Age tomb in his fields. The tomb collection made its way to the United States via a Swiss dealer who sold it to the Museum (the “possessor”) for two million dollars. The collection was accompanied by a warranty that simply stated that it was legally exported. When a scholar from Country A noticed the collection during a visit to the Museum, he recognized its similarities to a collection in Country A that he personally excavated; he also suspected that the collection could not have reached the market prior to 1964.

B. Settlement Possibilities for Illustration

1. *The Possessor Returns the Collection to the Claimant*

For the claimant, the advantages of this solution include retention of the collection and the opportunity to set a favorable precedent.⁶¹ The potential disadvantage for Country A is losing the impact of trial publicity, thereby forgoing the opportunity to send a message to the antiquities trade that Country A is a formidable adversary.⁶² However, if the claimant is intent on preserving some of

61. See William H. Honan, *U.S. Returns Stolen Ancient Textiles to Bolivia*, N.Y. TIMES, Sept. 27, 1992, at 23 (commenting on dealer’s decision to return ancient sacred textiles to Coroma Indians after textiles were illicitly removed from Bolivia; lawyer for Center for Constitutional Rights remarked that “[t]his will send a message to antiquities dealers that native people can fight back and win when their sacred objects are stolen to hang on collectors’ walls”); Montalbano, *supra* note 34, at A1 (quoting Engin Ozgen of Turkish Ministry of Culture for proposition that Turkey’s fight to retrieve its cultural property helps educate “people with the idea of stopping smuggling”).

62. See *Byzantine Mosaics Belong to Cyprus*, Judge Rules, L.A. TIMES, Aug. 4, 1989, at 1 (quoting former museum director for proposition that decision of court in *Autocephalous Greek-Orthodox Church v. Goldberg*, 917 F. 2d 278 (7th Cir. 1990) to return mosaics purchased by dealer under suspicious circumstances to owner would have far-ranging impact on art world “and tend to discourage the practice of going through the back door to acquire objects of questionable background”); Ozgen Acar, *Protecting our Common Heritage*, TURKISH TIMES, Jan. 1, 2002, at 3 (noting at least one commentator has opined that Turkey’s pursuit of stolen antiquities in the courts have “created an effective deterrent” by discouraging buyers from purchasing objects with a Turkish provenance).

the precedential value of the return, it can bargain for a provision in the settlement agreement precluding the possessor from describing the return as a gift or donation to the claimant.⁶³ Some claimant countries have generated publicity about successful settlements by organizing special exhibits of returned objects.⁶⁴ On the other hand, the claimant may want to avoid extensive publicity about the theft to avoid alerting potential looters to vulnerable sites.

The primary disadvantage for the possessor is that, unless the Museum can recover the sale price from the dealer, who may be dead or otherwise unavailable, the Museum will have to absorb a two million dollar loss. Also, the voluntary return of the collection arguably sends an unwelcome message about the Museum.⁶⁵ The primary advantages of such a settlement for the Museum are avoiding the cost of litigation and the scrutiny of a trial. The latter may be particularly relevant given the circumstances of the sale, which involved two classic indicia of theft: (1) the artifacts were similar to others found in the country of origin; and (2) the goods were passed through Switzerland, a country notorious as a stopping point for illicit artifacts.⁶⁶

The Museum should also consider insisting on confidentiality provisions to avoid undesirable publicity about its purchase of antiquities of dubious provenance. In cases where the object in dispute is a donation, private settlement affords museum possessors the possibility of protecting the donor's identity from publicity that could expose the donor to litigation.⁶⁷ Another advantage for the Museum is the goodwill acquired in a friendly settlement, which

63. This suggestion is not likely to be acceptable, however, to a private possessor if he contemplates an arrangement that may yield a tax advantage.

64. See Livia Borghese & Jason Felch, *Italy Exhibits Its Recovered Masterpieces*, L.A. TIMES, Dec. 18, 2007, at A12 (reporting opening of exhibit at Quirinale Palace of artworks returned by American museums).

65. See Honan, *supra* note 34, at C11 (noting art world's reluctance to "set precedents that might later be used to question who owns antiquities now in major museums"); Maier, *supra* note 46, at B36 (quoting archaeology expert Clemency Coggins for proposition that museums are reluctant to return objects to claimants because "they feel if they return this, they will have to return many others and don't want to create a precedent").

66. See Gerstenblith & Roussin, *supra* note 5, at 740 (stating incantation bowls on loan from private Norwegian collection were from modern Iraq); P.J. O'KEEFE & L. V. PROT, 3 LAW AND THE CULTURAL HERITAGE 408, 572 (1989) (noting Switzerland's reputation as stopping point for "'laundering' cultural goods").

67. Cf. Nicole Bohe, *Politics, Leverage, and Beauty: Why the Courtroom is Not the Best Option for Cultural Property Disputes*, 1 CREIGHTON INT'L & COMP. L.J. 100, 112 (2011) ("It is difficult to achieve a mandated return of the cultural objects in dispute. This difficulty means parties often resort to the media and other public outlets hoping to encourage a private settlement that both parties can agree upon and enact.").

could be helpful to future dealings with Country A with respect to loans, excavation permits, and access to scholarship and materials. In addition, the Museum may be able to bargain for a credit in publications about the collection, or a share in profits from exhibitions of the objects.

2. *The Possessor Returns Part of the Collection to the Claimant*

The advantages and disadvantages of this solution may depend on the holdings of Country A and the contents of the collection. Country A may be less resistant to this settlement if the portion of the collection it cedes is duplicative of other works it owns.⁶⁸ Regardless, this solution still presents the disadvantage of paying for property that Country A believes it rightfully owns.⁶⁹ On the other hand, Country A is certain of getting a portion of the objects returned without the expense of litigation. The advantages for the Museum are the ability to retain some of the objects, and avoiding judicial scrutiny of the “cloudy” circumstances of its purchase of the collection. Unless the Museum can obtain restitution from the seller, however, it will have to absorb the purchase price of the returned portion of the collection. The 2007 agreement between Italy and Princeton University provides an example of this “split the baby” approach. The University agreed to return four objects to Italy; in exchange, Italy agreed to recognize Princeton’s title to seven others.⁷⁰

3. *Collection is Sold and the Proceeds Divided Between Claimant and Possessor*

As this proposal is a variation of solution two, the same considerations would factor into its viability. In at least one case, however, a claimant and a possessor resolved their differences by dividing

68. See Acar, *supra* note 62, at 3 (describing litigation and eventual settlement involving Turkish government, Metropolitan Museum of Art in New York, and private collector William Koch). The settlement of the Elmali Hoard litigation provided for the return of most of the collection to Turkey, while the possessor retained a small portion; however, the claimant in that instance was a private collector. *See id.* (commenting on impact of collection’s return).

69. See William H. Honan, *Deal on Stolen German Art Meets with Mixed Reaction*, N.Y. TIMES, Jan. 9, 1991, at C13 (citing Constance Lowenthal’s comment that payment to Meadors in exchange for return of Quendlinburg treasures was “not so different from paying ransom to buy back your baby”).

70. See Gerstenblith & Roussin, *supra* note 5, at 734 (explaining details of agreement reached between parties on October 30, 2007).

part of the collection between themselves and splitting the proceeds from the sale of the remaining work.⁷¹

4. *The Possessor Returns the Collection to the Claimant in Exchange for Reimbursement of Expenses Incurred While the Collection Was in the Custody of the Possessor*

Expenses incurred by museums on objects in their custody can include storage and insurance costs, exhibition costs, publication costs for any souvenirs or writings, and restoration, study, and cleaning costs.⁷² As this solution allows the possessor to recoup payment for its “labor” on the collection, and allows the claimant to enjoy the fruits of that labor, both parties benefit. Reimbursement for the Museum’s efforts could take numerous forms, including payment, publishing rights, loan agreements, and/or exhibition exchanges.⁷³

The equity-based legal doctrine of *quantum meruit*, as well as several legal decisions, provide precedent for this proposal.⁷⁴ In *Hoelzer v. City of Stamford*,⁷⁵ in addition to holding that the disputed murals in the case belonged to the claimant, the court found that the art restorer/possessor was entitled to compensation for the time he had spent restoring and storing the murals.⁷⁶ The court valued the restoration work at \$557,200 and gave the claimant the option of satisfying judgment by payment or by abandoning the

71. See Notes on People; Settlement of Suit Reached on 3 O’Keeffe Paintings, N.Y. TIMES, Dec. 8, 1980, at C20 (explaining settlement in which both parties received one of three paintings while third was auctioned off with proceeds equally divided between them). The participants in the O’Keeffe settlement were a gallery owner and the artist. See *id.* (describing settling parties as “the 92-year-old Miss O’Keeffe” and “Princeton, N.J., art dealer, Barry Snyder”). A museum or government would be less likely to resolve their differences in this manner. *But see* Sharon Waxman, *Austria: Ending the Legacy of Shame*, ART NEWS, Sept. 1995, at 122 (discussing decision of Austrian government to auction art confiscated by Nazis from Jewish owners and divide proceeds among Jewish Community in Vienna and groups representing non-Jewish victims of Nazism in Austria).

