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Holocaust-Related Claims and Liability of Swiss Banks—Political and Legal Implications

PROF. DR. ROLF H. WEBER*

I. Introduction

A. HISTORY, LAW, AND POLITICS

During the last seven years, Switzerland was confronted with major judicio-political quarrels about disputed financial issues that originated from the time of the Second World War. The Swiss Government, the Swiss National Bank, the Swiss commercial banks, and further economic sectors (such as insurance and industry companies) became involved in various proceedings. The main drivers of the actions were Jewish organizations, substantially backed and supported by the U.S. Government. The political dispute was accompanied by class actions filed against Swiss companies in the United States.

Therefore, fifty years after the end of the Second World War, Switzerland was forced to accurately assess the past and to shed light on its behaviour during the war period. In such circumstances, it is not always easy to appreciate the historical dimension of a certain subject and to realise painful contradictions. Today, it seems to be too early to establish a weighted synthesis, however, first experiences can be discussed.¹ One question in particular that should be assessed is to what extent the political implications of the affair were more important than the legal questions.

B. RELEVANT ISSUES (DORMANT ACCOUNTS, NAZI GOLD)

In the political discussions, two completely different issues have frequently been mixed up and are also not clearly distinguished in the settlement arrangement that has been reached in the meantime:

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1. For discussion on this topic, see PETER NOBEL, *SWISS FINANCE LAW AND INTERNATIONAL STANDARDS* (Kluwer Law Int'l 2002).

- The first issue concerns the so-called “dormant accounts.” This term covers accounts that have been held by persons who have not survived the Second World War. According to a common opinion, the amounts deposited on these accounts should not be left to the disposition of the Swiss banks. However, for historical reasons, it is not always obvious how (eventual) amounts could be distributed to the legal beneficiaries.
- The second issue concerns the so-called “Nazi Gold.” Reproaches have been made that the Swiss National Bank willingly accepted (looted) gold that had been stolen by the Nazi troops and exchanged the gold against legal tender in favour of the Nazi Government.

Legally, these two issues are of a different nature and do not address the same facts. Nevertheless, as recent history has shown, political pressure has led to a conglomerate dealing with the two different problems.

C. LEGAL BACKGROUND

1. *Washington Accord*

Discussions about assets situated in Switzerland have already been held after the Second World War. These negotiations of 1946 led to the Washington Accord (WA), an international treaty between the Swiss Government and the Swiss National Bank, on the one hand, and the United States, the United Kingdom, and France (together with fifteen other states) on the other.² In this Agreement, dated May 25, 1946, the Swiss Government undertook to examine the existence of assets that belonged to victims of acts of violence of the late government of Germany and put them at the disposal of the three Allied Governments for the purpose of relief and rehabilitation. The Washington Accord also requested the Swiss Government tackle the issue of the dormant accounts and contained a waiver related to the Nazi Gold. Subsequently, however, the efforts shown by the Swiss Government in discovering hidden assets were not extremely strong and the question as to whether the Washington Accord has finally settled all disputes for the future remains unresolved.³

2. *Banking Secrecy*

According to Article 47 of the Swiss Banking Act of 1934, as amended, a person divulging a secret entrusted to him or her in his or her capacity as officer, employee, mandatory, liquidator, or commissioner of a bank shall be punished by prison or fine.⁴ The law fails to provide a definition as to what constitutes secret information. Nevertheless, it is generally accepted in the legal doctrine that nothing should be disclosed that might in any way harm the interests of a customer of the bank or impinge upon his or her right to confidentiality.⁵ Consequently, the banking secrecy forbids the disclosure of any information whatsoever about customers to third parties, public or private. The confidentiality undertaking, however, does not apply if disclosure is required by law, such as in criminal cases and bankruptcy proceedings.

Foreign authorities and governmental agencies are only allowed to be furnished with information about customers of Swiss banks if an international treaty (such as a treaty on

2. SR 0.982.1, at http://www.admin.ch/ch/d/sr/0_982_1/index/html.

3. See Section III.1 of this paper.

4. SR 952.0, at http://www.admin.ch/ch/d/sr/0_952/index/html.

5. BEAT KLEINER ET AL., KOMMENTAR ZUM BUNDESGESETZ ÜBER DIE BANKEN UND SPARKASSEN (v. 8 1934).

the mutual assistance in criminal matters or a tax treaty) provides for an information transfer. Generally, in such cases the foreign authority obtains the same amount of information that should be available to a Swiss authority under similar circumstances.⁶

