

# Switzerland

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## **A. Protection of cultural property**

### **1. What are the key characteristics of your country's regulations on cultural heritage and national patrimony?**

The Federal Act on the International Transfer of Cultural Property, also known as the Cultural Property Transfer Act (CPTA), has implemented the UNESCO Convention of 1970 (the '1970 UNESCO Convention') on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property into national law.

The CPTA has changed the legal regime applying to cultural property and national patrimony by introducing rules on the export of defined cultural property and a heightened standard of diligence in the art trade, creating a national patrimony, facilitating cross-border museum loans and allowing for the protection of other states' cultural property through the conclusion of bilateral agreements.

### **2. Under your national law, which criteria must be met in order to classify goods as cultural property?**

Under CPTA, cultural property is defined very broadly, first, by reference to Article 1 of the 1970 UNESCO Convention – it must be included in one of the 11 categories of cultural property listed in Article 1 of the Convention – and second, it has to be meaningful property from a religious or secular point of view for archaeology, pre-history, literature, art or sciences.

The categories of cultural property listed under Article 1 of the 1970 UNESCO Convention are as follows:

- antiquities more than 100 years old;
- pictures, paintings and drawings produced entirely by hand, works of statuary art and sculpture, original engravings, prints and lithographs;
- furniture more than 100 years old and old musical instruments;
- property of historical interest;
- products of archaeological excavations or of archaeological discoveries;
- elements of monuments or archaeological sites which have been dismembered;

- objects of ethnological interest;
- rare manuscripts and documents of special interest; and
- archives, including sound, photographic and cinematographic archives.

To meet the test of ‘meaningfulness’, the object has to be of particular interest to the public, its disappearance would be a loss to cultural heritage, or the object is rare and the subject matter is of scientific interest.

**3. What are the legal consequences arising from classifying an asset as cultural property? Does the classification of a private asset as cultural property affect the right of ownership?**

The classification of an object as cultural property does not affect the right of ownership. In particular, there are no provisions restricting the trade and export of cultural property that is privately owned. However, it affects the due diligence requirements that must be met in the course of a transaction (see the response to question D.1 below). Moreover, in the event the owner is unlawfully deprived of an object classified as cultural property, they benefit from an extended time limitation period to claim back their property. The dispossessed owner must make their claim within one year from knowledge of the location of the object and identification of the current owner, at the latest, however, 30 years from the date of the theft (as distinguished from the otherwise applicable five-year ‘absolute’ limitation period).

**4. Which authorities in your country define cultural property and who advises these authorities?**

As seen above, cultural property is defined by statute. A special division of the Federal Office of Culture, namely the Specialised Body for the International Transfer of Cultural Property, has been tasked with the implementation and enforcement CPTA, and represents Switzerland vis-à-vis foreign authorities. It negotiates any bilateral agreements with foreign states on the import and repatriation of cultural property, determining and defining in particular the categories of cultural property that shall be deemed of significant importance to the contracting states (see also question A.7 below).

In addition, the Specialised Body advises and coordinates the work of the federal and cantonal authorities on issues related to the transfer of cultural property, judicial authorities and public prosecution, cantonal archaeology authorities and cultural departments.

**5. Has your country ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and what are the main features of the national implementation?**

Yes. Switzerland has implemented the 1970 UNESCO Convention in national law by passing CPTA. Among its most distinguishing features are the following.

*Bilateral agreements*

CPTA enables the Swiss Government to enter into bilateral agreements with other states to foster international cooperation against the illicit export of cultural property. An import into Switzerland will only qualify as illegal under CPTA if it is in breach of a specific bilateral agreement. However, failing a bilateral agreement, the import of cultural property into

Switzerland may violate the criminal law provisions of CPTA if the cultural property item was lost against the will of its owner.

#### *Inventories of national patrimony*

Cultural property which belongs to the state, whether federal or cantonal, and is of paramount importance to cultural patrimony, is capable of listing and any so listed cultural property may neither be exported from Switzerland, nor be acquired by a private person or be subject to a statute of limitation in the event of a restitution claim. The Federal Registry of the federal government's cultural property of significant importance was published in early 2020. To date, the cantons have not published their inventories. The said Federal Registry does not comprise any cultural property that is not the property of the state; nor will the cantonal registries either.