72. See generally INTERNATIONAL COUNCIL OF MUSEUMS, RUNNING A MUSEUM: A PRACTICAL HANDBOOK (2004) (compiling management strategies on topics including collections management, inventories and documentation, care and preservation of collections, display, exhibits, and exhibitions, and museum security).

73. See *infra* notes 88-111 and accompanying text for a further discussion of possessor returns and compensation.

74. See, e.g., *Hoelzer v. City of Stamford*, 972 F.2d 495, 498 (2d Cir. 1992) (holding that city could satisfy plaintiff’s award through either payment or return of murals that plaintiff had restored).

75. 972 F.2d 495 (2d Cir. 1992).

76. See *id.* at 496 (affirming holdings of trial court).

murals to the possessor.⁷⁷ Notably, the court's analysis included a determination that the art restorer was "entitled" to equitable relief because he had restored the murals in "good faith."⁷⁸

5. *Possessor Returns the Collection to the Claimant in Exchange for Monetary Compensation*

The only advantages of this scenario to the claimant are certainty, and avoiding the risk of unfavorable legal precedent.⁷⁹ The primary disadvantage of this solution is that the claimant is put in the position of paying funds for property that it arguably owns.⁸⁰ Since Country A is likely to be a repeat claimant, given the unexcavated sites that it cannot afford to police, this solution puts Country A in the unhappy position of setting an unfavorable precedent for itself, and possibly providing incentive to looters.⁸¹

Although the participants could agree to make the terms of the settlement confidential, secrecy provisions can and have been

77. See *id.* at 498 ("[A]ffirm[ing] but direct[ing] modification of the judgment to allow the City of Stamford to satisfy the award by returning the murals to Hoelzer, within a reasonable time to be set by the district court.").

78. *Id.* at 497. See also *Erisoty v. Rizik*, 1995 U.S. Dist. LEXIS 2096, at *1 (E.D. Pa. Feb. 23, 1995) (explaining that possessor sought award based on claims to quiet title, and damages on basis of work done on disputed paintings, and agreeing to bifurcate case to decide title issue while reserving *quantum meruit* decision for future trial); *Mucha v. King*, 792 F.2d 602, 604 (7th Cir. 1986) (affirming order returning Mucha painting to claimant and ordering claimant to reimburse possessor for costs incurred to restore painting).

79. See *Perez-Pena*, *supra* note 38, at 3 (quoting statements suggesting that part of motivation behind Guggenheim's willingness to accept money in lieu of work at issue was that "it was more important to the Guggenheim to avoid an unfavorable precedent than to recover [the] Chagall").

80. See *Honan*, *supra* note 69, at C13 (commenting on German government's decision to pay possessors, heirs of alleged thief, for return of medieval treasure). Constance Lowenthal, executive director of the International Foundation for Art Research, stated that payment was "extortion because they're buying back what they already own." *Id.*

81. See Jo Ann Lewis, *Texans Return German Treasure*, WASH. POST, Jan. 8, 1991, at B1 (quoting Willi Korte, researcher and expert on stolen art, for proposition that "[t]he checkbook solution sends a terrible message for other cases"); Ralph Blumenthal, *A Stolen Old Master Painting is Brought Back for Poland*, N.Y. TIMES, Nov. 17, 1994, at C15 (commenting that arrangement to pay for return of Metsu painting looted by Nazis "created precedents for the next cases of stolen artwork, that they are not returned to the owner but he must pay"); Bibas, *supra* note 25, at 2458-59 (opining that reimbursing possessors harms future owners by encouraging more theft). While criminal prosecutions may ensue if the possessor's behavior was sufficiently egregious, this is a decision for law enforcement agencies. See William H. Honan, *Three Are Indicted in Sale of German Art Stolen by a G.I.*, N.Y. TIMES, Jan. 5, 1996, at A10 (reporting that U.S. government decided to pursue criminal charges for trafficking in stolen property against heirs of serviceman believed to have stolen Quendlinburg treasures, and against heirs' lawyer).

breached.⁸² In at least one case, the claimant country tried unsuccessfully to disguise payment for its property as a “finder’s fee.”⁸³ In another instance, obtaining the purchase funds from a third party similarly failed to remove the stigma from this solution.⁸⁴

Compensating the possessor is particularly problematic where, as here, the possessor was arguably not a good faith purchaser, as the object was obtained under suspicious circumstances and the possessor had reason to question the validity of any title representations made by the seller. Even Civil Law countries, which allow a good faith purchaser to acquire title from a thief, do not support reimbursement under these circumstances.⁸⁵ The blanket assertions of the seller and the Swiss connection should have made the Museum suspicious about the collection; as a potential buyer, the Museum was in a far greater position to police the initial transaction by contacting representatives of Country A or through other means, such as Interpol.⁸⁶ In addition, unlike a possessor, who can seek recourse to the seller for restitution, a claimant does not have

82. Even if there are penalty sections in the agreement for breaching confidentiality, if a breach occurs, the damage is already done. See Frank DiGiacomo, *Hoving in Contempt Over Sevso Secrets*, N.Y. OBSERVER, Dec. 20, 1993, at 1 (observing that, while contempt motion was brought against Thomas Hoving for breaking confidentiality terms of Sevso settlement, information was already public and could not be “retrieved”).

83. See Honan, *supra* note 69, at C13 (noting that German government’s characterization of payment to possessors of Quendlinburg treasures as “finder’s fee” fooled no-one).

84. See Blumenthal, *supra* note 81, at C15 (“That Poland — or entities acting for Poland — should have to pay for recovery of its own stolen property did not sit well with some experts.”).

85. See O’KEEFE & PROTT, *supra* note 66, at 405-09 (explaining that, even where controlling law allows for compensation for purchaser, payment is generally restricted to bona fide purchasers only). In addition, “reasonable compensation” can cover a range of possibilities, including purchase price or market value. *Id.* In a 1996 decision, France’s Cour de Cassation ordered the state to pay twenty nine million dollars to the owner of a Vincent van Gogh painting; pursuant to French law, the owner was forced to sell the painting in France, though the painting would have likely fetched a higher price abroad. See *French Court Upholds Award in van Gogh Sale*, N.Y. TIMES, Feb. 21, 1996, at C11 (reporting French court’s description of sum as “fair compensation for forbidding Jacques Walter, the former owner of van Gogh’s landscape ‘Garden at Auvers,’ to sell the painting abroad”). Notably, there were allegations in the Van Gogh matter that French officials may have refused the owner’s request for an export license because he refused to pay an illegal bribe. See Tony Allen-Mills, *Van Gogh Painting in French Bribes Scandal*, SUNDAY TIMES, Apr. 24, 1994 (describing allegations of bribery).

86. See *Autocephalous Greek-Orthodox Church v. Goldberg*, 917 F. 2d 278, 283 (7th Cir. 1990) (noting that possessor failed to take obvious steps to verify seller’s capacity to convey mosaics); O’KEEFE & PROTT, *supra* note 66, at 408, 572 (noting Switzerland’s reputation as stopping point for “‘laundering’ cultural goods”).

privity with the seller and cannot look to a third party to be made whole.⁸⁷

6. *The Possessor Returns the Collection to the Claimant in Exchange for Non-Pecuniary Forms of Compensation*

Some of the same considerations outlined in solution five would be true here as well, including the reluctance of claimants to reward bad faith purchasers. However, unlike a direct payment, non-pecuniary compensation can encompass a wide range of possibilities, several of which, such as conservation or loan agreements, can be mutually beneficial.⁸⁸ If the possessor is an institution, it might also be willing to return the work in exchange for excavation or research rights.⁸⁹ For example, the 2007 settlement between Italy and Princeton University provided that Princeton students would have “unique research opportunities at Italian excavations.”⁹⁰ Similarly, pursuant to a 2006 agreement, the Metropolitan Museum returned a number of disputed objects to Italy in exchange for the option of conducting excavations in Italy.⁹¹ The

87. See Drum, *supra* note 22, at 934 (noting that good faith purchaser can sue dealer for breach of warranty of title). However, the privity rule does not always apply outside the United States. *But see* O’KEEFE & PROTT, *supra* note 66, at 406 (discussing *Demoiselle D’Astugue de Sinceny v. Grumbach*, Cour de Cassation [Cass.] [supreme court for judicial matters] Feb. 11, 1931, Bull. civ. 1931, No. 340 (Fr.) wherein French court determined that owner may not recover from dealer where owner has reimbursed possessor). Again, counsel must be thoroughly familiar with the law of the governing jurisdiction.