The Swiss Banking Act was passed in parliament in 1934. At that time, the purpose of the banking secrecy was the protection of German Jewish clients of Swiss banks from the confiscating measures enacted by the Nazi Government. During the discussions in parliament, a Counsellor of State expressed the opinion that Article 47 of the Banking Act was aimed not only at the actual violators of banking secrecy, but also against foreign espionage.⁷ Nevertheless, the Swiss banking secrecy was not a principle exclusively introduced in order to fight the Nazi Government's activities. In the first draft of the Banking Act of 1931, a provision on banking secrecy had been proposed.⁸ At that time, the racial laws of the Nazi Government were not in place. Therefore, the banking secrecy was not invented to aid the Swiss banks in defrauding their customers but was introduced to safeguard bank deposits and their rightful owners from inquisitiveness (especially of a fiscal nature).⁹

II. History of Holocaust-Related Claims

A. PRESSURE ON SWITZERLAND AND ITS REACTIONS

1. *Jewish/U.S. Initiatives*

After some facts about Switzerland's behaviour in doubtful financial transactions during the Second World War became known in 1994, Israeli newspapers started to publish articles in April 1995 about immense amounts of assets belonging to Holocaust victims in the vaults of Swiss banks. Politicians reacted with motions in parliament, and the Swiss Bankers Association issued so-called "Guidelines of the Swiss Bank Association on the treatment of dormant accounts, custody accounts and safe-deposit boxes held in Swiss banks," which entered into force on January 1, 1996.¹⁰ The already established banking ombudsman was appointed as "contact person" for owners of dormant assets. A first report of February 1996 identified 775 heirless accounts, totalling an amount of 38.7 million Swiss francs.¹¹ Subsequently, the Jewish organizations rejected this analysis and declared it unacceptable. Beginning in April 1996, the matter of dormant accounts in Switzerland was also discussed in the United States, particularly in the U.S. Senate under the presidency of Senator Alfonse D'Amato of New York.¹²

In a Memorandum of Understanding of May 2, 1996, concluded between the Jewish organizations and the Swiss Bankers Association, an independent commission, the Independent Committee of Eminent Persons (ICEP), chaired by Paul Volcker, was established.¹³ The Federal Banking Commission of Switzerland supported the efforts of the ICEP and identified the legal basis for the ICEP investigations (art. 23*bis* para. 2 of the Banking Act) in order to avoid problems with a potential violation of banking secrecy provisions.¹⁴

6. *Id.*

7. Official Bulletin 1934, 269.

8. NOBEL, *supra* note 1, at 155.

9. *Id.* at 155.

10. See Section III.2 of this paper.

11. NOBEL, *supra* note 1, at 162.

12. *Id.*

13. See BF 2000—BANK—AND FINANZMARKTRECHT 2000 (Luc & Urs eds., 2001).

14. 1997 SWISS FED. BANKING COMMISSION ANN. REP. 13.

This temporary reconciliation approach was disrupted in October 1996 when one Jewish person (Gizella Weisshaus) filed a suit in the United States against Swiss banks in the amount of twenty billion dollars, followed by class actions in the United States from other Jewish persons.¹⁵ On the other hand, the U.S. Government announced to start its own investigations on dormant accounts and Nazi Gold led by Stewart Eizenstat, Special Envoy of the Department of State. As a reaction to these events, Switzerland established an "inter-departmental operational group responsible for coordinating the activities of the different Swiss administrative services" (called "Task Force Switzerland—World War II").¹⁶

2. *Independent Commission of Experts*

In late 1996, it became obvious that the dormant accounts and the Nazi Gold would become serious issues in politics and law and that a fast solution could not be found. Therefore, the Federal Council became active and released the Federal Decree of December 13, 1996, on the "Historical and Legal Investigation into the Fate of Assets which reached Switzerland as a Result of the National Socialist Regime."¹⁷ Based upon this Decree, the Federal Council appointed the "Independent Commission of Experts" (ICE), chaired by Jean-François Bergier of Zurich, an economic historian professor. The various tasks of the ICE are stated in Article 1 of the Decree. The investigations should "obtain the historical truth and shed light on the extent and fate of assets which reached Switzerland as a result of the National-Socialist regime."¹⁸ In particular, the research of the ICE was intended to cover the following fields:¹⁹

- Gold transactions and currency dealings between the Swiss National Bank and private commercial banks on the one hand and the Nazi Government on the other;
- Dealings in works of art, jewelry, etc., including the scope and relation of such dealings to looted goods and the degree of awareness about the origin of these assets;
- Activities of the Swiss armaments industry, particularly in the context of aryanisation measures;
- Government measures and legal basis of currency trading, supervision of banks, political control of the Swiss National Bank, control of export and import activities, control of trade in war material and finance matters;
- Measures undertaken for the identification, control and restitution of looted goods and fugitive capital; and,
- Refugee policy executed by governments on all levels.

The Independent Commission of Experts was granted a period of five years to produce its final reports. However, the ICE was asked to publish interim reports on selected subjects. Furthermore, private enterprises were not allowed to obliterate any archival material from the relevant time period. The members of the ICE were internationally accepted experts in various academic fields.

