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# Art law: Restrictions on the export of cultural property and artwork

December 2020

A report by the IBA Art, Cultural Institutions and Heritage Law Committee

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# Acknowledgement

I would like to thank the Co-Chairs of the IBA Art, Cultural Institutions and Heritage Law Committee, Nicholas M O'Donnell and Giuseppe Calabi for entrusting me with the task of updating *Art law: Restrictions on the export of cultural property and artwork*, originally published in November 2017.

This project would not have been completed without the efforts of the authors, both old and new. I am grateful for the time each of them has spent on reviewing and contributing chapters, despite the challenging times we have all faced this year.

We have been able to not only review and update earlier chapters, but also add a few more jurisdictions to this version. This updated 2020 manual is a significant compendium on export of art and cultural property, which, I am sure, will be a useful starting point for any practitioner in the field.

Sincerely,

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# Argentina

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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?

Argentina is a federal country, so there are three levels of legislation: federal, provincial and municipal. Federal law is strictly enforced, but controls are more relaxed at provincial and municipal levels, especially regarding sites and buildings protection.

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

Under the Cultural Heritage Act (Law 25197, enacted in 1999), 'cultural goods' are those objects, living beings or sites constituting the expression or evidence of human creation and the evolution of nature and having exceptional archaeological, historical, artistic, scientific or technical value.

There is a further definition of 'historical and artistic cultural property' comprising:

'...all human or natural/human works of irreplaceable nature, whose peculiarity, unity, rarity and/or antiquity confers upon them an exceptional national or universal value from a historical, ethnological or anthropological point of view, as well as architectural works, sculptures, paintings and those having archaeological nature.'

In addition to 'cultural property', under the statute creating the National Commission on Historical Monuments, Sites and Assets (Law 27103, enacted in 2014, amending a prior statute originally enacted in 1940), certain goods may be declared 'of national interest' if they have 'historical or artistic value'.

### 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 a particular asset is classified as 'cultural property' under the 1999 statute, it will only be subject to classification, with no further consequences. If an asset is declared to be a protected asset under the 2017 statute, any transaction affecting it, or its export, will require the prior intervention and authorisation of the Ministry of Culture. In the case where the intervention imposes limitations on property rights, the owner must be indemnified.

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

The authority defining which assets are to be considered of 'national interest' is the Ministry of Culture through the National Commission on Historical Monuments, Sites and Assets.

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. Argentina ratified the convention with no reservations or changes pursuant to Law 19943 (1972). Argentina is strictly enforcing the convention, basically when pre-Columbian artifacts are involved.

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?**

Yes. Argentina ratified the convention with no reservations or changes pursuant to Law 25257 (2000).

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

Yes. Argentina has ratified in 2002 the 1976 El Salvador Convention on the Protection of the Archaeological, Historic and Artistic Heritage (the 'El Salvador 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 to works by living or deceased artists (if, in the latter case, no more than 50 years have run after the death), except if the work has been declared to be part of the national cultural heritage of Argentina.

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

The National Board of Cultural Assets and Sites.

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

Proceedings are carried out online and, normally, permission is granted within 24 hours.

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

No.

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

Yes. The work by living artists, in practice, finds no restrictions. Works by artists who have been dead for over 50 years find more difficulties.

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

No. The owner must file an expropriation lawsuit with such purpose.

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

Yes, on a case-by-case basis.

**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?**

The exporter may face criminal charges.

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

There are many precedents in which the state has seized artworks illegally entered into Argentina and then later returned them to the country of origin. There are no precedents in which Argentina has claimed back artworks illegally exported from Argentina.

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

Under the El Salvador Convention (see question A.7 above), all countries party to the Convention must take all legal steps to ensure that no export or import restrictions of artworks are violated. If legal actions are required, the country whose assistance has been requested must file the legal action itself.

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

Normally no, however, the buyer could allege, and evidence, good faith.

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

None. To the extent artworks constitute mobile property, 'possession equals title', unless strong evidence can be provided that the buyer knew, or had reason to know, that the artwork was illegally transferred.