88. See Stacey Falkoff, *Mutually-Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL’Y 265, 265 (2007) (“A flush of repatriation claims brought in the past two years against several American museums has drawn much attention to extrajudicial mutually beneficial repatriation agreements (“MBRAs”) as an answer to cultural property disputes.”).

89. Conversely, termination of excavation, loan and/or research rights has been used as leverage to encourage possessors to come to terms with claimants; in 2009, the Louvre agreed to return disputed fresco fragments to Egypt after the Egyptian government suspended its excavation rights; similarly, the Getty Museum reached an agreement to return forty disputed works to Italy after the Italian government threatened to stop collaborating with the Getty on loans, research and conservation projects. See Dave Itzkoff, *Egypt and Louvre Resolve Differences*, N.Y. TIMES, Oct. 9, 2009, at C2 (describing methods used by Egyptian government to reach agreement with Louvre); Michael Kimmelman, *When Ancient Artifacts Become Political Pawns*, N.Y. TIMES, Oct. 24, 2009, at A1 (describing trend of museums and countries using artifacts as leverage); West & Hickley, *supra* note 5 (describing agreement between Italy and Getty Museum after Italian government’s threat of ending collaboration).

90. Gerstenblith & Roussin, *supra* note 5, at 734.

91. See Case Summary - Italy Claim Against Metropolitan Museum for Euphronios Krater and other Antiquities, INTERNATIONAL FOUNDATION FOR ART RESEARCH (IFAR), available at http://www.ifar.org/case_summary.php?docid=1184619726 (detailing circumstances surrounding return of objects).

agreement also provided for the loan of excavated objects “for the time necessary for their study and restoration.”⁹² In 2011, Yale agreed to return a group of artifacts to Peru; pursuant to this settlement, Yale entered into a partnership agreement with a Peruvian university to establish a joint center for the conservation and display of the works.⁹³

*United States v. Meador*⁹⁴ (conventionally known as the *Quendlinburg* case) provides yet another possibility for non-pecuniary compensation.⁹⁵ According to press reports, one of the terms of the settlement included an agreement by the German government to inform the appropriate U.S. agencies that it “did not want the United States government to take any action” against the possessors. The purpose of this provision was apparently to “employ diplomatic pressure to forestall any effort” to collect estate taxes or prosecute the possessors.⁹⁶ However, the possessors were subsequently cited in tax and criminal actions in the United States.⁹⁷

a. The Possessor Returns the Collection in Exchange for a Comparable Piece

This proposal is not likely to become commonplace because of the rarity of the pieces usually involved in art recovery cases, and the strong emotions that these suits engender.⁹⁸ Furthermore, as with solution five, exchanging another piece for the return of a disputed item essentially puts the claimant in the position of purchas-

92. *Id.* While an unlikely solution, at least one commentator has argued “for the revival of partage, a practice in which institutions were given some objects unearthed at sites where they led or aided an excavation.” Jori Finkel, *A Man Who Loves Big Museums*, N.Y. TIMES, May 18, 2008, available at <http://www.nytimes.com/2008/05/18/arts/design/18fink.html?pagewanted=all>.

93. See Kate Taylor, *Yale and Peru Sign Accord on Machu Picchu Artifacts*, N.Y. TIMES, Feb. 11, 2011, at C2, available at <http://artsbeat.blogs.nytimes.com/2011/02/11/yale-and-peru-sign-accord-on-machu-picchu-artifacts/> (explaining settlement agreement allowing for joint display of objects).

94. No. 97-40022, 1996 U.S. Dist. LEXIS 22058 (E.D. Tex. Oct. 22, 1996), *aff'd*, 138 F.3d 986 (5th Cir. 1998) [hereinafter *Quendlinburg*].

95. See William H. Honan, *Looted Treasures Returning to Germany*, N.Y. TIMES, Jan. 8, 1991, at C11, available at <http://www.nytimes.com/1991/01/08/arts/looted-treasures-returning-to-germany.html?pagewanted=all&src=pm> (detailing *Quendlinburg* settlement agreement).

96. See *id.* (explaining settlement agreement); Lewis, *supra* note 81 (describing settlement).

97. See Honan, *supra* note 69, at C13 (discussing additional resulting legal actions).

98. See Borodkin, *supra* note 18, at 413 (reporting that, in 1992, Chinese government attempted to sponsor its own sale of antiquities, but ultimately, “second-rate” quality of artifacts listed in accompanying catalog discouraged dealers from attending).

ing the work. Again, this is problematic where the claimant is likely to be a repeat litigant and/or is spending public money. In one instance, a government claimant had to rescind its initial agreement to provide the possessor with an equivalent piece because the public backlash was tremendous.⁹⁹ There has been at least one successful exchange between parties to a cultural property dispute. In 1994, the government of Iran agreed to exchange a Willem de Kooning painting for the return of part of the “Houghton” Shahnameh.¹⁰⁰ However, as one commentator noted, as far as the government of Iran was concerned, the de Kooning painting was “a disposable item: something that they did not want and did not want to show.”¹⁰¹

b. The Possessor Returns the Collection to the Claimant in Exchange for an Extended Loan of the Works or Loans of Comparable Works

The advantages of this arrangement for Country A are that its ownership rights are acknowledged and, at some future point, it will have custody and use of the collection. The Museum, meanwhile, has temporary “use and enjoyment” of the works, including the opportunity to exhibit and study the collection. If the parties decide upon an extended loan, they need to consider a number of issues unique to this arrangement. While questions regarding payment of insurance costs and liability for any damage to the works arise in many of these hypothetical settlements, participants to a loan agreement must also decide: (1) display issues, including provisions for the attribution of ownership on any descriptions of the piece; (2) publication rights and royalties accompanying catalogs or memorabilia; (3) security arrangements; and (4) provisions for any testing or restoration while the work is on loan.

As part of a settlement between the Norton Simon Museum and India, the parties agreed to a ten-year loan of the object at is-

99. See Stille, *supra* note 59, at 1 (reporting on negotiations between Art Institute of Chicago and government of Thailand over ownership of lintel that had once been part of Khmer temple; case settled when third party private foundation agreed to donate work to museum).

100. See Amy Gamerman, *Iran Swaps de Kooning for Persian Manuscript*, WALL ST. J., Oct. 13, 1994, at A14 (noting that de Kooning painting was given to corporation that was supposed to use proceeds of sale of painting to purchase Shahnameh fragments from Houghton trust).

101. See *id.* (citing Milo Beach, Director of the Freer and Sackler galleries of Asian art).

sue, after which the object was returned to India.¹⁰² The 2007 agreement between Princeton University and Italy provided for a four-year loan of four of the disputed objects, including an Etruscan head of a winged lion.¹⁰³ The 2007 agreement between the Getty Museum and Italy provided that one of the disputed pieces, a fifth century BC statue of a goddess, would remain at the museum until 2010.¹⁰⁴ Under a 2008 agreement between the Metropolitan Museum and Italy, the museum was allowed to keep a sixth century B.C. krater until 2010 in exchange for the return of ten Etruscan and Greek antiquities.¹⁰⁵ The 2006 agreement between Greece and the Getty Museum provided for long-term loans in exchange for the return of an ancient statue and gold wreath.¹⁰⁶

A number of museums have agreed to return disputed items to claimant countries in exchange for loans of “objects of equivalent value” and/or cooperation on exhibitions and excavations.¹⁰⁷ In 2008, the Italian Culture Ministry agreed to cooperate on cultural exchanges with the Cleveland Museum of Art after the Museum agreed to return fourteen objects.¹⁰⁸ In September 2006, the Boston MFA returned a statue of the Roman Empress Sabina, a fragment of a statue of Hermes, and eleven vases ranging in date from 500-250 BC in exchange for Italy’s agreement to loan significant works to the museum.¹⁰⁹ The first loan sent under the agreement, a statue of Eirene, was received in November 2006 and remained on display in Boston until 2009.¹¹⁰

One difficulty inherent in this solution is determining what constitutes an “object of equivalent value.” Drafters of such an agreement should include terms mandating who has the right to decide this issue, as well as any specifics regarding exhibition costs,

102. See Chandra, *supra* note 51, at 8 (discussing terms of settlement agreement between India and Norton Simon Museum).