15. *In re Holocaust Victim Assets Litigation*, 225 F.3d 191 (2d Cir. 2000).

16. NOBEL, *supra* note 1, at 163.

17. AS 1996 3487; BBl 1996 IV 1165 1184.

18. *Id.*

19. See NOBEL, *supra* note 1, at 164.

3. *Proposals for Foundations*

In January 1997, the major Swiss banks came up with the idea of creating a fund in favour of Holocaust victims. This "Holocaust Fund" was designed to become a humanitarian fund; 100 million Swiss francs were contributed by the big Swiss banks, 100 million by the Swiss National Bank and 65 million by other entities from the private sector. According to a special ordinance, in force since March 1997, the distribution of the amounts of the special fund should primarily serve the Holocaust/Shoah victims in need.²⁰

On March 5, 1997, Arnold Koller, acting president of the Swiss Confederation, proposed the creation of a fund of seven billion Swiss francs (so-called "Solidarity Foundation").²¹ This fund should be generated through a revaluation of the gold reserves of the Swiss National Bank. At that time, the distribution of the proceeds by the fund was not clearly defined, however, possible beneficiaries should be the victims of poverty, natural catastrophes, genocide, and other serious violations of human rights in Switzerland and abroad.²²

B. INVESTIGATIONS

The establishment of the ICEP and the ICE, as well as the creation of the two mentioned funds, were directed to overcome the problems of the dormant accounts and the Holocaust victims in need. However, at the time of the rolling-out of the respective activities, the issue of the "Nazi Gold" became hotly debated. In May 1997, the U.S. State Department published a "preliminary study" with a foreword by Stewart Eizenstat, describing the role of Switzerland during the Second World War as "very mixed."²³ Switzerland was accused of having maintained a "business as usual" attitude towards the Nazi Government.²⁴ Furthermore, the "vigorous trade with third Reich," thereby "supporting and prolonging Nazi Germany's capacity to wage war" was criticized.²⁵ Based upon this "preliminary study," political pressure was put on Switzerland and the Swiss banks. Class actions were prepared, and U.S. authorities excluded Swiss banks from business in the United States and expressed threats, such as the raising of obstacles against a merger between two major Swiss banks. In particular, the not very well-founded theory of Switzerland prolonging the Second World War was accepted as "historical fact" and not questioned in the United States or by the Jewish organizations.²⁶

Despite the discussions and quarrels, the Swiss banks continued their efforts to identify the holders of dormant accounts. In July and October 1997, two extensive lists containing names of possible owners of dormant assets were published.²⁷ The ICEP and the Swiss Federal Banking Commission (FBC) jointly supervised the establishment of a new special foundation, namely the "Independent Claims Resolution Foundation," which was created in order to monitor a so-called "Claims Resolution Tribunal I (CRT-I)." The task of the

20. See SR 611.042, at http://www.admin.ch/ch/d/sr/0_611_042/index/html.

21. NOBEL, *supra* note 1, at 164.

22. *Id.* at 165.

23. NOBEL, *supra* note 1, at 167.

24. *Id.*

25. See STUART E. EIZENSTAT & WILLIAM Z. SLANY, U.S. DEP'T OF STATE, US AND ALLIED EFFORTS TO RECOVER AND RESTORE GOLD AND OTHER ASSETS STOLEN OR HIDDEN BY GERMANY DURING WORLD WAR II (1997).

26. See also NOBEL, *supra* note 1, at 167.

27. Available at <http://www.icep-iaep.org>.

CRT-I was to adjudicate all claims to dormant accounts. The board of trustees of the CRT-I consists of reputable persons and is chaired by Paul Volcker. In October 1997, rules of procedure to be applied by the CRT were adopted.²⁸ In November 1998, the CRT-I announced that only ten to twenty percent of the identified assets were related to Holocaust victims. Subsequently, these numbers were confirmed in the course of the investigations. In 1997, the ICE started its investigations related to historical facts during the Second World War.

C. FINANCIAL SETTLEMENTS AND HISTORICAL FINDINGS

1. *Negotiations and Financial Settlement*

Since the summer of 1997, various Jewish organizations started to mention that enormous amounts of withheld assets had been found in Switzerland; moreover, the idea of a global compensation settlement, with regard to the Holocaust assets, was proposed by the World Jewish Congress (WJC) in November 1997.²⁹ The figure of several billion dollars was always rejected by the Swiss banks. Nevertheless, due to the political pressure from the U.S. Government, particularly Stewart Eizenstat, from Senator D'Amato backed by the WJC, and from state governments excluding Swiss banks from commercial activities, the Swiss hesitation to start negotiations about a global compensation agreement became less strong in the course of 1998. The flexibility was also increased in light of the fact that the ICE published the first interim report on "Switzerland and Gold Transactions in the Second World War" (200 pages long) in May 1998. The Swiss National Bank was accused in this report of not having undertaken any attempts to trace the origin of the gold, notwithstanding the fact that Germany obviously had amassed quantities of looted gold.³⁰

