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II. Privatrecht

Switzerland, Nazi Germany, and Jurisprudence. Part II. Private Law
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Summaries

Der Handel mit ausländischen Wertpapieren während des Krieges und die Probleme der deutschen Guthaben in der Schweiz sowie der nachrichtenlosen Vermögen aus rechtlicher Sicht

The Trade with Foreign Securities during the Second World War and the Problems with German Property in Switzerland inclusive of Unclaimed Assets seen from a Legal Perspective

Frank Vischer

This investigation illustrates different legal aspects of the trade with foreign securities that took place during the Second World War, the problem of German assets in Switzerland, and that of unclaimed assets. Focal points of the contents are legislation on restitution in Switzerland in 1945/46, the Washington Agreement of May, 25 1946, as well as the Federal Decree of December 20, 1962. In the introduction, reference is made to the legal sources in Switzerland prior to the 1945/46 decrees of the Federal Council.

On the basis of the special powers given to the government at the time, the Federal Council had not issued any special regulations in civil law concerning trade with looted or confiscated securities, or other movable assets until the end of the Second World War. The same applied to unclaimed assets until the Decree of the Federal Council of December 20, 1962 became effective. For any legal questions with respect to looted assets, the regulations of the Swiss Civil Law Code (Schweizerisches Zivilgesetzbuch ZGB) on property and its stipulations regarding the acquisition – in good or in bad faith or dishonestly – of movable property as well as money and negotiable finance instruments (Art. 933-936 ZGB) applied until the Decree of the Federal Council of December 10, 1945 became effective. For unclaimed assets, the regulations of the Code of Obligations applied, in particular with respect to prescription deadline and the contracts pertinent to bank transactions.

During the period in question, the privilege of trade on the Swiss stock exchanges was not regulated at a Federal level. The Federal authorities therefore basically lacked the possibility of intervening to regulate the securities trade on the stock exchange. During the Second World War, however, the Federal Council could have issued special regulations based on emergency law to protect owners dispossessed by the German occupation forces. Such a step was not taken, presumably first of all for political reasons. On the other hand, the stock exchanges kept so-called affidavits. Thus, in December 1940, official stock exchange transactions with Dutch, French, Polish, Danish and Norwegian titles were permitted only if an affidavit had been provided confirming that said title had, without interruption since September 2, 1939, been the property of Swiss citizens, legal entities, or trading companies with residence in Switzerland. However, the obligation to submit an affidavit only applied to the trade on the stock exchange, meaning that outside the stock exchange titles were traded even without proof of Swiss ownership. At a later date, securities were also traded on the stock exchange with affidavits L1, confirming Swiss ownership only as of June 1, 1944.

Immediately after the end of the war, Switzerland attempted by means of three Federal decrees to facilitate claims for restitution of assets confiscated by the occupation forces in

the occupied territories. Of crucial importance was the Decree by the Federal Council of December 10, 1945 (Decree on Looted Assets). According to this emergency law, the bona fide purchaser of an object under obligation to be returned, was entitled to obtain restitution of the purchase price from the unauthorized seller. The state of Switzerland was liable for compensation if the seller or his predecessor – as a rule a Swiss bank – had acted in good faith and purchased the titles from a bank abroad or a foreign seller who could not be held liable in Switzerland. The question of good faith in this context was to be judged in accordance with the general regulations in Art. 3 ZGB.

Swiss banks at the time carried out orders for the transfer of assets and the assignment of titles to special accounts of German and Austrian banks if the customer had signed the order himself, or if the authorized person was able to identify himself with a valid power-of-attorney. It must be assumed that the signing of such orders by victims of the Nazis was very often done under coercion and intimidation. From a legal point of view, the general rule applies that banks have to execute the orders of their customers without delay. On the other hand, according to the principle of good faith, the banks were committed to refuse the execution of contracts if they had reason to believe that the order of the customer had been obtained illegally.