**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?**

If the export licence is defective, the foreign lender may face severe difficulties to obtain protection.

**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?**

Argentine statutes providing tax exemptions to the import or export of artworks specifically indicate that the benefits are granted to their bona fide holders. Thus, it can be reasonably held that good faith evidenced locally would prevail over a foreign claim of an illegal export.

## **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 or buyer should require from the counterparty appropriate evidence that the artwork was declared for Argentine tax purposes plus a detailed invoice or receipt from the seller.

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

Yes. Art dealers and auctioneers must provide information to the relevant authorities from time to time.



# Austria

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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?

Austria has a stringent regime of protection of cultural property that stipulates strong incisions into the right of ownership and transfer. Transfer restrictions not only apply upon the export from Austria, but even upon a transfer of ownership within the country. Objects protected under Cultural Property Law may not be altered or destroyed by its owner. More importantly, the owner is obliged to conserve the object, to a reasonable extent, and at his or her own expense.

In terms of restitution, the Austrian regime has been strongly impacted by European harmonisation (most notably Directive 2014/60/EU) and the 1970 UNESCO Convention, allowing for impartial restitution proceedings before a Civil Law Court.

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

'Cultural property' is defined as all man-made objects of artistic, historical or other cultural significance. The broad definition of the term 'object' leads to a fairly wide scope, including – among others – antiques, paintings, drawings, miniatures, statues, reliefs, coins, excavated objects and musical instruments. Cultural property may also be vested in the arrangement of several objects (eg, a collection), effectively rendering them inseparable.

Cultural property is to be protected – meaning formally placed under protection by an administrative deed – in cases where public interest mandates their conservation. This will typically be the case where the 'total amount' of cultural heritage in Austria would be impacted negatively in terms of quantity, variety or distribution. Limitations of the export of an object may apply based on the nature of the object, even without formal protection having been enacted.

A de-classification from the status of cultural property or revocation of the protection can be applied for in cases where either the public interest to protect the object has ceased to the extent that a protection is no longer necessary, or in cases where a scientific re-evaluation of the object has led to the conclusion that its protection is no longer befitting. Needless to say that such cases occur only rarely.

**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 right of ownership is affected in a multitude of ways. Most importantly, free transfer of ownership (be it within the Austria's federal borders or be it internationally) is limited and subject to the cultural heritage protection authorities' consent.

For more information on cross-border restrictions, see Section B below.

Further, the classification as cultural heritage imposes several duties on the owner, most importantly the duty to maintain the object at his or her own expense to a reasonable extent – as well as the obligation not to alter or destroy it. The abidance by these rules is safeguarded by strict fines and even stricter rules for criminal prosecution.

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

Two authorities define cultural property.

The Federal Antiquities' and Monument's Office (Bundesdenkmalamt – hereinafter FAMO) is assigned to protect cultural property in general, meaning all cultural property that is not being supervised by other agencies – ie, all categories besides the ones explicitly assigned to the National Library.

The National Library (Nationalbibliothek) is the competent authority to supervise the protection of books, pictures, motion pictures, video and sound recordings created for the purpose of documentation of public information.

On appeal, matters assigned to these two authorities will be decided by Federal Administrative Court (Bundesverwaltungsgericht).

All of the above are consulted by an expert advisory board (Denkmalbeirat) established at the Federal Ministry of Education, Arts and Culture, a panel consisting of 60 volunteer experts. The board does not have the power to render binding decisions, but its recommendations are well reputed and will, in general, be followed.

**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?**

In light of the EU Commission's recommendations, Austria gave in to ratifying the 1970 UNESCO Convention on 1 July 2015. Together with Directive 2014/60/EU, it has been implemented within the framework of the Cultural Heritage Restitution Act (*Kulturgüterückgabegesetz – KGRG*). This Act provides for the legal framework to initiate restitution proceedings before a civil court. In such proceedings, the government authorities may participate as observers but are not parties.