After several weeks of negotiations, the Swiss banks, Jewish groups, and Holocaust survivors reached a settlement in August 1998. According to this settlement, the Swiss banks should pay \$1.25 billion in reparations to five distinct classes of victims of the Nazi regime.³¹ This understanding later became the "Settlement Agreement" of January 26, 1999, which provided for the release of all claims, including dormant account claims against the Swiss commercial banks (mainly UBS and Credit Suisse), the Swiss National Bank, and the Swiss industry.³² In parallel, it was hoped that the Settlement Agreement would facilitate the outcome of the extraordinary audits of the ICEP, this hope did not realize however. The very thorough investigations cost approximately 800,000 Swiss francs, mainly covered by the Swiss banks.³³ In August 2000, the Settlement Agreement was confirmed by the United States District Judge Edward Korman in principle and the Claims Resolution Tribunal II was established; nevertheless, the Judge requested the parties agree on more detailed rules and regulations about the distribution of the amounts.³⁴

Because the Settlement Agreement did not provide for the release of the Swiss insurance companies, these enterprises, together with European insurers, signed a special Memoran-

28. See NOBEL, *supra* note 1, at 166.

29. *Id.* at 168-69.

30. See *Independent Commission of Experts, Switzerland - Second World War*, available at <http://www.uek.ch>.

31. NOBEL, *supra* note 1, at 170.

32. See *id.* at 170-71.

33. 1999 SWISS FED. BANKING COMMISSION ANN. REP. 34.

34. *In re Holocaust*, *supra* note 13, at 191.

dum of Understanding with the Jewish organisations in August 1998, thereby establishing the International Commission on Holocaust Era Insurance Claims (ICHEIC), chaired by the former U.S. Secretary of State Lawrence Eagleburger.³⁵ As a consequence of the investigations, a total of more than 45,000 names of insurance policy owners, dating from the Nazi time, were published on the Internet in three announcements between April 2000 and April 2001.³⁶

2. *Political Reconciliation*

During the World Economic Forum in Davos, Switzerland at the end of January 1999, the acting President of the Swiss Confederation Ruth Dreifuss, and U.S. Vice-President Al Gore publicly and formally ended the Holocaust assets controversy.³⁷ Since that time, discussions have been concentrated on certain legal issues and the distribution of the funds. Some issues, however, are not yet settled. For example, it is still open whether the Swiss Solidarity Foundation will be realized because its creation is subject to a referendum taking place in late 2002.³⁸ It remains to be seen what reactions will take place if the Swiss population does not approve the creation of this Foundation.

3. *Reports of Involved Organizations*

Based on the Federal Decree of December 13, 1996, which obliged Swiss enterprises to allow inspections of all records (including private archival sources), and which stated that documents may not be destroyed despite any statute of limitation provisions, the established institutions (ICE, ICEP) for the investigations into Switzerland's behaviour during the Second World War thoroughly worked on the relevant issues during a time period of approximately five years.

The ICEP conducted investigations of a historically never-seen size; the audits covered a total of 4.1 million accounts in 481 Swiss banks, representing 60 percent of all accounts from the relevant period.³⁹ In December 1999, the ICEP presented its final report of about 350 pages requesting the Swiss banks to publish approximately 25,000 new names that had not already been published.⁴⁰ In total, 53,886 accounts were found "with probable or possible relationship to holocaust victims."⁴¹ Nevertheless, the ICEP's investigations do not allow a clear-cut evaluation of the value of the relevant accounts. Estimations have been made leading to amounts between 200 and 400 million Swiss francs. The ICEP held its last meeting in February 2000. Subsequent publications of names of possible account holders were completed in January 2001.⁴²

The Claims Resolution Tribunal I adjudicated a total of sixty-five million Swiss francs: forty-nine million went to claimants of non-victim accounts and sixteen million to claimants of victim accounts.⁴³ About 30 percent of all claims submitted had been approved. Overall,

35. NOBEL, *supra* note 1, at 171.

36. Available at <http://www.icheic.org>; *id.* at 171–72.

37. NOBEL, *supra* note 1, at 173.

38. *Id.* at 173.

39. *Id.* at 175.

40. REPORT ON DORMANT ACCOUNTS OF VICTIMS OF NAZI PERSECUTION IN SWISS BANKS, INDEPENDENT COMMITTEE OF EMINENT PERSONS (Sept. 3, 2002).

