

# Germany

Friederike Gräfin von Brühl

K&L Gates, Berlin

## A. Protection of cultural property

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

The German provisions to protect Germany's cultural heritage are fairly strict. Regarding movable cultural property, Germany has a national list specifying cultural objects of national significance that may not be exported (the 'National List'). In addition, certain categories of cultural objects require export permissions, in particular, based on specific age and value thresholds (see question B.1.5 below). This two-fold system of protection, combining the so-called 'list principle' and the so-called 'categories principle', is based on a regime on the protection of cultural heritage that has entered into force in August 2016, on the basis of the *Kulturgüterschutzgesetz* (Cultural Property Protection Act – KGSG).

As for immovable cultural property, every German state has its own regime for the protection of historical sites and historically relevant objects as landmarks. While the main focus of German landmark protection law lies with immovable objects, certain German states have implemented landmark protection for movable objects as well. State-based landmark lists exist for every German state, publishing all objects protected as landmarks in the respective state.

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

German law distinguishes between cultural property and national cultural property:

- 'cultural property' is any movable object or aggregate that is of cultural, historical or archaeological value or otherwise part of the cultural heritage, in particular, of palaeontological, ethnographical, numismatic or scientific value; and
- 'national cultural property' is cultural property that is either in public ownership or registered in the National List. The entry in the National List shall be reserved to cultural property that is highly relevant for the German cultural heritage and contributing to its sense of identity, such that its departure from the German territory would mean a significant loss for the German cultural landscape and that its retention in Germany is of extraordinary cultural and public 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?

As for the legal consequences of such classification, German law distinguishes again between cultural property and national cultural property (see question A.2 above). Cultural property

that meets certain age and value thresholds (see question B.1.5 below) cannot be exported from the German territory without export permission. For national cultural property, permanent export permissions are generally not granted, while temporary export permissions can only be granted if specific conditions are met (see question B.3 below).

The classification of a private asset as cultural property or national cultural property does not affect the right of ownership.

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

On the state level, the competent authority is the Ministry of Culture (Kultusministerium); on the federal level the competent authority is the Federal Government Commissioner for Culture and the Media (Die Beauftragte der Bundesregierung für Kultur und Medien). These authorities are advised by officially appointed expert commissions. Each expert commission consists of five members that are appointed for five years. Typically, the members of the expert commission are experts from museums or universities, art or antiquity dealers, or private collectors.

**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, regarding the illegal export of cultural objects and artwork: what are the main characteristics of the national implementation?**

Yes, Germany has ratified the 1970 UNESCO Convention. The ratification and the implementation into national law date from 2007. The national legislation implementing the 1970 UNESCO Convention was significantly amended in 2016.

The German legislator has taken a generous approach regarding the time scope of cultural goods enjoying protection: where there is uncertainty whether the import of a cultural object took place before or after the national implementation legislation came into force, the cultural object is considered to have been imported into the German territory after implementation of the 1970 UNESCO Convention into national law, thus making the protection regulations of the national implementation law applicable to the import.

A similar approach is taken as per the definition of the term ‘illegal export’ of an object: a cultural object that was legally exported for a limited time period but not returned at the end of that time period is considered illegally exported.

**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?**

No, Germany has not ratified the 1995 UNIDROIT Convention.

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

Yes, Germany has ratified the 1954 Hague Convention.

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

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

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

Export permission is granted for all cultural property that does not qualify as national cultural property. For national cultural property, permanent export permissions are generally not granted, while temporary export permissions can only be granted if specific conditions are met (see question A.3 above).

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

See question A.4 above.

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

The proceeding is triggered by an application by the person wishing to export the cultural property, typically the owner of the artwork. The parties to the proceeding are the applicant and the authority competent in the particular case (see question A.4 above). The proceeding can be a matter of several days, but can also be a matter of several months.

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

Yes, there are monetary thresholds, see question B.1.5 below.

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

Works by living artists may be registered in the National List, but this is only permitted in cases where the artist has consented. Also, an export permission is typically not required for works by living artists. For most works by living artists, the applicable age thresholds are not met; also, if an artist who is still alive exports his or her own works, no export permission is required.

Regarding the age thresholds, the time of creation of the artwork is of crucial relevance. An export permission is only required for cultural property that meets certain age thresholds (eg, 100 years for archaeological objects). Most age thresholds are combined with value thresholds. An export permission is, for example, required in the following age and value scenarios:

- 75 years and €300,000 for paintings;
- 75 years and €100,000 for aquarelles, gouaches, pastels and sculptures;
- 75 years and €50,000 for mosaics, drawings, etchings, lithographs, photography and manuscripts; and
- 50 years and €50,000 for archives.