The KGRG allows for the restitution of cultural property that was illegally exported from its country of origin – most notably in breach of the UNESCO Convention or in breach of EU law. This may apply either to objects unlawfully removed from their country of origin, or for

objects that were initially lawfully removed, but whose permission has later ceased to exist. Unlawfulness must be given at the time of import to Austria.

Proceedings are held before a civil court. The owner of the object is entitled to compensation if he or she acted diligently upon acquisition of the object. This will, in general, be the case if he or she had reason to believe the import was lawful (eg, when acquiring from a trustworthy source), and when he or she inquired available resources/databases of stolen object of the concerned category. Possessors acting in bad faith upon acquisition are also obligated to pay the rightful owner compensation of legal costs.

**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?**

Austria has not ratified the 1995 UNIDROIT Convention.

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

Most notably, Austria is bound by EU Directive 2014/69/EU on the return of cultural objects unlawfully removed from the territory of a Member State, which has been implemented into national law by the KGRG (see question A.5 above).

## **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 is granted?**

A fairly strict regime is set forth in the Cultural Heritage Protection Act (*Denkmalschutzgesetz – DMSG*). In general, the export of protected cultural property as well the export of cultural property not yet protected is subject to permission by the authorities.

Concerning the former, export regulations are very stringent and export permissions will only be granted in crucial cases, meaning in cases where the intrinsic value of the export of the object itself outweighs the public interest that lead to its protection as cultural property in the first place. Burden of proof lies with the proprietor of the object.

Concerning the latter, the competent ministry regularly publishes a decree of *de minimis* thresholds, below which a permission is not necessary. Should the authorities conclude that an object not formally protected may not be exported, it is obliged by law to initiate protection proceedings concerning the object. Thus, a request for granting an export permission may lead to unpleasant consequences for the owner of a cultural object.

Exceptions to this rule may apply to restituted artworks and works of contemporary arts, which may be exported without the need for permission, unless they have been

formally declared public heritage. Further exceptions apply in the cases of temporary import of artworks to Austria (see question B.3 below).

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

See the response to 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?**

In the first instance, the petitioner requesting permission is the only party before the responsible office. The advisory board will be called upon in a consulting role. On appeal before the Administrative Court, the role of the responsible office shifts to that of a regular party defending its decision. In general, there is no cost compensation in these proceedings. Duration depends on the workload of the office/court but lies within EU averages.

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

See the response to question B.1.1 above.

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

Yes, Section 16(4) of DMSG provides for an exception for the export of the work of contemporary artists. Works of contemporary artists, and works of artists deceased no longer than 20 years ago, do not require an export permission, unless they already are under protection.

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

No.

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

There are some exceptions to the general rules stated above. Temporary export may be permitted in return for a security deposit amounting to twice the market value of the object, so long as the return of the object to Austria is not endangered.

In practice, the most important exception is the permit to re-exportation. Such permit must be applied for within three years of importation into Austria at the latest. Given the artwork was previously outside of Austria, and it was imported lawfully, the authorities are obliged to permit the re-exportation. Such permits are usually granted for ten years but may be extended up to 50 years.

Further, objects that are classified as foreign cultural heritage, that are temporarily imported for exhibition may be declared immune.

## **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?**

Besides monetary fines, the Austrian legal framework provides for restoring orders. Where cultural property was exported without permission, the authorities may order the exporter to effect appropriate measures to retrieve the object at its own expense. This may include the order to purchase the object. Objects retrieved this way may be expropriated by the state.

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

See question A.5 above for restitution according to the KGRG.

Furthermore, the Art Restitution Act (*Kunstrückgabegesetz* – KRG) provides for a legal regime dedicated to the restitution of Nazi-looted art.

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

Most notably within the framework of the Internal Market Information (IMI) System which provides for support in the repatriation before the initiation of civil proceedings. As set forth in Directive 2014/69/EU, the central institutions of the Member States concerned are to cooperate in order to ease repatriation.

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

For compensation and due diligence, see the response to question A.5 above.