#### *General and special duty of diligence*

CPTA stipulates a general duty of diligence for a seller or intermediary, who must ensure that any cultural property object was not stolen, lost or illegally excavated, or illicitly imported. Dealers and auction houses must comply with an additional set of duties. They must identify the supplier or seller, inform their customers about existing import and export regulations, keep written record of the acquisition of cultural property and exchange information with the authorities where appropriate. 'Dealers' is a broad term, potentially extending to collectors making transactions per year for a total value in excess of CHF 100,000. Foreign dealers are equally held to the higher standard of due diligence if they do more than ten transactions a year in Switzerland for a total value of CHF 100,000.

Other important features of the Swiss 1970 UNESCO Convention implementation law include the regime of anti-seizure guarantee (CPTA, Article 10), the reinforcement of international judicial and administrative cooperation (Articles 21–23), criminal sanctions (Article 24 and 25), the extension of limitation periods for restitution claims (Article 32) and the amendment of the customs regime also affecting free ports (Article 19).

**6. Has your country ratified the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, and, regarding the illegal export of cultural objects and artwork: what are the main characteristics of the national implementation?**

Switzerland signed the 1995 UNIDROIT Convention on 26 June 1996, but it has not been ratified.

**7. Has your country ratified any other international conventions or bilateral agreements relating to the export of cultural objects?**

Switzerland ratified The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and its Second Protocol, and the European Convention for the Protection of Archaeological Heritage of 1992 as amended.

Switzerland has, so far, concluded eight bilateral agreements under CPTA, all of which are in force, namely with China, Colombia, Cyprus, Egypt, Greece, Italy, Mexico and Peru. These agreements regulate the import of cultural property into the other contracting state and the terms of repatriation of illegally imported cultural property.

## **B. Restrictions on the export of cultural property and artwork**

### **1. What are your country's export restrictions regarding cultural property and artwork?**

Switzerland has chosen to prohibit only a narrow range of cultural property from export, (ie, objects of cultural property listed on any federal or cantonal register – see the response to question A.5 above). Generally, there are no restrictions on the export of cultural property, other than a requirement of customs clearance (see question B.1.3 below). In fact, customs clearance, to the high standard of disclosure introduced under new customs regulations pursuant to CPTA, is aimed, in the first place, at the import of cultural property.

Subject to any possible ad hoc trade restriction, such as the specific legislation passed to protect Iraqi and Syrian cultural heritage, prohibiting the import, export, transit, sale, distribution and other forms of transfer of Iraqi or Syrian cultural property that was stolen or illicitly exported from its originating country.

#### **1.1 Under which conditions is export permission granted?**

There is a general ban on the export of any cultural property listed on any federal or cantonal inventories (see the response to questions A.5 above and B.3 below), and the export of cultural property containing an endangered species according to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) requires a permit.

The foregoing is the (extremely limited) extent of actual Swiss cultural property export restrictions.

#### **1.2 Which authority grants such export permission and who advises this authority?**

Any required cultural property export permit is granted by the customs authorities, upon advice by the Specialised Body for the International Transfer of Cultural Property, of the Federal Office of Culture.

#### **1.3 What does the proceeding look like, who are the parties to the proceeding and what is the duration of the proceeding?**

A person wishing to export cultural property must complete a detailed customs clearance declaration form, attaching all relevant documents (invoice, any proof of origin and authorisations/certificates, provenance statements, etc) – under penalty of criminal consequences. The form may be completed online, with same day clearance.

In case of suspicion, customs authorities may withhold cultural property at the border and report the matter to the criminal prosecution authorities.

Temporary exportation licence applications must be filed together with a pro forma invoice indicating the owner, consignee and estimated value of the object.

#### **1.4 Are there any monetary thresholds (*de minimis*)?**

The value of the individual cultural property item has no impact on the export proceeding.

