

# The Netherlands

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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?

In 2016, the new Heritage Act (*Erfgoedwet*) came into force. It integrated various rules and regulations into one single Act, including the former Cultural Heritage Preservation Act 1984, the Dutch Monuments Act 1988 and the Convention Implementation Act 1970. The main purpose of the Heritage Act is to prevent loss of access through export to objects significant to the cultural history of the Netherlands. Predominantly privately owned objects are protected. Objects in public collections are not included since they are already regarded as protected. If an object is listed in the Heritage Act inventory of the Dutch Ministry of Education, Culture and Science (the 'Ministry'), it cannot be exported without a permit.

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

In the Netherlands, the Heritage Act defines movable cultural objects of national cultural relevance as something irreplaceable and indispensable for the cultural heritage of the Netherlands. Protected cultural objects are defined by the Heritage Act as:

- objects or collections which have been granted protected status by the Minister of Culture based on various criteria;
- objects from public collections of institutions such as museums, archives and libraries;
- objects from ecclesiastical collections;
- protected historic buildings and monuments and parts of them;
- archives; and
- unlawfully excavated archaeological objects.

### 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?

If an object is listed in the Heritage Act inventory of the Ministry, it cannot be exported without a permit. At present, according to the Ministry, more than 150 objects and around 31 collections (with thousands of items) are listed. For temporary export of a listed object

outside the European Union, for instance, on loan for a foreign exhibition, a permit from the Ministry is required. Any transfer of listed objects in ownership or relocation within the Netherlands is subject to notification to the Inspectorate. A failure to notify qualifies as an economic crime. Sale of a listed object to a foreign party is not invalid but any transfer abroad requires a permit. If an object has been brought to another EU Member State without a permit, the Netherlands can start proceedings for the return of the listed object under Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State.

Archaeological objects from excavation sites are protected against the risk of being (illegally) removed or transferred or being stolen. When nobody can prove ownership otherwise, the ownership of objects excavated from a site protected under the Heritage Act goes to a public authority (city, province or state). It is therefore important when purchasing archaeological finds in the Netherlands to check their provenance. Violations of the Heritage Act are prosecuted under criminal law.

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

The Dutch Ministry of Education, Culture and Science defines ‘cultural property’, advised by the Information and Heritage Inspectorate (Inspectie Overheidsinformatie en Erfgoed), which is governed by the Ministry.

**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?**

The Netherlands is a party to the 1970 UNESCO Convention on Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property.

The Dutch Act ratifying and implementing the UNESCO Convention was enacted in 2009 by the Dutch 1970 Convention Implementation Act. This act has been integrated into the Heritage Act in Chapter 6, paragraph 1. It designates as Dutch cultural property the objects protected by the Heritage Act.

**6. Has your country ratified the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, and what are the main features of the national implementation?**

The Netherlands concluded that the UNIDROIT Convention was not suitable for ratification. The Netherlands reasoned that the 1970 UNESCO Convention provided greater scope, for example, to adopt the basic principles of the UNIDROIT Convention. The Heritage Act is partly based on the same principles as expressed in the UNIDROIT Convention.

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

The United Nations Security Council and the EU have taken measures to protect the cultural heritage of Iraq and Syria. Due to the conflict situations in both countries, the cultural heritage is under serious threat, which leads to illegal excavations, looting and destruction. The Netherlands has implemented these measures by means of the Iraq Sanctions Order (II)

(2004) and the Syria Sanctions Order (2012). The import of any cultural good from either Iraq or Syria into the EU is strictly prohibited, as is any trade in cultural goods which are known or may reasonably be assumed to have been unlawfully removed from these countries.

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

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

Apart from the protective measures in the Heritage Act and the 1970 UNESCO Convention, the Netherlands strictly applies the EU requirements that certain cultural objects in EU Member States can only be exported outside the EU with an export licence. Whether a licence is required depends on the thresholds for value and age and the category of the cultural property, which apply in all EU Member States under Council Regulation (EC) No 116/2009.

Works of art containing parts of endangered species may have limitations placed on their export, or require export licences based on the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) ratified and entered into force in the Netherlands in 1984. Antique objects containing ivory may only be sold and transferred in the Netherlands when they are 'pre-1947 specimens' and accompanied by an expert certificate or statement confirming that the object predates the 1947 threshold including a clear description and at least one photo.