103. See Gerstenblith & Roussin, *supra* note 5, at 734 (explaining agreement reached by parties).

104. See West & Hickley, *supra* note 5 (detailing settlement agreement wherein some objects would be immediately returned and return of others would be deferred).

105. See Miller, *supra* at note 49, at 18 (detailing agreement between Italy and Metropolitan Museum).

106. See *id.* (discussing long-term loan exchange agreement).

107. See e.g., Povoledo, *supra* note 4, at C3 (citing examples of return agreements).

108. See *id.* (discussing agreement between Italy and Cleveland Museum of Art).

109. See Miller, *supra* note 49, at 18 (discussing implementation of agreement between Italy and Boston MFA).

110. See *id.* (discussing implementation of loan detailed in settlement agreement).

such as insurance. Under the 2006 agreement between the Metropolitan Museum and Italy, the museum returned twenty-one objects in exchange for Italy's promise to loan pieces of "equal value;" the agreement provided that the objects would be chosen "from a list submitted by the museum, which then must be approved jointly."¹¹¹

7. *The Possessor Retains the Collection in Exchange for Compensating the Claimant*

This solution highlights the importance of knowing the client's true goals. In some circumstances, the claimant may be less interested in the return of an object than in acknowledgment of its ownership rights. For example, Country A may decide that the collection does not add substantively to works it already has on exhibit or that interim damage or restoration to the collection has destroyed its aesthetic or historical value. In this case, Country A may prefer payments and/or services to a return of the objects. The primary disadvantage of this resolution for the possessor is that, unless restitution is forthcoming from the seller, it is paying twice for the same object.

Given that many art recovery lawsuits involve unique or rare pieces that have great historic and/or emotional value, this settlement scenario is unlikely to work if the claimant is a country.¹¹² However, in several cases, out of court settlements provided for possessor museums to retain the object at issue in exchange for payments to private possessors.¹¹³

111. *Id.*

112. See, e.g., *Autocephalous Greek Orthodox Church v. Goldberg & Feldburg Fine Arts, Inc.*, 717 F. Supp. 1375, 1403-04 (S.D. Ind. 1989) (noting historical importance and uniqueness of mosaics involved, which were among few pieces to avoid destruction during period of Iconoclasm); *Alaskan Village*, *supra* note 58, at B10 (noting spiritual value of totems at issue to Klukwan Indians). However, in some instances a work of great religious importance may have lost some of its value to a claimant because it has been removed from its original site or has been handled by non-believers; consequently, the claimant may be interested in selling the piece.

113. See Bickelhaupt, *supra* note 43, at 33 (noting that Boston MFA was able to obtain title from Lafayette College for Egyptian pectoral stolen from college years earlier and later sold by dealer to museum; as alleged thief in this instance was known, college also filed suit against him); Dave Itzkoff, *Judge Rebukes Museums for Secret Picasso Settlement*, N.Y. TIMES (Jun. 18, 2009), <http://artsbeat.blogs.nytimes.com/2009/06/18/judge-rebukes-museums-for-secret-picasso-settlement/?scp=1&sq=Judge%20Rebukes%20Museums%20for%20Secret%20Picasso%20Settlement,%20N.Y.%20TIMES&st=cse> (reporting that Museum of Modern Art and Guggenheim Museum reached settlements with owners of two Picasso paintings allegedly sold under duress in Nazi Germany; under agreements, museums were allowed to keep works in exchange for payments of undisclosed sums).

8. *The Possessor Donates the Collection to an Agreed-Upon Third Party*

In a number of cases, ownership disputes were resolved by donations of the disputed works to non-profit foundations.¹¹⁴ To date, these settlements have involved only private possessors and have offered those individuals the possibility of a tax advantage.¹¹⁵ If the possessor's donation qualifies under the U.S. tax laws, he may qualify for a tax deduction for the market value of the work, which is almost always higher than its purchase price, given the inflation of the art market.¹¹⁶

In practice, this resolution has resulted in the return of the objects to the claimant in the form of an extended or indefinite loan from the non-profit institution.¹¹⁷ Because of the structure of the U.S. Tax Code, if there is an overt, explicit agreement at the time of the settlement to return the works to a foreign claimant, the possessor will not be eligible for the tax deduction.¹¹⁸ The parties would also have to be careful not to attribute ownership of the work

114. See *Smuggled Treasures Are Returned to Turkey*, WASH. POST, Aug. 17, 1994, at Section B2 [hereinafter *Smuggled Treasures*] (stating New York dealer's agreement to donate second century A.D. statue of Marsyas to Turkish American foundation in exchange for tax deduction and noting statue was eventually returned to Turkey); Irvin Molotsky, *20 Years After Thievery, Rare Gold Ornaments Will Return to Greece*, N.Y. TIMES, Jan. 31, 1996, at 1 (noting possessor's donation of disputed Mycenaean gold pieces to Society for Preservation of Greek Heritage, which eventually returned them to Greece; possessor reportedly received large tax write-off in exchange); Borodkin, *supra* note 18, at 404 (discussing private collector's decision to donate Roman era sarcophagus on loan to Brooklyn Museum to non-profit American-Turkish Society).

115. While solution seven offers the possibility of an agreement without either party having to absorb the cost of the object, several commentators have challenged such arrangements because they are, in effect, funded by the American taxpayer and make the American public "the unwitting insurers" of questionable acquisitions. Borodkin, *supra* note 18, at 404-05. See also Blumenthal, *supra* note 81, at C15 (detailing exchange agreement that allowed private investor large tax deduction).

116. See I.R.C. § 501(c)(3) (2010) and regulations thereunder providing for tax deductions for donations to domestic institutions organized and operated exclusively for religious, charitable, literary, scientific or educational purposes, if the donor qualifies.

117. See *Smuggled Treasures*, *supra* note 114, at B2 (relating agreement of New York dealer to donate second century A.D. statue of Marsyas to Turkish American foundation in exchange for tax deduction, and subsequent return of statue to Turkey); Molotsky, *supra* note 114, at 1 (discussing possessor's donation of disputed Mycenaean gold pieces to Society for Preservation of Greek Heritage; possessor reportedly received large tax write-off, and Society for Preservation of Greek Heritage subsequently returned objects to Greece).

118. See Molotsky, *supra* note 114, at 3 (describing how donation of disputed ancient treasure to non-profit organization enabled large tax write-off, whereas direct agreement with foreign claimant would not have resulted in tax write-off). In addition to the usual considerations, such as conservation and publication rights, the drafter of an extended "loan" agreement should also include provisions for

to the original claimant in any way, including on displays. The primary disadvantage of an extended loan arrangement for the claimant is that it does not acquire full ownership of the work, as title rests with the non-profit.

If the possessor is a private individual, another settlement possibility is to have the possessor retain custody of the object for his lifetime, or for a term of years, in exchange for an agreement to donate the object to a qualified organization after his death or at the end of the loan period.¹¹⁹ If the possessor chooses lifetime ownership and bequeaths the work to a qualified non-profit institution, the possessor's estate may be eligible for a tax benefit for the value of the "remainder."¹²⁰ Again, as the value of fine art tends to appreciate, the tax deduction is likely to exceed the purchase price.

IV. PREPARING FOR SETTLEMENT

Taking into account both the client's wishes and the prevailing law, counsel should prepare for settlement negotiations by devising alternative and back-up positions, which must be discussed with the client.¹²¹ Both parties retain the alternative of litigation.¹²² In some cases, a client may not be willing to make any compromise and will insist on litigating the matter.¹²³ As it is ultimately the client's decision whether or not to settle, the client must be informed of all settlement offers.¹²⁴

"subleases" if the claimant wants to loan the work out during the course of its custody of the piece.