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

No such obligation exists under German law. However, if an export permission has been denied, the competent state authority may, upon the owner's request, consider to purchase the artwork. Such purchase, however, does not have to be based on a fair market price.

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

The temporary export of national cultural property can be permitted by the competent authority if the owner grants that the work will be brought back to the German territory without any damage and in due course.

The ability to export a work of art that enters the German territory for being temporarily exhibited in a German museum can be guaranteed in the form of a guarantee declaration by the competent state authority.

**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?**

In the case of breach of export restrictions, or significant suspicions indicating such breach, the competent authority (see question A.4 above) may order a seizure of the cultural property concerned and hand it out to the party entitled to claim restitution.

At the same time, a breach of German export restrictions regarding cultural property is a criminal offence and can cause punishments of up to five years in prison for private individuals and up to ten years in prison for commercial art dealers.

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

In practice, restitution and repatriation negotiations start with a dialogue between the competent German authority and the respective foreign country. To trigger such dialogue, European Union Member States must file their restitution claims to the federal authority, Die Beauftragte der Bundesregierung für Kultur und Medien, whereas countries that are not EU Member States must file their restitution claims to the German Foreign Office, the Auswärtiges Amt.

If an amicable settlement cannot be reached with the country filing restitution claims, an administrative court procedure in German administrative courts may follow, starting at the local administrative court (Verwaltungsgericht), going up to the higher regional administrative court (Oberverwaltungsgericht), and potentially being ultimately decided by the administrative court on the federal level (Bundesverwaltungsgericht).

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

In case of restitution claims based on EU law, the 1970 UNESCO Convention or the 1954 Hague Convention, the cultural property that has been illegally imported into the German territory is to be handed back to the country of origin.

The German legislator has taken a generous approach regarding the time scope of goods enjoying protection and the definition of the term ‘illegal export’ of an object (see question A.5 above).

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

Yes, a good faith buyer enjoys protection and is entitled to receive a compensation equal to the fair market value of the item.

**5. Which regulations exist for the protection of the purchaser against title claims?**

Title claims are generally excluded in the event the acquirer has acquired the item in good faith. Good faith is excluded where the buyer positively knew that the seller was not the rightful owner, or where ignoring this fact was grossly negligent. For stolen items, German law strongly supports the interests of the original owner. Good faith acquisitions are excluded for objects that have been stolen or lost or that otherwise went missing against the original owner’s will, except where sold at an auction publicly performed by a bailiff or other publicly employed auctioneer.

As a peculiarity of German law, property and possession may permanently fall apart where rightful title claims are time-barred under the statute of limitations. Under German law, the statute of limitations for title claims is 30 years. As a result, even a bad faith purchaser can refuse to return the object after expiry of the 30-year period, although he or she may never acquire good title.

**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?**

German law provides anti-seizure protection in two respects; on the one hand against third-party title claims and, on the other hand, against registrations of an object as national cultural property. To trigger such anti-seizure protection, the competent authority on the state level must declare an anti-seizure guarantee.

**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 import of cultural property exported illegally from its country of origin into the German territory is considered illegal and in violation of German import restrictions.

## **D. Due diligence obligations**

### **1. What general due diligence is required from the seller/buyer of artwork if the artwork is intended to be exported?**

The seller/buyer of cultural property is expected to have reviewed diligently: (i) whether the cultural property went missing against the former owner's will; (ii) whether it has been illegally imported; or (iii) whether it has been illegally excavated. As for typical indications that should raise alarm bells, KGSG mentions exceptionally low prices or the seller's request for cash payment of an amount exceeding €5,000.

The degree of due diligence required depends on the particular circumstances of the purchase, which are determined on a case-by-case basis. Of prime importance are the person and expertise of the seller/buyer, as well as the value of the work in question. The more professional the seller/buyer and the more valuable the item, the higher the due diligence requirements will be. For commercial art dealers, for example, KGSG sets forth a detailed catalogue of due diligence obligations.

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

Yes, German anti-money laundering regulations stipulate detailed obligations for individuals dealing in goods, including art dealers. The Fifth EU Anti-Money Laundering Directive, Directive 2018/843/EEC, which entered into force on 1 January 2020 and was implemented into German national laws, mentions art dealers, agents and even art storage companies as being subject to the European anti-money laundering regime. The German cash payment threshold for the application of customer due diligence measures, again in accordance with EU requirements, amounts to €10,000 (Directive 91/308/EEC).