41. *Id.*

42. Available at <http://www.dormantaccounts.ch/>; see NOBEL, *supra* note 1, at 175.

43. NOBEL, *supra* note 1, at 166.

more than 20,000 interested persons had contacted the five information offices set up by the Swiss banks, and about 175,000 queries were answered.⁴⁴ Almost 75,000 accounts were identified, however, approximately 80 percent of these accounts contained less than 100 Swiss francs. The amounts of these accounts were donated to the Red Cross.⁴⁵ In early June 2002, Judge Korman questioned the efficiency of the proceedings applied by the Claims Resolution Tribunal II.⁴⁶ The respective quarrel was calmed down by the tribunal's chairman, Paul Volcker, with the decision to facilitate the burden of proof for the Nazi victims, thereby deviating from traditional civil law evidentiary principles. The success of the new approach remains to be seen.

The ICE published a first interim report in May 1998, with a study of approximately 350 pages in length on "Switzerland and Refugees in the Nazi era."⁴⁷ This report has influenced the final negotiations of the financial settlement. In August 2001, the first eight of the final reports of the ICE were published, followed during the subsequent months by the remaining reports, together with two juridical and eight research contributions, bringing the total number of publications to twenty-five reports.⁴⁸ The comprehensive final account and report of the ICE was made public in March 2002.⁴⁹ The ICE has scrutinized the archives of 120 companies at a cost of twenty-two million Swiss francs. With the publication of the final reports, the ICE has fulfilled its tasks. The reassessment of Swiss history during the Second World War seems now to have come to an end.

III. Legal Aspects of the Controversy

The description of the various activities executed during the last seven years shows that legal questions did not play an important role during the intensive political discussions. In general, it is noteworthy that legal suits have not been filed against Swiss banks in Switzerland according to the applicable rules of jurisdiction. Apparently, the claimants wanted to avoid legal proceedings governed by Swiss law. Nevertheless, some legal issues can be discussed.

A. MEANING OF THE WASHINGTON ACCORD

1. *Dormant Accounts*

After the conclusion of the Washington Accord in 1946, parliamentary questions were raised concerning assets in Switzerland, supposedly deposited by the Nazi regime or Jewish persons. In the early 1950s, a member of the Swiss parliament proposed to establish a federal agency where dormant accounts and deposits should be reported. However, this proposal was met with fierce opposition from various sides, mainly from the banks, insurance companies, and the associations of lawyers and notaries.⁵⁰ In particular, two objections were made, namely the inevitable infringement of banking secrecy and the lack of efficiency in the case of introducing special legislation for small amounts in question.

44. See *id.* at 168.

45. See *id.*

46. See *id.* at 171.

47. 1997–2000 INDEP. COMMISSION OF EMINENT PERSONS INTERIM REP., at <http://icep-iaep.org>.

48. 2001–2002 INDEP. COMMISSION OF EMINENT PERSONS INTERIM REP., at <http://icep-iaep.org>.

49. 1997–2000 INDEP. COMMISSION OF EMINENT PERSONS FINAL REP., at <http://icep-iaep.org>.

50. NOBEL, *supra* note 1, at 156.

In 1962, the Swiss Government submitted a Federal Resolution "concerning Switzerland-based assets of foreigners and stateless persons persecuted for racial, religious or political reasons" (Registration Decree).⁵¹ Since January 1963, the Registration Decree has stated that assets situated in Switzerland, whose proprietors were foreigners who had not been heard of since the end of the Second World War and who were, or were believed to be, victims of racial, religious, or political persecution, had to be reported to a special authority (Claims Registry) created by the Swiss Government.⁵² Nevertheless, the Registration Decree had serious weaknesses. The legal capacities of the Claims Registry were very limited because it was not able to conduct investigations of its own and was therefore dependent upon the reports from third persons. Moreover, the Claims Registry lacked the proper authority of prosecution, which remained with the Cantonal authorities. Furthermore, the financial institutions did not have any incentive to report eventual dormant accounts. Therefore, it is not surprising that the results in terms of amounts of money reported were rather meager.⁵³

In 1974, the unclaimed remainder of the money collected by the Claims Registry was distributed, two-thirds going to the Swiss Federation of Jewish Communities and one-third to the International Committee of the Red Cross in Geneva.⁵⁴ Six years later, the so-called "Dormant Assets Account" with the Federal Finance Administration was wound up.⁵⁵ Further attempts to set up a special fund and to introduce new regulations were not successful until the beginning of the crisis in the late 1990s.

The Washington Accord requested from the Swiss Government to examine the existence of assets that belonged to victims of acts of violence of the Nazi regime. Following the conclusion of the Washington Accord, the Swiss Government complied with the immediately executable obligations and started the investigations of dormant accounts. Nevertheless, it cannot be overlooked that the activities were not very intensive during five decades. Furthermore, the Washington Accord does not contain a specific waiver that would release the Swiss Government from the permanent efforts to examine the existence of assets belonging to war victims. Consequently, Switzerland could not avoid conducting the investigations of the last five years regarding the dormant accounts. From a private law point of view, the liability of the banks depends on the applicability of the statute of limitations.