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

The civil law title to cultural property is to be treated independently of its cultural property status. In terms of ownership, for the duration of its unlawful removal, the legal fiction applies that the property law statute of the country of origin continues to apply until the object is returned to its country of origin. This is to provide that the unlawful removal cannot serve to improve the removers' legal situation, for example, by allowing him or her to acquire the object through adverse possession.

### **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?**

The wording of the law does not provide for exceptions for objects on loan – if the removal was unlawful, the restitution regime applies. For further information, see question A.5 above. However, foreign loans may – under some circumstances – be eligible for temporary immunity. Such immunity will protect the artwork from seizure.

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?**

See the response to question A.5 above.

## **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?**

As already touched upon in question A.5 above, due diligence requirements depend on the trustworthiness of the sources from which the object was acquired (eg, reputed auction houses versus backyard sales). Other factors include whether the buyer is a commercial or private entity. Where available, public databases of unlawfully removed objects will have to be inquired as part of a thorough due diligence process.

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

Stringent and complex regulations apply to art dealers and auction houses, who are required to identify the person economically responsible for a purchase above the threshold of €10,000. Duties include the documentation of valid ID, the analysis of corporate structures in order to define the natural person on whose behalf the transfer is being effected, as well as pre-emptive information of tax authorities.

# Belgium

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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?

National patrimony laws in Belgium traditionally seek to protect the assets owned by the state, called the 'public domain', to the extent the state (which includes, within Belgium, regional and local authorities and their respective entities) owns these assets for the public interest, meaning that they are assigned to the use of all or to the exercise of a public service. Cultural goods belonging to the public domain – public museum collections, public libraries and archives – cannot be sold or transferred, nor be seized, nor can their ownership be acquired over time, unless they are disused.

Movable cultural property belonging to the private domain is in principle subject to the same regime of title and ownership as other private assets.

However, since 2002, specific protection legislation to protect certain important items of cultural property has been enacted on a regional level, mainly providing for classification or listing measures and export restrictions.

In this regard, an essential feature of the Belgian constitutional system is the federalisation of the Belgian State. Movable cultural heritage falls within the powers of the three Belgian communities (Flemish, French and German-speaking) while the powers to regulate immovable cultural heritage belong to the three Belgian regions (Flanders, Wallonia and Brussels). However, the Brussels region, given its specific status, was granted in 2014 its own powers for the protection of immovable as well as movable and intangible cultural property. This led to a specific regulation confined to cultural property 'of regional interest' situated in the Brussels region. The exact scope of this concept is not yet entirely clear, but it excludes federal museum collections – which continue to be governed by the Federal State – and all cultural property belonging to institutions whose activities are exclusively directed at the Flemish, French community, as the case may be.

Accordingly, four regulations seek to protect movable cultural heritage in Belgium:

- the Decree of the French Community of 11 July 2002 (FR);
- the Decree of the Flemish Community of 24 January 2003, as amended from time to time (FL);
- a Decree of the German-Speaking Community of 20 February 2017 (GER); and
- a decree ('*ordonnance*') of the Brussels Region of 25 April 2019 (BR).

The territorial reach of those regulations depends on the actual location of the good within the Belgian territory. Some exceptions can come into play if the good has just been transferred from one community or region to the other, in order to prevent abuses.

For the purpose of this questionnaire we limit ourselves to the Flemish (FL), the French-speaking (FR) community decrees and the Brussels regional decree (BR) as they cover the main part of the country.

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

FL: The protection extends to movable goods and collections that are rare and indispensable because of their exceptional archaeological, historical, cultural-historical, artistic or scientific importance for the Flemish community (then becoming a '*topstuk*'). A good is rare when few copies (similar or identical), exist inside the Flemish Community. A good is indispensable when it has a particular value for the collective memory, the function of link in the evolution of the art, the value of a standard in the evolution of art or a particular artistic value.