119. See Honan, *supra* note 34, at C11 (noting that claimant and possessor resolved their dispute over collection of Roman era antiquities illicitly removed from claimant's farm by agreeing that possessor could retain custody of works for his lifetime, after which they would be donated to British Museum).

120. See I.R.C. § 170(b)(1)(a)(i) (2006) (outlining applicable tax deductions when gift or bequest is made to qualified non-profit institution).

121. See generally Sara Holtz, *Clients Generally Need a Briefing on the Process Before Mediation Begins; Because Many Clients May Be Unfamiliar with the Goals of Mediation, Preparation is Key*, 18 NAT. L.J. 16 (1995) (commenting that advance preparation is similarly important in settlement discussions and in litigation, and that client and counsel should have "well-thought-out game plan" before process begins).

122. See *id.* (describing that when alternative settlement arrangements are not agreed upon, back-up plan of litigation may be pursued).

123. See *id.* (noting that because mediation focuses on resolution rather than determination of which party was right or wrong, some clients "may be frustrated or surprised that vindication is not going to occur"); see also Sochynsky, *supra* note 33 (commenting that "not every dispute is amenable to settlement").

124. See Sochynsky, *supra* note 33 (concluding that for client to make ultimate decision regarding settlement or litigation, client must be informed of all possible options).

In addition to a thorough knowledge of the applicable law and the client's objectives, counsel in an art recovery case must also be aware of policy considerations that may influence the settlement process. Over the last two decades, there has been a general trend against the acquisition of objects of dubious provenance.¹²⁵ This trend is reflected in guidelines promulgated by museums and non-governmental organizations that advise against conduct that might promote damage to archaeological sites, including the purchase of works of dubious provenance.¹²⁶ Cultural nationalism may also impact cultural property cases, as these disputes commonly involve pieces that have great emotional or religious significance for country claimants.¹²⁷ As a result, these cases can have ramifications that extend beyond the interests of the particular parties involved.¹²⁸

A. Legal Preparation

Counsel entering settlement negotiations for a cultural property dispute must be thoroughly familiar with the law of the jurisdiction involved. Precedent can be a powerful leveraging tool in negotiations and settlement strategy, and positioning often depends on the party's odds of prevailing in court. Counsel also needs to consider potential claims against third-parties, such as sell-

125. See, e.g., 2008 Report, *supra* note 6 (recommending, *inter alia*, that museums should not normally acquire work unless there is evidence that work was outside its country of probable discovery before 1970 or was legally exported from that country).

126. See, e.g., Anna Somers Cocks, *The Getty Museum Retreats from the Antiquities Market*, 6 ART NEWSPAPER 54, Dec. 1, 1995, at 16 (reporting that, under new policy, Getty Museum, formerly one of most formidable antiquities collectors on the market, would "only be acquiring and displaying pieces with a documented provenance," which automatically excludes most items on market today); 2008 Report, *supra* note 6 (enunciating guidelines for museums advocating more exacting acquisition policies).

127. See Stein, *supra* note 36, at 1 (citing Robert Brown, professor of art history, for proposition that for emerging economies like Cambodia or Myanmar, "culture is very often the major way" they begin to define themselves).

128. See David L. Shirey, *Syrian Mosaic Returned by the Newark Museum*, N.Y. TIMES, Dec. 25, 1974, at 16 (noting that former Secretary of State Kissinger expressed his appreciation to Newark Museum for its return of ancient Roman mosaic to Syria). Because of the broad ramifications of these cases in the art world, advocacy organizations for both dealers and claimants often seek to intervene in art recovery actions as "amici." Commentators have also noted that, because government claimants are sometimes also frontline states in the war against the international drug traffic, the U.S. government had reason "to avoid actions that appear to damage" the interests of these countries from which federal agencies are seeking help with respect to the "war on drugs." See Meyer, *supra* note 59, at A22 (describing responsible curator's motives are not to plunder valuable artwork); Stille, *supra* note 59 (noting that Nixon administration's decision to sign a bilateral treaty to help Mexico recover Pre-Columbian artifacts may have been "in exchange for increased spraying of the Mexico marijuana crop").

ers, auction houses, and any other participant in the transfer of the objects, and determine whether those parties should be involved in settlement.¹²⁹

Lex situs, or law of the place where the object is in custody, has generally determined choice of law in property cases.¹³⁰ This is a crucial point, as the laws governing ownership of cultural property vary widely from country to country.¹³¹ Furthermore, although the rule in the United States is that a thief cannot convey good title, the grounds for determining whether there are any exceptions to this rule are not consistent from state to state.¹³² For example, federal courts in the First and Seventh Circuits have held that the “discovery” rule applies to art recovery cases.¹³³ Pursuant to this rule, the statute of limitations is tolled when a case arises from a wrong that is “incapable of detection by the wronged party through the exercise of reasonable diligence.”¹³⁴ Determination of whether the

129. See, e.g., *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 427-28 (N.Y. 1991) (detailing dealer who contributed part of payment that led to locating painting at issue); *Menzel v. List*, 267 N.Y.S.2d 804, 806-08 (N.Y. Sup. Ct. 1966) (describing possessor who brought in dealer as third party after claimant filed suit).

130. See, e.g., *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1159-60 (2d Cir. 1982) (describing legal concept of *lex situs*); *Winkworth v. Christie Manson & Woods Ltd.*, (1980) Ltd. 1 Ch. 496 at 513-14 (Eng.) (presenting evidence of English court’s ruling that *lex situs* law, of Italian origin, governed case).

131. See Alexandre A. Montagu, *Recent Cases on the Recovery of Stolen Art—The Tug of War between Owners and Good Faith Purchasers Continues*, 18 COLUM.-VLA J.L. & ARTS 75, 75-76 (1993) (detailing different cultural property ownership laws throughout the world).

132. See *Bell v. United States*, 462 U.S. 356, 359-60 (1983) (noting that when possessor acquires property by trick or by false pretenses, act is crime and actor does not have good title to convey).

133. See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 917 F.2d 278, 290 (7th Cir. 1990) (allowing for discovery rules in art case); *Republic of Turkey v. OKS Partners*, 797 F. Supp. 64, 69-70 (D. Mass. 1992) (approving discovery rules in art case).

134. *Borden v. Paul Revere Life Ins. Co.*, 935 F.2d 370, 376 (1st Cir. 1991) (citing *Int’l Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc.*, 560 N.E.2d 122, 126 (Mass. App. Ct. 1990)). The determination of what constitutes due diligence on the part of an owner also varies from jurisdiction to jurisdiction and sometimes from case to case. See *Elicofon*, 678 F.2d at 1164 (describing defendant’s display unidentifiable; thus, third party exercised reasonable due diligence in discovery of stolen property that tolled statute of limitations); *Goldberg*, 917 F.2d at 289-90 (arguing that due diligence is highly fact specific and must be decided on case by case basis); *Lubell*, 569 N.E.2d at 430-32 (noting that under New York case law, duty of reasonable diligence should not be applied to owners of stolen art work for statute of limitations purposes). In September 2010, the California legislature approved a bill extending the statute of limitations for stolen art from three to six years. See Kate Taylor, *California Lawmakers Approve Stolen Art Bill*, NY TIMES (Sept. 1, 2010), <http://artsbeat.blogs.nytimes.com/2010/09/01/california-law-makers-approve-bill-on-stolen-art-claims/> (describing desire to change statute of limitations for claims of stolen art work). In addition, the bill frees plaintiffs from

claimant exercised due diligence in locating the missing object is a fact-intensive inquiry.¹³⁵ Among other factors, courts have considered whether the work's location was publicized by way of exhibitions or exhibition catalogues, and whether the claimant notified any organizations concerned with stolen artwork, including UNESCO, the Art Dealers of America, or the International Foundation for Art Research.¹³⁶ In 2007, the Ninth Circuit held that a claimant was barred by the statute of limitations from recovering a Vincent van Gogh painting.¹³⁷ The court noted that the possessor's 1963 acquisition of the painting was publicized at the time, the 1970 catalogue raisonné for the artist stated it was owned by the possessor, the work was exhibited at the Metropolitan Museum in 1986 and 1987, and the work was offered for sale at Christie's in 1990.¹³⁸

Not all jurisdictions apply the discovery rule to art recovery cases. For example, courts in New York have applied the "demand and refusal" rule to such disputes.¹³⁹ Under the demand and refusal rule, the statute of limitations is tolled until the owner of a work has demanded its return from the possessor and been refused.¹⁴⁰

having to show reasonable diligence and "the clock does not start until plaintiffs have gathered enough information to evaluate whether they have valid claims." *Id.* To date, it has not been signed into law by the governor. *Id.*

135. See *Goldberg*, 917 F.2d at 289-90 (explaining due diligence is fact specific inquiry).

136. See, e.g., *Orkin v. Taylor*, 487 F.3d 734, 741-42 (9th Cir. 2007) (analyzing reasonableness of discovery rule); *Goldberg*, 917 F. 2d at 283 (noting factors of outside claims or registrations of dealers when analyzing due diligence of discovery rule); *O'Keeffe v. Snyder*, 416 A.2d 862, (N.J. 1980) (describing several factors of analysis under due diligence of discovery rule and statute of limitations).