2. *Nazi Gold*

With respect to the potential Swiss obligations connected with the Nazi Gold, the Washington Accord of 1946 contained the following major principles:

- German assets in Switzerland were to be liquidated—50 percent accrued to the Swiss Government and 50 percent was placed at the disposal of the Allies for rehabilitation of countries devastated or depleted by the war.
- The Swiss Government put at the disposal of the Allied Governments the amount of 250 million Swiss francs payable on the demand in gold in New York. In return, the Allied Governments issued a waiver of claims against the Swiss Government and the

51. AS 1963 427, 435.

52. *Id.* art. 1, para. 1.

53. NOBEL, *supra* note 1, at 158.

54. *Id.*

55. *Id.*

Swiss National Bank in connection with the gold acquired by Switzerland during the Second World War.

- The United States unblocked Swiss assets in the United States and the Allies discontinued the blacklists against Switzerland.⁵⁶

During the Washington negotiations the issue of the Nazi Gold never meant that the Swiss National Bank had illegally withheld gold reserves belonging to the Nazi Government. Moreover, the moral problem consisted in the reproach that the Swiss National Bank exchanged looted or stolen gold against German legal tender in favour of the Nazi Government. Theoretically, the private law question could be discussed as whether legal title can be acquired in the case of stolen goods. However, this issue did not play a role and the agreed payment was payable as compensation for an alleged moral misbehaviour.

The negotiations which led to the Washington Accord were not easy; the Swiss Government described them as "agitated . . . and not always enjoyable."⁵⁷ In particular, it was contested by the Swiss delegation that the Swiss National Bank should not have known the origin of some stolen gold delivered by the Nazi regime, particularly since the disappearance of gold, held by the National Bank of Belgium, was reported. During the negotiations in 1946, the Allies were able to challenge the Swiss position due to the intelligence information and other sources. In Nuremberg, a former Reichsbank Vice Director said that the second man in the Swiss National Bank had known that gold was bought which had been stolen from Belgium.⁵⁸ This "second man" was sitting at negotiation table in Washington. Consequently, the Swiss delegation was forced to admit certain knowledge and therefore, lost some bargaining power. Furthermore, Switzerland was confronted with the problem that quite large amounts of Swiss gold were still frozen in New York.⁵⁹

After three months of negotiations, a compromise was reached, and six weeks later, the Swiss Government paid the mentioned 250 million Swiss francs in gold to the Allies.⁶⁰ The payment was declared a "voluntary contribution" by Switzerland, "not recognizing the obligation to restitute any part whatever of the gold acquired by the Swiss National Bank during the war and that the good faith of the Swiss National Bank as regards to the origin of the gold is not in question."⁶¹ In return, the Swiss business entities were removed from the blacklist, the Swiss assets in the United States were unblocked, and the waiver was signed.⁶² Despite some attempts to reopen certain aspects of the Washington Accord, its validity was never disputed until the late 1990s.

The topic of the looted gold was extensively discussed during the negotiations in 1946. At that time, Switzerland had to admit that the Swiss National Bank in fact knew more than officially "declared." The reports of the late 1990s dealing with the Nazi Gold issue did bring some new aspects to the knowledge of the public. However, it can hardly be said that completely new issues have arisen. A realistic view rather comes to the conclusion that the business of the Swiss National Bank was not handled in an ethically proper way, but did not materially influence the war activities of the Nazi regime. On the basis of such

56. *Id.* at 159.

57. BBI 1946 II 723.

58. See NOBEL, *supra* note 1, at 160.

59. See *id.* at 160–61.

60. *Id.* at 161.

61. *Id.*

62. *Id.*

evaluation, the Swiss banks would have had the possibility to invoke the waiver signed in the context of the Washington Accord. This question about scope and extent of the waiver, however, has never been discussed in a legally adequate manner. Moreover, the political pressure on Switzerland was so substantial that all involved organizations rather preferred to find a politically acceptable solution than to enter into a legal discourse.

B. MERITS OF SELF-REGULATION

Because the state legislature is often quite slow in passing laws, self-regulation can play an important role.⁶³ This observation is also true in respect to the Holocaust-related claims. The Swiss Bankers Associations already acted in September 1995, publishing "Guidelines of the Swiss Bankers Association on the Treatment of Dormant Accounts, Custody Accounts and Safe-deposit Boxes held in Swiss Banks." In February 2000, these Guidelines were replaced with an updated version.⁶⁴ The purpose of the Guidelines is "to provide for a continuous contact, respectively a restorable contact, between customer and bank by organizational measures."⁶⁵ Five goals should be achieved, namely:

- Prevention (i.e., to prevent the loss of contact with the customer.);
- Protection against misuse of assets when contact with the customer has been lost;
- Administration of assets according to uniform principles when contact with the customer has been lost;
- Restoration of the contact between banks and proxies while safeguarding confidentiality as required by law; and,
- Facilitation of inquiries by customers, respectively proxies, concerning assets.⁶⁶