However, if the sale price or estimate value is below CHF 5,000, the higher standard of due diligence imposed on dealers and auction houses (see the response to questions A.5. above and D.1 below) does not apply, save in relation to:

- objects from archaeological or palaeontological excavations or discoveries;
- portions of dismembered artistic or historical monuments or portions of excavation sites; or
- ethnological objects; and
- where dealers and auctions houses are always held to the higher standard.

#### **1.5 Does the circumstance of the artist still being alive or the time of creation of the artwork matter?**

CPTA ties certain categories of cultural property to an age requirement. Antiquities and furniture must be more than 100 years old to fall under the scope of CPTA (see the response to question A.2 above). Otherwise, age and time of creation do not matter.

#### **2. Is the state obliged to buy out the artwork for which an export permission was denied?**

No, or not applicable, as export is generally unprohibited (see the response to question B.1 above).

#### **3. Are there any exceptions to these regulations (eg, temporary export for exhibitions, conservation or private reasons of the owner)?**

Not applicable, as export is generally allowed, with the exceptions referred to under question B.1.1 above (any listed Swiss national cultural property objects, ivory or other endangered species component objects or cultural property caught under recent Iraq or Syria regulations). There would be temporary export available for such cultural property.

Portable musical instruments may be temporarily imported or exported without any formalities provided that they are to be used for concerts or for teaching purposes or loaned for personal use.

### **C. Consequences in case of violation of import/export restrictions; restitution and repatriation of illegally exported cultural property**

#### **1. What are the legal consequences in case of breach of import/export restrictions?**

The legal consequences of illegal import or export are criminal penalties (ie, fine and imprisonment) in cases where the author acted in a professional manner, and seizure in the case of suspicion that the cultural property was stolen, lost against the will of the owner or illegally imported into Switzerland (in breach of foreign export restrictions acknowledged under bilateral agreement).

**2. Give a description of the regulations and practices in your country relating to the restitution and repatriation of illegally exported cultural property**

Switzerland has concluded eight bilateral agreements (see the response to questions A.5. and A.7 above) allowing for the repatriation of cultural property unlawfully imported into Switzerland, that is, in breach of the other contracting state's export regulations – failing a bilateral agreement, the import of cultural property into Switzerland may only be held illegal under Swiss law if the item was lost against the will of the owner or incorrectly declared during import or transit. Anyone in possession of a cultural property object imported in breach of the export regulations of the other contracting state is liable to an action in restitution.

Following the enactment of CPTA there have been a few spontaneous restitutions, to Italy, Greece, Lebanon, Serbia and Turkey. There have been restitutions to China, Egypt and Iraq based on CPTA.

**3. Under which conditions does your country assist foreign countries seeking repatriation of cultural property/artwork?**

A schedule to each bilateral agreement, with examples and images attached, details the cultural property protected.

Export from the contracting state must have taken place after the date of entry into force of the relevant bilateral agreement (the first bilateral agreement to become effective was with Peru, in December 2006).

The foreign state must bring the action in restitution within one year of knowledge of the location of the object and identification of the possessor. The action is time barred 30 years after the unlawful export. All costs associated with the action will be paid by the claimant state (subject to financial aid by Switzerland).

It is fair to say that, generally speaking, the Federal Office of Culture is taking a supportive view of foreign bilateral agreements between cultural authorities when considering and ruling on their requests for assistance, passing them on to the relevant cantonal law enforcement authorities. Many of the latter take a sympathetic view, too.

**4. Does a buyer enjoy protection against restitution claims for violation of foreign export restrictions?**

If the buyer purchased the cultural property item in good faith, restitution will be against indemnification, based on the purchase price.

**5. Which regulations exist for the protection of the buyer against title claims, in general?**

Generally, under Swiss private international law, the issue of acquisition of title is governed by the law of the place of acquisition, being the place of transfer of title. Swiss courts give effect to foreign law protecting the acquirer in good faith.

Under Swiss law, the acquisition in good faith of an object in due possession of the transferor is not open to challenge, no matter whether the transferor lacks actual power of disposal, provided that the object was not stolen or looted, or the original owner had not in some other way been deprived against their will.