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

Since 1 January 1993, a licence has been required for temporary or permanent export of specific categories of cultural goods in EU Member States to a destination outside the EU.

Cultural objects are divided into 15 categories, which are standardised throughout the EU. Each category has certain age and value thresholds. The full list with relevant categories, descriptions, value thresholds and custom codes including a practical brochure has been published by the Dutch Cultural Heritage Inspectorate on its website.

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

The Tax Department/Customs – Central Office for Import and Export (CDIU or Centrale Dienst In-en Uitvoer), advised by the Information and Heritage Inspectorate.

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

Export licence application forms can be requested from the CDIU. The application must be accompanied by one or more photographs and all relevant documentation to confirm the age, value, provenance and legal ownership of the object concerned.

The Information and Heritage Inspectorate will use the completed form received by the CDIU to determine whether an export licence is in fact required for the objects in question. The applicant will be informed if no licence is required. A determination will also be made as to whether the goods are protected cultural heritage of the

Netherlands or any other of the EU Member States. The Information and Heritage Inspectorate may require that an object be examined before a licence is granted. When there is no objection to export, the CDIU will provide the applicant with two copies of the export licence, based on the information in the application.

The lead time per licence is on average 14 days. The duration for issuing a licence (from application to issue or decision) is normally up to eight weeks, but as of 2019, due to the fact that the Inspectorate more often seeks independent advice before deciding on a permit application, the processing of an application takes longer than the usual decision period of eight weeks. In 2019, a total of 347 export licences have been granted for the export of cultural objects outside the EU.

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

The full list with relevant categories, descriptions, value thresholds and custom codes including a practical brochure has been published by the Information and Heritage Inspectorate on its website (<https://english.inspectie-oe.nl>).

There are no monetary thresholds for archaeological object more than 100 years old. The same applies for elements forming an integral part of artistic, historical or religious monuments, which have been dismembered, of an age exceeding 100 years.

There are also no monetary thresholds for incunabula and manuscripts, including maps and musical scores.

For watercolours, gouaches and pastels or mosaics, executed entirely by hand in any medium and on any material, a threshold of €3,000 applies.

For pictures and paintings, other than watercolours, gouaches and pastels or mosaics, executed entirely by hand in any medium and on any material, a threshold of €150,000 applies.

For original engravings, prints, serigraphs and lithographs with their respective plates and original posters, photographs, films and negatives thereof, a threshold of €15,000 applies.

Books more than 100 years old, singly or in collections, original sculptures or statuary and copies produced by the same process as the original, other than those in the first category, a threshold of €50,000 applies.

Other categories and thresholds may be found on the aforementioned website of the Information and Heritage Inspectorate.

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

It does not make a difference if the artist is alive or not. For some objects, the time of creation matters, see the response to question B.1.4 above.

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

When the Ministry denies export because of a (intended) sale, the Dutch State will at the same time make an offer to purchase the listed object. If the Dutch State and the owner of the listed object do not agree on the price, the District Court of The Hague has jurisdiction to fix a price. If the price is too high for the State, the object can be exported.

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

For the intention of exporting a specific object on a temporary basis, it is possible to apply for a 'specific open licence'.

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

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

A breach of export restrictions can be considered as an economic crime if done intentionally and is, therefore, punishable by imprisonment of up to two years or community service or a fine of up to €21,750. If not done intentionally, it is considered an offence and is punishable by imprisonment of up to six months or community service or a fine of up to €21,750.

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

The return of cultural property imported into the Netherlands in breach of the prohibition may be claimed, subject to section 1011(a)–(d) of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*), by proceedings brought by the state party from which the property originates or by the party with valid title to such property.

If an object has been brought to another EU Member State without a permit, the Netherlands can start proceedings for the return of the listed object under Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State.

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

Directive 2014/60/EU stipulates the restitution of cultural goods which, given national rules, may not leave the territory of a Member State. In the Netherlands, these cultural goods are, for instance, the objects that are protected by the Heritage Act, in addition to objects from public collections of museums, archives, libraries and religious institutions.

The Directive applies to cultural property that has been illegally exported from 31 December 1992. Legal proceedings by Member States are contained in the Dutch Code of Legal Procedure. The Information and Heritage Inspectorate is the authorised institution and considers requests including custody based on this Directive. The court will decide on any claim.