According to the Guidelines (and in line with Swiss law), dormancy occurs after a period of ten years, "except when the bank has proof that the customer is deceased and that contact with eventual heirs or proxies is not possible."⁶⁷ The Guidelines request to apply proactive measures to keep contact with the customer. Furthermore, the Guidelines state that the rights of the customer against the bank remain intact in case of dormancy. Administration of dormant accounts should be organized in a uniform way, always with the aim of handling the assets in the customers' best interest. Finally, "in the case of dormant customer relations the bank is to safeguard the relevant original contractual documents as well the records of transactions which existed at the beginning of the dormancy . . . until the restoration of contact with the customer, beyond the legal period of time for safeguarding."⁶⁸

The Guidelines also established a so-called Central Claims Office that undertook the administration of the holders of dormant accounts.⁶⁹ The respective databank with names and further information on dormant account holders is hosted by Sega Aktienregister AG.⁷⁰

63. To the merits of self-regulation in general. See ROLF H. WEBER, *Regulatory Concepts for the Online World*, Zurich/The Hague 2002, 83 ss.

64. *Guidelines of the Swiss Bankers Association* (Feb. 2000), available at <http://www.swissbanking.org>.

65. *Id.* at 2.

66. To these goals and to the following procedural aspects in more detail, see NOBEL, *supra* note 1, at 178–79.

67. *Guidelines*, *supra* note 64, at 2.

68. *Id.*

69. See NOBEL, *supra* note 1, at 179.

70. *Id.*

Therefore, inquiries by customers, heirs of deceased, or missing customers or representatives are best addressed to the Central Claims Office. If the databank information and the data contained in a claim match in a relatively close way, the request is forwarded to the relevant bank, which must examine it "with great care" and decide on the entitlement of the claimant.⁷¹ In the case of a positive decision, the matter must be settled in due time. In the case of a negative decision, the bank is obliged to report the findings to the Central Claims Office together with a short substantiation. The Office is entitled to examine the records of the bank and to give recommendations. If a settlement is not reached, the potential customer can pursue litigation against the bank.

The detailed Guidelines of the Swiss Bankers Association are a good example of a timely and efficient self-regulation. Despite the fact that a governmental enforcement of the Guidelines is not possible, the banks have complied with their contents and acted accordingly. In view of the fact that state legislation is still not yet in place, it is hard to see how the whole matter could have been handled during the last five years without these Guidelines. Moreover, if the fact is considered that mainly the two major Swiss banks have negotiated the Settlement Agreement and paid the amount of \$1.25 billion, it can be said that the private sector has delivered the most valuable contributions for the solution of the Holocaust problems.

C. LIMITED IMPORTANCE OF TRADITIONAL LEGAL PRINCIPLES

1. *Banking Secrecy*

Banking secrecy is an important issue of Swiss banking law. Often, however, misunderstandings exist about scope and extent of the Swiss banking secrecy. Article 47 of the Banking Act cannot be applied if criminal activities are at stake. Furthermore, between the bank and the customer, secrecy reservations do not exist. A bank may only invoke the banking secrecy if a request by a third person is placed, particularly in the case of a "fishing expedition."

The debate about the Holocaust claims has shown that the banking secrecy did not hinder the investigations of the expert groups because the secrecy provisions could be extended to the respective experts and auditors. Furthermore, the dealing of claims in connection with dormant accounts was easily done in accordance with the applicable legal provisions. The issue of the Nazi Gold does not have any connection with the banking secrecy.

In a nutshell, all comments making the banking secrecy "responsible" for the problems of the dormant accounts and the Nazi Gold are not convincing. Moreover, an adequately understood protective scheme does allow the taking of appropriate steps in order to grant to the legitimate customers the access to dormant accounts and to indemnify victims of the Second World War.

2. *Statute of Limitations*

In general, all claims for which the law does not provide another time period are forfeited because of the statute of limitations after ten years.⁷² Insofar, the legal question arises whether this provision is applicable in relation to dormant accounts. The period of ten years starts at the time when a claim becomes due; therefore, as long as the account relationship exists, the

71. *Id.*

72. Art. 127 of the Swiss Code of Obligations.

statute of limitations period is not running. Consequently, a customer of a dormant account only has a risk if the bank would terminate the contractual relationship.

Legally, such termination is hardly possible if the bank is not able to give notice to the customer. Additionally, paragraphs 5 and 16 of the Guidelines of the Swiss Bankers Association are inviting the banks to keep proactive contacts with the customers and to waive their right to terminate a contractual relationship with the customer in a dormant account situation.⁷³ Future legislation intends to take up this approach. Therefore, in sum, the statute of limitations does not allow the banks to avoid the repayment of assets to a legitimate customer of a dormant account.