After the end of the war, the question of the handling of German assets in Switzerland arose. In this context, Switzerland took the position that the claims of the Allies for an expropriation of German assets without compensation were in stark contradiction to Swiss public order. Under massive pressure by the Allies, Switzerland finally agreed in the Washington Agreement of 1946 to liquidate assets of all kinds deposited in Switzerland by Germans living in Germany. It has to be emphasized, however, that with respect to German assets, the Washington Agreement was not implemented fully in accordance with its content.

This legal expert study finally treats the legal questions connected to unclaimed assets. Among the legal problems investigated are the opening of accounts and deposits, the prescription of entitlement to restitution, the obligation to safekeep documents, the payment of interest on deposits, the administrative obligations of the banks, and the question of the obligation to conduct enquiries about customers. Before the Federal Decree of December 20, 1962 had become effective, these questions were governed by the ordinary regulations of Swiss civil and commercial law. The Reporting Decree of 1962 ultimately obligated all managers of assets in Switzerland to report assets for which dependable information had not been received since May 9, 1945 and for which it was assumed that the last known owners had become victims of racial, religious, or political persecution. After expiration of the ten-year validity of this Federal Decree, the regulations of the Swiss Civil Law and the Swiss Code of Obligations once again became applicable.

Die Rechtsprechung der schweizerischen Gerichte im Umfeld des nationalsozialistischen Unrechtsregimes auf dem Gebiet des Privatrechts, unter Einschluss des internationalen Zivilprozess- und Vollstreckungsrechts (Schwerpunkt Ordre public)

Pronouncements of Swiss Courts relating to the Nazi Regime of Injustice in the Area of Private Law, under the Inclusion of the International Law of Civil Procedure and of Enforcement (Focal Point: Public Order)

Adolf Lüchinger

This investigation deals with the fundamental question as to what extent the confrontation with the Nazi regime of injustice influenced the passing of judgment by cantonal courts and the Federal Supreme Court in the field of private law. The focus is on how the clause of public order was applied in court practice. In particular, judgments in connection with Nazi-imposed

company management, the inability of Jews under Nazi civil law to receive an inheritance, as well as the expropriation of insurance claims are examined. In addition, a part of the study is consecrated to jurisprudence on the issue of carrying out German court decisions within the territory of Switzerland. The study begins with some fundamental comments on the functions of public order in Switzerland's application of international private law.

The question of public order arises when a Swiss judge must either himself decide a case of litigation according to foreign law, or when he has to decide on the enforceability of a foreign judgment in Switzerland. In both cases, the observance of foreign law is subject to the proviso of public order, which means that it may not contradict any fundamental principles of Switzerland's own legal system. Public order thus is a limit to the application of the relevant foreign law in the Swiss practice of international private law. The same function is performed by public order with respect to foreign judgments which are to be approved and enforced in Switzerland.

The recognition and enforcement of German judgments in Switzerland was in compliance with the agreement between Switzerland and Germany concerning the mutual acknowledgment and enforcement of court decisions and arbitration awards dated November 2, 1929, according to which final German verdicts theoretically had to be acknowledged in Switzerland without verification of their content, provided that the German courts, in accordance with the stipulations of the agreement, were competent for jurisdiction in the case of litigation in question. There was, however, one major stipulation, i.e., the proviso that, in accordance with Art. 4, Para. 1 of the agreement, there be no violation of Swiss public order. It was this clause which Swiss courts relied on to prevent the execution in Switzerland of injustices decided by the Nazi judicial system. In the study, the case of UFA vs. Thevag is mentioned. The Federal Supreme Court was called upon to decide this case in 1936. The court refused to recognise that Universum-Film-Aktiengesellschaft (UFA) had the right to rescind its contractual commitment because of the racial identity of the movie director Erich Löwenberger. Such an interpretation of the contractual clause in question was in contradiction to the equality of all citizens before the law. According to the court this was a fundamental principle of the Swiss legal system (Art. 4 of the Swiss Constitution of 1874), and thus clearly in opposition to Swiss public order. Similarly, in the case of Gustav Hartung vs. the People's State of Hessen, the Federal Supreme Court denied the arbitrariness of Nazi justice to be enforced in Switzerland. The court considered the refusal of compensation to the head of the state theater in Darmstadt, who had been dismissed without notice by the Nazi regime, a violation of public order in the sense of the Swiss/German enforcement agreement.