137. See *Orkin*, 487 F.3d at 738-41 (stressing that most important question was "whether there [was] 'any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one'" (citing *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 834-35 (9th Cir. 2004); *First Pac. Bancorp., Inc. v. Helfer*, 224 F.3d 1117, 1121-22 (9th Cir. 2000)).

138. See *id.* at 737-42 (noting that publication and exhibition by museum of artwork factored into due diligence determinations).

139. See *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429 (N.Y. 1991) (explaining New York's "demand and refusal" rule starts accrual period of statute of limitations when true owner demands return of property and possessor refuses to return property).

140. See *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1161 (2d Cir. 1982) (describing that, under New York law, innocent purchaser becomes wrongdoer after owner's demand for return is not met); *Lubell*, 569 N.E.2d at 430-32 (emphasizing "demand and refusal" rule in protecting owner whose property has been stolen); *DeWeerth v. Baldinger*, 836 F.2d 103, 108 (2d Cir. 1987) (noting "demand and refusal" rule is to protect innocent party by assuring notice).

The differences are much greater when the case involves the law of other countries. In general, countries governed by Civil Law allow title to vest in a bona fide purchaser, although specific terms vary from country to country.¹⁴¹ For example, under the German legal principles cited in *Kunstsammlungen Zu Weimar v. Elicofon*,¹⁴² a good faith purchaser may acquire title by possessing the work in good faith for at least ten years, or by purchasing the work from someone entrusted with it by the owner.¹⁴³ Under the Swiss laws cited in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*,¹⁴⁴ a bona fide purchaser can acquire title to stolen property after a period of five years from the date of the theft.¹⁴⁵ In interpreting Swiss law, the *Goldberg* court found that a determination that a purchaser acted in good faith required a factual examination of the elements surrounding the sale, including the price, the nature of the items, and the reputation of the seller.¹⁴⁶ However, even the general principle that a good faith purchaser can acquire title is not universally applied in all countries governed by Civil Law.¹⁴⁷ For example, Portugal, Denmark, and Norway have been cited as countries that allow “unlimited recovery to the owners.”¹⁴⁸

141. See O’KEEFE & PROTT, *supra* note 66, at 405 (describing Civil Law system of title vesting). Interestingly, an EU Directive on the “Return of Cultural Objects Unlawfully Removed from the Territory of a Member State” provides for a statute of limitations not “more than one year after the Requesting Member State became aware of the location of the cultural object and the identity of its possessor or holder.” See Council Directive 93/7/EEC, art. 7, 1993 O.J. (L 74) 74, 74 (EU) (detailing limitations placed on European Member States). The EU Directive was implemented in the United Kingdom in 1994, replacing the old market law, which allowed a buyer to acquire title to goods purchased in daylight and good faith from some markets. *Id.* The EU Directive also provides an absolute cut-off date for recovery suits for most works of art of thirty years after the unlawful removal. *Id.*

142. 678 F.2d 1150 (2d Cir. 1982).

143. See *id.* at 1160 (discussing policy of *Ersitzung*); see also O’KEEFE & PROTT, *supra* note 66, at 407 (outlining Civil Law system of obtaining title).

144. 917 F.2d 278 (7th Cir. 1990).

145. See *id.* at 291 (highlighting Swiss laws regarding acquisition of title); see also Montagu, *supra* note 131, at 79 (outlining legal process of acquiring title in different parts of Europe).

146. See *Goldberg*, 917 F.2d at 290-94 (analyzing good faith of purchaser with evidence of elements surrounding purchase of item in dispute); see also O’KEEFE & PROTT, *supra* note 66, at 409 (noting that Swiss Civil Code provides that “*bona fides* is presumed in favour of the possessor”); Bibas, *supra* note 25, at 2465 n.163 (suggesting that to determine bad faith “courts should look at a series of objective factors that suggest affirmative blindness,” such as whether seller’s story was plausible, and whether sale was hurried or took place in suspicious location).

147. See O’KEEFE & PROTT, *supra* note 66, at 409 (noting countries that do not include good faith purchaser rule in legal practice).

148. *Id.*

In addition to the statute of limitations issue, claimant countries seeking the return of looted objects located in the United States must also establish the legal basis of the claimant's demand for return, which often entails verifying the identity and/or find spot of the object. Thus, claimant countries must show that their laws provide the state with some proprietary interest or ownership right in the disputed work. Most claimant countries have enacted laws providing for ownership of all antiquities discovered in that country after a specified date.¹⁴⁹

Identity and find spot issues arise in cases involving works that have been illicitly excavated and smuggled out of the country of origin before being inventoried. In some instances, the claimant has found eyewitnesses to the theft, or demonstrated a "fit" with objects known to have been excavated in the claimant country. In other cases, experts provided stylistic or scientific evidence linking the object to the claimant country.¹⁵⁰ Notably, claimants have lost cases where the experts could not provide anything more specific than an assertion that the piece is typical of a style associated with the alleged find spot.¹⁵¹

While replevin actions seeking recovery of the object are the most common type of cultural property claim, where applicable, counsel should consider other possible civil actions and remedies. In *Republic of Turkey v. OKS Partners*,¹⁵² the claimants included claims predicated on consumer protection laws, as well as RICO

149. See, e.g., Mary Williams Walsh, *A Grecian Treasure: Back from the Grave?*, L.A. TIMES (Aug. 12, 1996), http://articles.latimes.com/1996-08-12/news/mn-33617_1_aidonia-treasure (stating that "the Antiquities Act of 1932 makes all ancient art national property"); see Miller, *supra* note 49 (noting that "[a] 1939 Italian law claims state ownership of all antiquities located in Italy, except for those privately owned before 1902") (citation omitted).

150. See Montalbano, *supra* note 34, at A1 (describing how plaster cast made from lower half of statue of Hercules in collection of museum in Antalya, Turkey fit disputed top half of statue of Hercules in custody of Boston MFA); see also Borodkin, *supra* note 18, at 404 (noting that possessor agreed to settle dispute over garland sarcophagus when "it was revealed that an almost identical companion piece had been excavated in Turkey").

151. See *Peru v. Johnson*, 720 F. Supp. 810, 812 (C.D. Cal. 1989), *aff'd sub nom.*, *Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991) (finding expert in case could state only that objects in dispute were "of Peruvian style and culture"); see also *Republic of Croatia v. Tr. of Marquess of Northampton 1987 Settlement*, 610 N.Y.S.2d 263, 265 (N.Y. App. Div. 1994) (finding claims of ownership did not have merit because claimants could not show "find-site"); Borodkin, *supra* note 18, at 403 (noting difficulty of proving find spot after its "contexts have been obliterated").

152. 797 F. Supp. 64 (D. Mass 1992).

and replevin counts.¹⁵³ Claimants may also be able to sue for damages if the objects have been altered while in the custody of others.¹⁵⁴

In a number of instances, stolen art was returned to owners as a result of suits maintained by the United States government.¹⁵⁵ For example, pursuant to its ratification of the UNESCO Convention in 1983, the United States brought suit against a London dealer for the return of a carved wooden panel that had been removed from a Turkish mosque; the dealer ultimately settled the case by returning the piece.¹⁵⁶ In a 1999 case, the United States successfully sued a collector for the return of a fourth century BC gold phiale based on claims that the collector had violated customs laws by making false statements on declaration forms.¹⁵⁷ In *United States v. Schultz*,¹⁵⁸ the Second Circuit held that the National Stolen Property Act (“NSPA”) applied to art looted from a foreign country where there was already a patrimony law in place governing the ownership and export of such work.¹⁵⁹ While criminal claims can

153. See *id.* at 66 (alleging violations of RICO and Massachusetts Consumer Protection Act). The case ultimately settled out of court in 1999. See *Just Returns, CULTURE WITHOUT CONTEXT* (McDonald Inst. for Archeological Res., U. of Cambridge, Cambridge, Eng.), Spring 1991, available at <http://www.mcdonald.cam.ac.uk/projects/iarc/culturewithoutcontext/issue4/news/htm> [hereinafter *Just Returns*] (stating case settled out of court in 1999).