3. *Ordre Public*

A special question is related to the issue of the extent to which a bank may invoke the principle of public policy ("ordre public"). In a well-known and also widely criticized decision rendered in March 1953, the Swiss Federal Court protected life insurance in the following situation.⁷⁴ A life insurance policy was confiscated by the German authorities after the deportation of the beneficiary, a German Jew, to the Theresienstadt concentration camp. Subsequently, the life insurance paid out the policy amount to the German authority at its request. Under a formal point of view, the life insurance company had complied with the German laws in force at that time, meaning that the contract was, in essence, fulfilled. Therefore, the Swiss Federal Court expressed the opinion that the insurance company was not obliged to pay the proceeds of the policy back to the claimant. The argument of the claimant that the payment to the German authority had been an act violating the principle of public policy was rejected by the reasoning of the Court.

During the last fifty years, no similar decisions have been reached in Switzerland. Apart from the fact that the term "ordre public" is nowadays generally interpreted in a restrictive way, it seems to be doubtful that the Swiss Federal Court would uphold its previous jurisprudence.

D. FOLLOW-UP LEGISLATION

In July 2000, the Swiss Government presented a preliminary draft for a Federal Act on Dormant Assets. The main features of this new law are the following:⁷⁵

- Statutory obligation for banks, fund managers, securities dealers and insurance companies to actively search for their customers in cases where client contact had been interrupted for a period of eight years;
- Statutory obligation for financial actors to avoid the breaking up of customer relationships by organizational means;
- Provision that after a dormancy period of fifty years, unclaimed assets accrue to the Swiss Confederation.

Presently, this Federal Act on Dormant Assets is being discussed in the Parliament, however, it is not likely to come into force during this year.

73. See NOBEL, *supra* note 1, at 178.

74. BGE 79 II 193; see NOBEL, *supra* note 1, at 173.

75. NOBEL, *supra* note 1, at 180.

After the announcement of a "Swiss Solidarity Foundation" in March 1997, the beneficiaries of payments were not very clear. During the following years it became obvious that this special project would have a relatively broad scope and would not only be realized to the benefit of the holocaust victims. The purpose should be the "prevention of the causes of poverty, suffering and violence and the alleviation of their consequences" throughout the world.⁷⁶ In particular, the Solidarity Foundation should aim at the following objectives:⁷⁷

- Social and professional integration of economically disadvantaged families;
- Social integration of victims of violence, in particular women and children;
- Fight against poverty-related diseases;
- Educational programs to foster tolerance between cultures;
- Prevention of genocide and crimes against humanity; and,
- Building up or rebuilding of basic social infrastructures.

The Federal Council presented the Draft Act on a Swiss Solidarity Fund to the parliament in May 2000.⁷⁸ Furthermore, it was established that the Solidarity Foundation should be financed with 500 tons of gold no longer required by the Swiss National Bank for the pursuit of its monetary policy.⁷⁹ The outcome of the project is still uncertain since a counterproposal has been submitted. In an optional referendum the Swiss population will vote on the project in late 2002.

IV. Conclusion

For the time being, it appears to be premature to draw a final conclusion about the handling and outcome of the crisis which unexpectedly hit Switzerland fifty years after the end of the Second World War. In principle, the investigations are finished, and the results are available. Switzerland has experienced that history is not always free of painful contradictions and must admit that there is some shadow on its behaviour during the war time.⁸⁰ However, the reports did not produce any evidence that the involvement of the Swiss National Bank and the Swiss commercial enterprises in business with the Nazi regime has materially influenced the war activities.

In the near future, the distribution of money to owners of dormant assets and to victims of the Nazi regime will go on and might last another few years. Furthermore, important legislation is still pending in Switzerland. The Federal Act on Dormant Assets is in the process of being passed by the parliament and no further major objections are expected. To a certain extent the situation is different with the Act on a Swiss Solidarity Fund; the outcome is still uncertain and it remains to be seen how foreign organizations will react if the Swiss population should reject this project.

The history has been reassessed during the last five years. A further thorough evaluation of Switzerland's behaviour during the Second World War, however, does not seem to be possible anymore because the Federal Council stated in its decision of July 3, 2001, that privately owned records used by the ICE and the ICEP would have to be given back to

76. *Id.* at 181.

77. *Id.*

78. BBI 2000 II 3979; see NOBEL, *supra* note 1, at 181.

79. BBI 2000 II 4023.

80. NOBEL, *supra* note 1, at 183.

their owners, thus rendering any further research in these fields at least difficult, if not almost impossible. Therefore, a forthcoming synthesis must be based upon the present insights. In particular, the question whether legal principles have not been, at least partly, overlapped or even overruled by political decisions would merit further consideration. At least up to now, the financial liability of the banks was honoured on the basis of political decisions, not legal judgements. However, it is important to remember that the tasks of judges and historians are different. History might be a moral authority, but it is not a judicial authority.⁸¹

81. *Id.*