One of the means of implementing the Nazi policy of expropriating and plundering Jews was the subordination of «Jewish companies» to compulsory administration by the state. In the cases investigated, Swiss courts refused to grant such measures any effect with respect to assets in Switzerland. Thus the court of the canton of Zurich stated in the case of Thorsch that the imposition of compulsory administration was in contradiction to public order, as it was equivalent in its consequences to an expropriation without compensation. A clear expression that such measures were in opposition to public order was shown in the Federal Supreme Court's December 2, 1942 judgment in the case of Böhmische Unionbank vs. Heynau. The judgment found it to be a measure which was in stark contradiction to the principles of the protection of property and the guarantee of equality enshrined as fundamental norms in the Swiss legal system.

No less consistent were the judgments of courts with respect to the incapacity of Jews in the «Third Reich» to receive an inheritance. In one case which the court of the canton of Zurich was called on to decide, the issue was one of upholding the assertion of claims to an inheritance in Switzerland by the descendants, living in London, of a Jewish testator who had died in Germany. These heirs had put the Swiss assets of the testator under seizure and filed an action against the descendants residing in Berlin so as to recover their part of the

inheritance. The latter referred to the 11th ordinance to the November 25, 1941 Law on Citizenship, according to which the assets and claims to inheritance of expatriate Jews fell to the state. The court of the canton of Zurich approved the claim with the justification that this ordinance violated the principle of equality as a fundamental principle of the Swiss legal system (public order) and was therefore to be disregarded by the Swiss judge.

Finally, the report elucidates the judgments of Swiss courts in connection with the expropriation of insurance claims in the «Third Reich». Of particular importance in this context is a judgment by the Federal Supreme Court in the case of the Schweizerische Lebensversicherungs- und Rentenanstalt vs. Julius Elkan. Elkan – a German Jew who had signed a life insurance policy with the Schweizerische Lebensversicherungs- und Rentenanstalt – filed a claim in Switzerland after the war requesting declaratory judgment that the Schweizerische Lebensversicherungs- und Rentenanstalt had failed to meet its contractual obligations by transferring the cash value of the insurance policy to the German authorities. Contrary to the court of the canton of Zurich, the Federal Supreme Court's judgment concluded that discharging the Schweizerische Rentenanstalt of its obligations toward Elkan did not constitute a violation of Swiss public order. Rather it had to be taken into consideration that in casu there was a closed legal operation which could not be rescinded. The author expresses his doubts as to the correctness of this decision of the Federal Supreme Court, yet specifically points out that there were inevitably certain specific risks inherent to the business activities of the defendant insurance company in Nazi Germany, such as the risk of double payment.

Rechtsfragen zum Handel mit geraubten Kulturgütern in den Jahren 1933–1950

Legal Questions in connection with the Trade in Looted Cultural Assets in the Years 1933–1950

Kurt Siehr

This study refers to legal questions in connection with the trade in looted cultural assets in the years from 1933 to 1950. In the first part of the expert report, the legal situation prevailing in Switzerland during the period in question is presented, with the principles of private law on the derivative acquisition from unauthorized sellers, as well as the Federal Decree on Looted Assets of December 10, 1945 as points of focus. The second part of the investigation deals with the basic principles of restitution of cultural assets as they were and still are applied in various foreign countries.