FR: There are two categories of cultural property, the wider being 'movable cultural goods' and the narrower 'treasures' (*trésors*). To classify as cultural good, the object has to meet thresholds of age and value that differ according to the type of good (paintings, books, photography, etc) similar to those set out in the Annex to the European Union Regulation 116/2009 on the export of cultural goods. Even if the decree is not clear in this regard, it seems that only cultural goods that have been listed (*classés*) are protected. This means that the French Community government must initiate a classification procedure that leads to the publication of the decision to classify a good as a *bien culturel* in the Belgian *Legal Gazette*. This publication mentions whether the cultural property is also to be considered as a 'treasure', which is invariably the case.

BR: 'Cultural property' is defined as a movable good or a collection which either: (i) belongs to one or more categories as referred to in Annex I.A. of the EU Regulation 116/2009 on the export of cultural goods; or (ii) is protected (listed) by the Brussels government in accordance with the listing regime provided by the decree. The criteria for listing are the same as under the Flemish Decree: the cultural good or collection must be rare and indispensable because of its exceptional archaeological, historical, cultural-historical, artistic or scientific importance for the Brussels region. All items of cultural property – listed and unlisted – of historical, archaeological, artistic, aesthetic, scientific, social, technical or folkloristic interest for the Brussels Region are included in its inventory of movable cultural property.

EU: The aforementioned sub-national regimes are subject to, and are supplemented by, the European regime that retains its own definition of 'cultural goods' for the purpose of exportation outside the EU. Like the regime of the French Community (which reproduces mainly the EU definition), cultural goods should meet thresholds of age and value that differs in function of the category of good.



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

The consequences of classifying as cultural property are threefold. First, the good would be subject to restrictions on export, being understood that the rules on (temporary or definitive) export vary from community to community. Second, the right to sell and/or move the goods within the territory of Belgium will potentially be affected. In both the French-speaking community and the Brussels region, the government can exercise a pre-emption right on any sale of movable cultural goods, the former on all cultural property whether listed or not, the latter only in respect of listed property. Finally, the French, Brussels and Flemish decrees impose certain obligations on the owner, possessor or holder of a protected object with a view to preserving it.

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

FL: The Flemish Community Government registers cultural property items it deems worthy of protection (*topstukken*) on the list of the movable cultural heritage of the Flemish Community, but a good or collection can qualify as *topstuk* even if not included in the list. This means that any owner should assess for himself if a particular good is likely to qualify as a *topstuk*. Guidelines are issued by the Flemish authority to assist owners in this regard.

Owners can also request the Flemish Government to issue a certificate confirming that an object or collection does not qualify as a *topstuk*. There is also an advisory body, the Council of Cultural Heritage (Topstukkenraad) designed to advise the Flemish authority and made up of specialists chosen by the ministry of culture.

FR: The French Community Government classifies cultural goods. To advise the government, there is a consultative commission for the movable cultural property (*commission consultative du patrimoine culturel mobilier*), made up of 17 members (art historians, university members, museum curators, legal experts, art restorers, trade representatives and politicians).

BR: The Brussels Government determines which items are included in the inventory and which items qualify for listing. It is assisted by the Commission for movable and intangible cultural property, an advisory body.

**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?**

Belgium ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property on 31 March 2009 and it entered into force on 1 July 2009. An implementing law has been in preparation for years, but no final instrument has been enacted. The draft legislation amongst other things provides for:

- the seizure of cultural goods that were, after 1 July 2009, illegally exported from another country party to the Convention or stolen from an institution of another party to the Convention (such as a museum) where the good was inventoried; and

- the right of the claiming country to request the restitution of the illegally exported or stolen object within a year of discovery of the location of the object and the identity of its possessor or holder and in any event no later than 30 years after the cultural object left the country of origin. The current holder of the object may receive a fair compensation in the event of restitution provided he or she held it in good faith, meaning that he or she should have exercised due diligence when acquiring the object. However, good faith is always presumed (the burden of proof resting on the claimant) and must only exist at the time of acquisition.

**6. Has 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?**

Belgium has not ratified the 1995 UNIDROIT Convention at the time of writing, and probably will not, according to the conclusions drafted in a joint study ordered by the different cultural authorities. These authorities believe the ratification at Belgian level is not necessary in the wider perspective of (prospective) European legislation and with due regard to the evolving position of the major trade countries. The priority is currently given to the implementation of the 1970 UNESCO Convention.