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

Cultural property that has been brought into the Netherlands in breach of this prohibition may be reclaimed by the state party from which the property originated or by those with valid title to that property. Legal proceedings for the return of the property are contained in the Dutch Code of Civil Procedure. Defences to those proceedings based on acquisition in good faith, acquisitive or extinctive prescription or acquisition of a pledge in good faith are suspended in whole or in part.

When there is reasonable suspicion that cultural property found by authorities has been obtained in breach of the prohibition, it can be taken into custody.

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

The general rule is that a buyer of a movable object who acquired it in good faith from a seller, who was not authorised or qualified to sell or transfer, is protected against title claims and the transfer will be deemed valid. ‘Good faith’ means that the buyer neither knew nor ought to have known (reasonably could have known) that his predecessor was not qualified to sell or dispose. A transfer for no consideration is not protected. There are several exceptions and the law with regard to time limitations is extensive and complicated.

**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?**

In this respect, a difference must be drawn between private property and cultural objects owned by a foreign state. Articles 436 and 703 of the Dutch Code of Civil Procedure forbid both executory and precautionary seizure of goods intended for public service. On the basis of international (customary) law, applicable through Article 13a of the General Legislative Provisions Act, cultural goods owned by a foreign state that are on loan in the Netherlands for an exhibition are considered to be goods intended for public service. Therefore, these cultural goods are protected to a large extent.

On the basis of Article 3a of the Court Bailiffs Act, a bailiff is required to contact the Ministry of Justice before acting to make sure international law is not incompatible with imminent seizure. Occasionally, the Dutch State issues on request a notification which states that everything will be done to protect the cultural objects owned by a particular state from being encumbered while on Dutch territory.

However, these measurements are not foolproof because immunity from seizure does not mean immunity from jurisdiction. Legal proceedings cannot be excluded. Privately owned works of art are not protected by this legislation.

**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?**

The Heritage Act applies to cultural property illegally exported from, or unlawfully appropriated in, a state party from 1 July 2009. The legal proceedings for return and the right of defence are contained in the Dutch Code of Civil Procedure. The court will decide on any claims.

## D. Due diligence obligations

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

The sale of a work of art is governed by the general rules of Dutch law applicable to the sale of movable goods not subject to registration. A successful claim in court to vitiated consent, such as error, threat, fraud or abuse of circumstances leads to annulment of the agreement. To prevent the risk of a successful claim it is important that the seller not only gives correct but also sufficient information. The buyer should have a 'correct idea of the state of affairs'. This criterion must be approached with reasonableness and fairness. However, apart from 'own opinions' and/or 'sales talk', the buyer should be able to rely on the information given by the seller. In accordance with the Dutch Civil Code, goods sold and transferred must be in conformity with the purchase agreement. Good faith on the part of the seller is not relevant in this instance. Good faith can be relevant in a claim for damages on the basis of an unlawful act.

To define the due diligence required, it is also important to know if the seller is aware of certain facts and knows, or ought to know, that this is of importance to the buyer when concluding an agreement. The courts will decide case by case, based on facts, circumstances and the principles of reasonableness and fairness what level of a seller's due diligence is required. Other facts and circumstances may also be of importance to the due diligence of the seller, such as the expertise of the parties and the price. A professional buyer has a greater duty to inspect and a professional seller has a greater duty to inform.

### 2. Are there any anti-money laundering regulations applicable in the art trade and at art auctions?

The Anti-Money Laundering and Anti-Terrorist Financing Act (*Wet ter voorkoming van witwassen en financieren van terrorisme* or 'Wwft') entered into force on 1 August 2008, implementing the EU's Third Anti-Money Laundering Directive into Dutch national law. As of 21 May 2020, the Wwft has been modified to implement the EU's Fifth Anti-Money Laundering Directive. The Wwft provides a comprehensive set of measures to prevent use of the financial system for money laundering or terrorist financing. Institutions are responsible for doing their own client assessment, before and during the business relationship. Whereas art dealers must, in principle, comply with all client assessment measures, the intensity with which measures are applied can be adjusted to the risk posed by a certain type of client, relation, product or transaction. Payments (in cash or cashless) surpassing €10,000 triggers an extensive client screening and potentially the transaction must be reported to the Financial Intelligence Unit, in accordance with the Wwft.