Swiss Civil Law Code (Schweizerisches Zivilgesetzbuch ZGB) recognizes secondary (derivative) acquisition in good faith of movable assets from an unauthorized person, differentiating between two situations relevant for trade in looted cultural assets. In the first scenario, if the legal owner entrusted the object of art to a person (voluntary relinquishment of ownership) and this person sells the cultural asset to a bona fide purchaser, the right of ownership passes to the purchaser (Art. 933 ZGB). If the legal owner, however, is deprived of the ownership of an object against his will, the bona fide purchaser will acquire said object after a five-year period of forfeiture (Art. 934 Para. 1 ZGB). A special regulation is applied in the case of acquisition at public auctions. Such an acquisition is privileged insofar as the purchaser is obliged to restitute the art object to the owner within the five-year period of forfeiture only against reimbursement of the price he had paid (Art. 934 Para. 2 ZGB).

On the basis of these civil law regulations, which were also in effect during the Nazi period, a bona fide purchaser was able to legally acquire «Nazi-looted art» in Switzerland immediately or after expiration of the five-year period of forfeiture. A purchaser was considered to be acting in good faith in accordance with Art. 3 Para. 2 ZGB if he could not be blamed for the lack of awareness about the illegal origin of the looted assets. Good faith thus required a certain degree of diligence. Despite the character of art objects as being unique items with a

fluctuating market value, legal doctrine and jurisprudence of the time did not assume any increased duty of diligence on the part of art dealers. Only recently has the opinion begun to prevail in supreme court rulings that in the case of trade in works of art, increased diligence is to be required of all parties involved.

Against the background of various Allied declarations and agreements promulgated in the period of the Second World War (London Declaration of January 5, 1943, the Bretton Woods Conference of July 22, 1944, the «Currie Agreement» of March 8, 1945, laws decreed by the Allied Control Council in 1945), the Federal Council on December 10, 1945 issued a decree concerning claims for the restitution of assets plundered in the occupied territories (Decree on Looted Assets). This Decree granted injured parties the opportunity – within the December 31, 1947 deadline – to request restitution of looted cultural assets, irregardless of whether the current owners had acted in good faith or not. According to the Decree on Looted Assets, the (bona fide) purchasers, now obliged to restitute looted objects of art, had the right to file a counter-claim against the seller and, as an ancillary measure, to file a claim for compensation by the Confederation if the deceitful seller was insolvent or could not be sued in Switzerland.

The Federal Supreme Court's Chamber for Looted Assets which, according to the Decree on Looted Assets possessed jurisdictional competency in claims for looted assets, dealt with claims for restitution and with counter-claims in several cases concerning looted assets. The restitution proceedings investigated by the author were characterized by the fact that all art objects in question were returned either on order by the court or voluntarily. In the case of counter-claim proceedings against art dealers and the Confederation, the good faith asserted by purchasers and art dealers as well was recognized; only in assessment of the amount of compensation by the Confederation was the negligence of art dealers taken into account as a mitigating factor.

In the second part, the author analyzes the fundamental principle of restitution of art objects (models for settlement) as they are applied in several foreign countries. He comes to the conclusion that the position of Switzerland in the case of claims for restitution was not different from that of other countries in comparable situations.

Die Geschäftstätigkeit der Schweizer Lebensversicherer im «Dritten Reich». Rechtliche Aspekte und Judikatur

Business Activities of Swiss Life Insurance Companies in the «Third Reich». Legal Aspects and Jurisdiction

Eric L. Dreifuss

The first part of this investigation presents the general legal basis for business activities of Swiss insurance companies in Germany in the period of Nazi dictatorship and after the end of the war. In the second part, the expert report explores various aspects of a legal evaluation of the business activities of Swiss life insurance companies in Germany. The focus is on the conclusion of policies in foreign currencies, their conversion, and finally on the confiscation of life insurance policies in the «Third Reich».

Of significance for the evaluation of business activities of Swiss life insurance companies in the «Third Reich» is the question of the legal conditions under which these business activities were performed. The main aspect here is on the regulations regarding the supervision of insurance companies. For insurance companies doing business in Germany in the period in question, the law concerning the supervision of private insurance companies and mortgage loan associations dated May 12, 1901 (VAG) applied. According to VAG, the Swiss insurance companies in their capacity of insurance companies of supraregional importance were under the direct control of the «Reichsaufsichtsamt» (the Nazi supervisory authority). In addition,

they required a local (German) so-called «Hauptbevollmächtigten» (principal plenipotentiary) with residence in Germany. In the report it is shown that the contracts concluded in Germany by Swiss insurance companies were generally subject to the German law on insurance contracts.