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

Apart from The Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols as well as the Convention on the Protection of the Underwater Cultural Heritage, Belgium is not party to any other international conventions or bilateral treaties relating to the export of cultural property.

Since 27 June 2019, the EU Import Regulation (Regulation (EU) 2019/880 on the introduction and the import of cultural goods) is in force in Belgium as in the whole European Union.

**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?**

FL: The export permission is granted if the Flemish Government considers that there are no archaeological, historical, cultural, artistic or scientific reasons to maintain the protected good within the Flemish Community.

FR: The permission is granted if the French Community Government considers its export will not cause serious harm to the cultural heritage of the French Community. The cultural goods classified as 'treasures' can only be temporarily exported (licence of one year). Since all listed cultural goods have been qualified as 'treasures' up to now, this means no listed cultural property can permanently leave the French-speaking Community.

BR: The Brussels Government will only grant permission to export a listed item on a temporary or definitive basis if:

1. the export does not threaten to entail a serious prejudice to the cultural property of the Region; or
2. the conditions imposed by the government, if any, are such that they can eliminate the risk mentioned in point 1 above (such conditions may include measures restricting the ownership right, such as conservation measures, exhibition methods, transport restrictions and conditions of access to the public).

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

The export permission is formally granted by the executive branch of each entity, meaning the Flemish, the French and the Brussels Governments respectively, as identified in the answer to question A.4 above.

The practical handing of applications (and issuing permits and certificates) is delegated to the respective administrations:

- French Community Authority (Ministère de la Communauté française, Service General du Patrimoine culturel et des Arts plastiques): **[www.patrimoineculturel.cfwb.be](http://www.patrimoineculturel.cfwb.be)**;
- Flemish Community Authority (Vlaamse Overheid, Department of Culture, Youth, Sport and Media): **[www.kunstenenerfgoed.be](http://www.kunstenenerfgoed.be)**;
- Brussels Region: Direction du Patrimoine culturel: **<http://patrimoine.brussels/decouvrir/inventaires-du-patrimoine-bruxellois/linventaire-du-patrimoine-culturel-mobilier>**.

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

FL: An application must be filed with the Flemish administration. This is specifically a form or letter that contains the identification of the property and the reasons of the export. The administration must render its decision within two months of the application date. If the applicant does not receive a permission within two months, he or she must be deemed to be authorised to pursue the export. The whole procedure is confidential.

FR: No specific procedure is set for the French Community. In practice, applicants can use the application form for an EU export licence.

BR: no specific application procedure is provided as yet but the decree provides that authorisation is to be granted within two months of receipt of the complete application and that in the case of no answer, authorisation is deemed to be refused.

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

Monetary thresholds rather play a role at the level of the definition of cultural property to qualify for protection or listing/classification.

FL: The guidelines issued by the Flemish administration refer to indicative thresholds – €500,000 for paintings and €100,000 for other cultural goods – in order to qualify as a *topstuk*. The guidelines specify that goods whose value is less than the values set out in the annex of the EU Regulation are less likely to be considered as *topstukken*.

FR: As mentioned, there are monetary thresholds to qualify as a cultural good that varies from types of objects (inspired by the EU Regulation). For example, archaeological objects qualify no matter their value, whereas, paintings must have a minimum value of €150,000.

BR: No thresholds are provided.

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

FL: The decree provides that if the owner is the author (maker) of the object, the export permission cannot be refused but the mere fact that the artist is still alive does not per se entail a permission to export.

FR: In general, goods being less than 50 years of age would not be considered as cultural goods. For certain types of goods, the object should still be older (such as 100 years for archaeological objects). No specific exemption applies to artworks of living artists.

BR: No.

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

FL: Yes. If an export permission is denied, the owner of the artwork can request the Flemish Community Government to make a purchase offer. Negotiations with the government must start within one month of this request, failing which the authorisation is deemed to be granted. The artwork must be acquired at the international market price. Failing an agreement between the owner and the government within one month of negotiation, the price is to be determined by an expert panel. If the owner refuses the offer at the price determined by the experts, he or she will not be entitled to apply for an export permission for three years after this refusal.