Good faith is presumed. The claimant must establish that the acquirer failed to exercise the required care and attention in the particular circumstances. In particular, the buyer shall check the available stolen art registers (INTERPOL, ICOM Red List, FBI and relevant national registers) and verify the seller's right of disposal. Buyers must be particularly diligent when considering the purchase of objects coming from excavations or archaeological discoveries.

An acquirer with industry familiarity (not only auction houses and dealers) must verify that the seller had the power to dispose of the object, not only when in actual doubt but when general circumstances warranted prudence. Courts are becoming increasingly strict.

Therefore, a buyer will ensure that the sale agreement includes: (i) a detailed description of the seller's title (with provenance details); (ii) a statement of ownership by the seller (no title dispute); and (iii) a provision making it clear that the seller will be liable for title claims.

**6. Does a lender from abroad enjoy protection against seizure of items on loan to local exhibitors if the good fails to have proper export licence?**

An anti-seizure regime, by way of return guarantee, is available in respect of any cultural property on loan emanating from an UNESCO Convention contracting state to a museum or other cultural institution in Switzerland.

The return guarantee would be applied for by the borrowing Swiss institution. The application must contain a detailed description of the cultural property object and all appropriate information on its provenance, with a copy of the relevant loan contract provisions. The application is published in the Federal Bulletin, setting off a 30-day period for possible title claims. Save for an admitted possible claim, and provided import is not unlawful (see the response to question A.5 above) and the loan agreement states clearly that the object will be returned to the country of origin at the expiry of the exhibition, the return guarantee will be granted. The effect of the return guarantee is to set the cultural property object free and clear of all claims, public and private, while in Switzerland (the guarantee does not stand in the way of any possible action by Swiss criminal enforcement authorities).

**7. What regulations exist concerning the import of cultural property that may have been exported illegally from its country of origin or that is the subject of claims?**

Cultural property exported illegally from its country of origin and imported into Switzerland is caught under the restitution regime described above under the responses to questions C.1–C.4 above, provided Switzerland has concluded a bilateral agreement to that effect with the relevant country (see the response to question A.7 above). Imported cultural property that is stolen or otherwise lost against the will of the owner may be confiscated and returned to its original owner.

## **D. Due diligence obligations**

**1. What general due diligence is required from the seller/buyer of artwork?**

Cultural property may only be sold when it can be assumed that the property is not stolen or otherwise lost against the will of the owner, illicitly excavated or illegally imported into Switzerland.

Special duties of diligence apply to the trade, essentially dealers and auction houses. As outlined under question A.5 above, dealers and auction houses are under a duty to:

- establish the identity of the supplier or seller during initial contact; including last name, date of birth, address and citizenship of persons, company name and registered address of legal entities (it is a matter of verification of the contracting seller's right of disposal, rather than ultimate beneficial owner);
- review information based on probative documents to the extent questions exist requiring a challenge to the correctness of the information;
- obtain a written declaration on the right to dispose of the cultural property from the supplier or seller;
- inform customers of existing import and export regulations from contracting states to the 1970 UNESCO Convention; and
- keep records on the acquisition of cultural property, including description and origin or provenance, date of transfer of ownership, sale price or appraised value, and information on identity and declaration on the right to dispose.

See also question B.1.4 above.

**2. Are there any anti-money laundering regulations applicable to (individual) sellers, dealers, auction houses or agents?**

Under the Anti-Money Laundering Act (AMLA), all persons who negotiate goods professionally in consideration of cash payments in excess of CHF 100,000 (per transaction) must comply with specific obligations, unless the said cash is processed through a bank or other financial intermediary which held themselves to the AMLA. They must, in particular: (i) verify the identity of the contracting party; (ii) identify the beneficial owner (name, address, date of birth and citizenship) and the judicial structure of the contracting party; and (iii) establish and retain documents relating to the transaction.

They must engage in further verifications of the background and purpose of the transaction in case of suspicions. Transactions are considered as suspicious if they appear unusual or if indications arise that the assets originate from a criminal offence or tax offence or are linked to a criminal organisation. Serious suspicions must be reported to the Swiss Money Laundering Reporting Office.

Furthermore, dealers and intermediaries who fall within the scope of the AMLA and accept cash transactions above CHF 100,000 must mandate an auditor with reporting obligations to the above law enforcement authority.