154. See *India Sues Simon For Return of Idol Allegedly Stolen*, N.Y. TIMES, Dec. 8, 1974, at 80 (noting that when government of India filed suit against Norton Simon over ownership of Shiva Nataraja, complaint asked for “\$1.5 million and the return of the . . . [statue,] or \$2.5 million additional if . . . [the statue was] not returned”); see also Honan, *supra* note 61, at 23 (quoting lawyer for proposition that claimants seeking return of sacred Coroma textiles could have won damages for loss of use of textiles).

155. See, e.g., *United States v. An Antique Platter of Gold*, 184 F.3d 131, 132-33, 140 (2d Cir. 1999) (affirming district court’s ruling that antique gold platter be forfeited because of its status as stolen property under Italian law and material false statements on customs forms); see also Borodkin, *supra* note 18, at 396 (noting that “[f]ederal prosecutors are beginning to interpret basic criminal statutes,” such as those criminalizing “[f]ederal mail fraud” and “criminal conspiracy,” among others, to cases in the “art context”).

156. See *Just Returns*, *supra* note 153 (noting that case settled out of court in 1999).

157. See *Antique Platter*, 184 F.3d at 134 (discussing facts of case and district court’s entry of summary judgment against defendant); see also ICE Press Release, *supra* note 29 (discussing similar instances of government intervention in retrieving artifacts).

158. 333 F.3d 393 (2d Cir. 2003).

159. See *id.* at 398-99 (describing NSPA section pertaining to unlawful transportation of art or cultural artifacts). The NSPA makes it a federal crime to transport stolen goods in foreign trade. See Fox, *supra* note 27, at 232-33 (stating that, because NSPA is criminal statute, it is strictly interpreted; thus the statute requires finding that defendant knew goods involved were stolen goods); see also *United States v. Hollinshead*, 495 F.2d 1154, 1155-56 (9th Cir. 1974) (stating that defend-

only be maintained by the government, the possibility of criminal penalties has played a role in at least two settlements.¹⁶⁰

B. Negotiation and Drafting

Settlement proceedings generally begin with a demand letter outlining a proposal for the terms of the negotiation. If the demand letter is sent prior to the filing of a suit, it should include provisions for tolling the statute of limitations. The letter should also include language requesting preservation of the object while the dispute is pending, and an agreement that the possessor will not convey or transfer the object while negotiations are pending. In turn, the possessor might want an agreement from the claimant to abstain from any action to change the status of the object while settlement discussions are ongoing or until a specified date.

The parties should also consider whether they wish to have a mediator or facilitator involved in the process.¹⁶¹ Because art recovery cases often involve foreign governments as claimants, a number of negotiations have called upon the services of American diplomats to help facilitate the process.¹⁶² If a suit has been filed, the parties should decide whether they want to participate in a standstill agreement tolling the underlying court action. The advantage to a standstill agreement is that it potentially avoids wasting

ants were charged with transporting pre-Columbian artifacts and burden of proof was on government to show defendants "knew that [the object] was stolen"); *United States v. Turpin*, 1996 U.S. Dist. LEXIS 1293, at *1, *7 (S.D.N.Y. 1996) (denying defendant's motion for acquittal or new trial after affirming that NSPA applied to transfer of stolen Chagall).

160. See Honan, *supra* note 61, at 23 (noting that dealer "agreed . . . to surrender [his] claim to [ownership of Coroma textiles] without compensation in exchange for an assurance from the United States Attorney in the Northern District of California that he would not be prosecuted"); see also Honan, *Looted Treasures Returning to Germany*, *supra* note 95, at C11 (reporting that, through part of settlement, German government agreed to inform appropriate United States agencies that it "did not want the United States Government to take any action against [the possessors]").

161. See Bickelhaupt, *supra* note 48 (noting that Lafayette College and Boston MFA were able to reach agreement concerning Egyptian pectoral with aid of both mediator and appraisers).

162. See Grace Glueck, *Simon and India: Battle on Idol Widens*, N.Y. TIMES, Dec. 30, 1974, at 36 (noting that Daniel Moynihan, then ambassador to India, assisted resolution of controversy between Indian government and Norton Simon over bronze statue). In several recent cases, government claimants have sought the intervention of UNESCO in their attempts to recover cultural property. See Robert Browning, *No Flaws in the Case for Losing Our Marbles*, THE GUARDIAN, May 27, 1995, at 24 (noting involvement of UNESCO in claim by Turkey to retrieve stone sphinx from Germany); see also Maier, *supra* note 46, at B36 (reporting that UNESCO stepped in on behalf of Afghanistan to recover sculpture in possession of Metropolitan Museum).

time and expense. If the parties do not reach an agreement, however, a standstill agreement will further prolong the case.

If the parties enter settlement negotiations, they must provide for the custody, maintenance, and insurance of the object while the settlement process is pending. If the work is not on view, the claimant should ask for an opportunity to inspect the piece to satisfy itself with respect to identity, condition and other issues.¹⁶³ The claimant should also consider asking for periodic inspections to insure that the work is still in good condition. The possessor may want to have a representative present at such art inspections. The possessor might also want the claimant to agree to a temporary waiver of publication rights while the dispute is pending, which would allow the possessor to photograph or exhibit the work without risking the accrual of damages.

One of the advantages of the settlement process is that it allows a party the opportunity to discover what the other side requires in terms of evidentiary proof. For example, in a case involving the return of a nineteenth century statue of a philosopher to Okinawa, the possessor college agreed to consider returning the statue once it was satisfied that the claimant sincerely wanted the work.¹⁶⁴

Early exchanges of crucial proofs and evidence may also lead to an early resolution if one party has an especially strong case. If the parties decide to exchange information during the settlement process, they should consider a written agreement governing the terms of the exchange. For example, the parties should agree that any communications between them during settlement are inadmissible pursuant to Rule 408 of the Federal Rules of Evidence.¹⁶⁵ Both parties should also bear in mind that an opponent's knowl-

163. This demand is crucial where the piece at issue has been stored for a long period of time. See *Christies Fine Art Storage Services*, CHRISTIES, <http://www.cfass.com/New-York/> (last visited Nov. 2, 2011) (describing art storage facilities at renowned art auction house).

164. See William H. Honan, *Okinawa Seeks Return of Statue*, N.Y. TIMES, Oct. 24, 1994, at C11 (highlighting willingness of college's president and trustees to reconsider denial if presented with new evidence that Okinawans genuinely wished to have statue). The Okinawa case also raised an additional issue that arises in cases where a possessor acquires an object through a testamentary bequest: what happens if the terms of the bequest mandate retention of the object and there has not been any court adjudication of title? See *id.* (noting that trustees' denial was motivated by recognition of wishes of college's former president, who accepted statue and declared in letter that it would remain in selected location at college forever). Theoretically, if the beneficiary violates the terms of the bequest, the estate might be able to bring a claim against the beneficiary. See *id.* (explaining estate's possible causes of action against beneficiary).

165. See FED. R. EVID. 408(a)(2) (stating rules regarding "compromise negotiations").

edge could give him an advantage with respect to discovery demands if the dispute is not resolved.

V. CONTENTS OF THE SETTLEMENT AGREEMENT¹⁶⁶

Settlement agreements are largely comprised of two types of provisions: (1) “whereas” clauses, which generally reference the facts that preceded settlement, and (2) “representations and warranties.” Typically, these provisions include statements by the parties that neither admits any liability or fault, and that the settlement was entered into as a means of avoiding litigation. Art recovery settlements usually include representations by the possessor that his acquisition of the work at issue did not violate the law; these provisions are intended to avoid potential criminal claims and typically contain language “opening up” the agreement in the event that the representations are later contradicted.