The author explains that due to the unstable economic situation in Germany in the 1920s, there was a great demand for insurance policies in foreign currencies. Insurance companies with business activities in Germany were therefore confronted with a great number of requests from persons who wanted to sign a life insurance policy made out in Swiss francs. This demand was met by Swiss insurance companies. In this context, the question is discussed as to whether and to what extent Swiss companies, against their better knowledge, were fostering the belief that the contractual sum would nonetheless some day be paid out in the agreed foreign currency.

The directives contained in the foreign exchange regulations of 1934 had the effect that no foreign currency was available to pay for insurance premiums on policies in foreign currency. The existing policies therefore either had to be transformed into insurance policies without premiums or insurance policies in Reichsmarks with a foreign currency share in the amount of the premium reserves accumulated in foreign currency to that date. After the contractual transformation of foreign currency policies, in 1938 there followed a statutory conversion by which the remaining insurance policies in foreign currency were completely transformed into insurance policies in Reichsmarks.

One of the questions discussed by the author in this context is whether a legal margin existed for Swiss life insurance companies with respect to the concrete application of German foreign currency law. He makes a distinction between the situation in 1934 and that of 1938. He states that the insurance companies did not act contrary to the wording of the respective circular letter of 1934 when they merely offered the transformation but at the same time looked for adequate alternatives for the customer. In 1938, the situation was fundamentally different. This time the direct transformation of insurance policies in foreign currency to policies in Reichsmarks was ordered by law. Further, the author analyzes the question of whether the transformation was in compliance with the conditions of the contract. Again a distinction needs to be made between the two situations. In 1934, the insurance companies were only bound to propose the transformation to Reichsmarks to their customers, and if the person taking out the insurance did not accept this, nothing changed in the insurance contract. The full transformation in 1938, on the other hand, was introduced ex lege, so that the question of compliance with contractual conditions did not arise.

The economic exploitation of Jews in Germany and in the occupied territories manifested itself in the sector of insurance business, particularly in the confiscation of life insurance policies. The German authorities appropriated the insurance premiums of Jews by ordering the companies to pay out the insurance benefits or the cash value of insurance policies not to the beneficiaries, but directly to the tax authorities instead. In this context, several legal questions arise which the author discusses using three court cases as examples.

It may be asked, for instance, whether the insurance companies were not bound by their loyalty obligation at least to defer payment. Concisely put, the statement of the Federal Supreme Court in the Sulzbacher case seems justified, i.e., that an insurance company was acting in violation of its contractual loyalty obligation whenever it made the payment to the chief finance inspectorate (Oberfinanzpräsident) in an all too compliant way, without having made the least effort to prevent confiscation.

In connection with the confiscation of life insurance policies in the «Third Reich», the aspect of public order is of particular importance. The court of the canton of Zurich in its judgment of May 27, 1952 took the position that the dissolution of the insurance claim of the claimant (Julius Elkan) had to be judged as without substance in Switzerland out of consideration for Swiss public order. The Federal Supreme Court was also of the opinion that the Nazi

regime's racial legislation was fundamentally in violation to Swiss public order, but it added that it was not indicated to ignore the accomplished fact and to impose on the insurance company the obligation of double payment.

With respect to the decision of the Federal Supreme Court in the Elkan case, the author in his conclusion draws attention to the fact that the question of double payment on the basis of public order was extremely difficult to decide. The discretion of the judge as to what was correct and adequate was of considerable weight in this question. But precisely in cases where a judge's discretion plays a significant role, it behooves him to embrace moral considerations when establishing legal precedent.

 Original version in German

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