Other standard provisions include warranties of authority confirming that the signatories are authorized to sign the agreement on behalf of the parties and that the parties know of no other claims, liens, or encumbrances, pending or otherwise, concerning the underlying property. The parties might also want to include provisions stating that any modification of the agreement must be in writing, and that the agreement contains the whole of the parties’ understanding. If the agreement is governed by American law, the drafter should consider inserting language rejecting the common law rule that ambiguous language is interpreted against the drafter.¹⁶⁷

If the agreement provides for the return of the object, the parties must decide: (1) who is to pay insurance costs during the transfer and pending the transfer; (2) whether the other party must approve the insurer and policy; (3) how the work is to be shipped; (4) which party is to pay shipping costs; (5) whether the other party can be present during the packing of the object; and (6) whether to turn over any research materials generated while the piece was in custody of the possessor. If the possessor is a museum, there should

166. The considerations discussed in this Part must be tailored to the law of the jurisdiction that governs the agreement; specifically, any law determining the enforceability of contract provisions. Consequently, a thorough knowledge of such law is necessary. See SETTLEMENT AGREEMENTS IN COMMERCIAL DISPUTES: NEGOTIATING, DRAFTING AND ENFORCEMENT § 2.01 (Richard A. Rosen, ed., 2010) (discussing need for lawyers’ knowledge of law and ability to acknowledge limitations in settlement negotiations).

167. See RICHARD A. LORD, WILLISTON ON CONTRACTS § 32.12 (4th ed. 2009) (describing rule of “*contra proferentem*” where ambiguous language in a contract “will be interpreted against the drafter”).

be a provision for the formal de-accessioning of the object from the museum's collection. The insurance and shipping considerations noted above also apply if the agreement provides for a loan. In addition, the parties to a loan agreement must consider: (1) who receives or retains publication rights; (2) the conditions of the exhibit in terms of space, temperature, and number of viewers at a given time; (3) attribution of ownership; and (4) liability for damage to the work.

A. Confidentiality Provisions

The parties must also determine whether they want to include a confidentiality or non-disclosure clause in the agreement. If settlement negotiations began after a suit was filed, the parties should consider whether they want to ask the court to seal the record.

There may be instances in which a client prefers that the agreement not be confidential. A possessor who voluntarily returns an object may want the event to be publicized as a "good deed."¹⁶⁸ A claimant country that is likely to be a repeat litigant might want the terms of an object's return to be public information to put "moral pressure" on possessors.¹⁶⁹ Public exposure of purchases by prestigious galleries and institutions under dubious circumstances could also provide an added incentive for dealers and museums to conduct "due diligence" and generally encourage buyers to investigate provenance.¹⁷⁰ Claimant countries may also be concerned that confidential settlements play into the hands of smugglers by leaving intact what one court has characterized as the "arcane" practices of the art world.¹⁷¹

On the other hand, a claimant might not want the terms of the settlement publicized if a payment to the possessor was involved, or if the property was lost through the claimant's own failure to prop-

168. See Stein, *supra* note 36 (quoting possessor's lawyer for proposition that possessor's decision to return Buddhist statue to Myanmar was motivated by concern that possessor would otherwise be accused of "stealing antiquities," and expressing hope that Myanmar "will be appreciative enough to give my guy a letter of commendation for doing what is morally right").

169. See Honan, *supra* note 34, at C11 (describing increasingly sophisticated procedures undertaken by countries in retrieving cultural items).

170. See Drum, *supra* note 22, at 912-13 (discussing justifications asserted by dealers for lack of proper investigation of provenance).

171. See O'Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980) (noting that in "arcane world of sales of art . . . paintings worth vast sums of money sometimes are bought without inquiry about their provenance"); see also Stein, *supra* note 36 (citing Constance Lowenthal for proposition that "works of art from other countries which come to market today frequently come through a path that is murky").

erly secure archaeological sites or public collections.¹⁷² For a possessor whose decision to return a work was motivated by the threat of public embarrassment, confidentiality may be a vital part of the agreement.¹⁷³ If the parties decide to include a non-disclosure clause, they need to consider how much of the process to keep confidential. For example, if the parties have exchanged information during the course of settlement negotiations, they should decide whether non-disclosure provisions cover these communications. The parties also need to provide for exceptions if they need to communicate any information in the settlement agreement to third-parties, such as insurance or tax authorities. Finally, parties to confidential agreements should include penalty provisions for a breach. While penalty provisions cannot repair the damage caused by a breach, they might make a party reconsider before releasing confidential information.

B. Releases and Stipulations of Dismissal

Settlement agreements should contain mutual releases with prejudice and, if a suit has been filed, stipulations of dismissal with prejudice of all claims. The release provisions should be comprehensive and include any and all claims of any kind stemming from the underlying dispute. Institutional defendants may want to include language absolving employees and trustees from liability.¹⁷⁴ Counsel may also want to consider the inclusion of “hold harmless” clauses with respect to potential suits against third parties, such as donors to the museum. Attempts by claimants or possessors to

172. See Honan, *supra* note 69, at C13 (noting that German government characterized payment to possessors of Quendlinburg treasure as “finder’s fee”).

173. See Honan, *supra* note 34, at C11 (noting “that moral pressure or the threat of public embarrassment has helped persuade some dealers and collectors to relinquish contested cultural property”).

174. See Gerstenblith & Roussin, *supra* note 5, at 734 (noting that Italian government “dropped its civil claim[s]” against former Getty Museum curator after reaching settlement agreement with museum for restitution of certain objects; however, criminal case against Getty Museum curator continued); *see also* Hugh Eakin, *Italy Focuses on a Princeton Curator in an Antiquities Investigation*, N.Y. TIMES, June 2, 2010, at C1 (reporting that 2007 settlement agreement between Italian government and Princeton University that provided for return of numerous objects did not prevent Italian government from subsequently launching investigation of antiquities curator at Princeton University Museum of Art); SHARON WAXMAN, LOOT: THE BATTLE OVER THE STOLEN TREASURES OF THE ANCIENT WORLD 197 (2008) (noting that prior to reaching agreement with Metropolitan Museum over cultural pieces, Italian government threatened criminal prosecution against multiple officials at Metropolitan Museum, including former curator).

avoid lawsuits by non-parties to the agreement are unlikely to succeed.¹⁷⁵

C. Breach Provisions

As a settlement agreement is essentially a contract, the parties should include provisions that apply in case of a breach. After looking at the pros and cons of contract law in every possible jurisdiction, the parties should include language determining which state's law governs the agreement in the event of a dispute over its implementation. The parties should also consider whether to include a clause mandating arbitration in the event of a breach. Such a provision should name a specific arbitrator or arbitration association if the parties can agree on one. If the agreement does not provide for mandatory arbitration in the event of a breach, the parties should consider including provisions for service of process and expedited judgment if permitted by the governing jurisdiction.

Finally, the parties should consider whether to include provisions for damages or other penalties, such as rescission or the award of attorneys' fees to the non-breaching party, in the event of breach. Even if a court or arbitrator ultimately decides that these provisions are not enforceable, they may encourage a party to think twice before breaching. The parties should also determine whether or not breach of a specific clause renders the entire agreement void.

VI. CONCLUSION

In the past, collectors and museums often "stonewalled" claimant countries seeking repatriation of looted pieces, relying on lengthy and costly litigation to discourage such claims.¹⁷⁶ To some extent, this was possible because many claimants were developing countries with limited resources. However, recent decisions by the

175. For example, as part of the settlement of the Quendlinburg litigation, the German government allegedly agreed to include a provision stating that it "did not want the United States government to take any action" against the possessors. See Honan, *supra* note 69, at C13 (stating that German government "did not want the United States government to take any action against the [possessors]"); see also Lewis, *supra* note 81, at B1 (discussing possessors' demands to deter pending litigation against them by United States government). However, the possessors were subsequently cited in tax and criminal actions in the United States. See Honan, *supra* note 81, at A10 (noting possessors subsequently charged).

176. See, e.g., WAXMAN, *supra* note 174, at 193, 313 (stating that when it came to returning cultural items, "Met stalled, stonewalled, and would not be swayed - until it was forced to do so," and remarking that Getty Museum also stalled when approached by Italy regarding return of cultural items).

governments of Greece and Italy to pursue criminal prosecutions of dealers and curators have changed the legal landscape.¹⁷⁷ In response, museums have adopted stricter guidelines concerning the purchase of antiquities of dubious provenance. Thus, more than ever, parties to cultural repatriation disputes should consider settlement as a means of preserving their mutual interests and avoiding the time and expense of litigation.

177. See Povoledo, *supra* note 4, at C2 (noting one museum director described the trial of former Getty curator as a “wake up call”).