FR: No.

BR: No.

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

FL: There are a few exceptions to the general rule. The authorisation cannot be refused if the artwork is less than five years in the Flemish Community, if it is still owned by its author or has been brought in the Flemish Community by its author, or if its owner has acquired it within five years of its entry in the Flemish Community. The Flemish regime does not distinguish between definitive and temporary export, except that in the event of temporary export, the export application should mention the conservation measures that will be taken abroad and the guarantees of the artwork's return.

FR: As mentioned, the French regime only authorises temporary exports of up to one year.

BR: No distinction is made between temporary and definitive export requests. In both cases the government may make its authorisation subject to certain conditions in respect of the object's conservation or to protect the particular interest which justified its listing. The temporary export licence will fix the period within which the good must return to the Brussel region.

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

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

FL: Whoever violates export restrictions is subject to a fine of €300 to €100k and a prison term of four months to five years. Those penalties can be doubled if the Flemish Community never recovers the good in the end. The court will decide between the minimum and maximum according to the circumstances of the case. The Flemish Government can also request the court to order the person responsible for the illicit export to bring the good back into the Flemish Community. In that case, the defendant has to pay a bail equal to the internal market value of the good. If the good returns, the bail is reimbursed (minus expense to repair damages). If not, the Flemish authority will retain the bail as damages.

FR: No explicit criminal sanctions are provided for in the French decree, which only specifies that illegally exported goods can be seized by the French Government. If there is a risk of recidivism, the government is entitled to confiscate the property.

More generally, if protected cultural property is illegally exported to another Member State of the EU (the 'EU Directive'), the Belgian State would be entitled to request its restitution before the court of the Member State of location, on the basis on the European Directive 2014/60 on the return of cultural objects unlawfully removed from the territory of a Member State. Restitution of cultural property illegally exported outside the EU is also possible under international regimes, such as the UNESCO Convention of 1970.

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

BR: Violation of the export-related obligations entails a prison term of eight days to one month and fines ranging from €100 to €500, which are doubled in certain aggravating circumstances. This can be combined with other enforcement measures including returning the object to Brussels, forced restoration, etc.

No general policy has been published to date regarding the restitution of goods illegally exported from Belgium.

However, in the context of the international agreements on the restitution of looted cultural assets during the Second World War, Belgium assigned a special team within the Ministerial Department of Economic Affairs to recover art and archives looted from Belgium. The mission of this team has since expired, even though not all items registered as such have yet been retraced or recovered. Where possible, Belgian enforcement authorities seek to rely on

the (voluntary) assistance of the diplomatic or enforcement agencies of the country of the present location.

Regarding cultural goods that have been illegally imported to Belgium, Belgian authorities will have the obligation to return under conditions set out in the Belgian implementation laws of the 1970 UNESCO Convention and the EU Directive.

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

Experiences show that Belgium will often cooperate with other states seeking repatriation through international and European letters rogatory under inter alia the European Convention on Mutual Assistance in Criminal Matters (adopted under the Council of Europe), the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, or bilateral treaties on mutual cooperation or extradition.

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

If the good has been illegally exported after 1993 from another EU Member State, the Belgian law transposing the EU Directive on restitution of cultural goods (law of 28 October 1996) provides that Belgian courts must order the restitution of the good.

In that case, the Member State requesting the good has to pay a fair compensation to the good faith buyer, provided that he or she had acted with due diligence at the time of the acquisition. In the case of export after 1 July 2009 from a non-EU state that ratified the 1970 UNESCO Convention, the implementing law to be enacted also provides for fair compensation (see question A.5 above). Outside the scope of European and international instruments and their implementations into Belgian law, the Belgian International Private Law Code grants the plaintiff in cultural restitution claims (which must be a state) the option between applying the *lex rei sitae* or the law of the country of origin of the disputed object. Where Belgian law is applicable to the restitution claim, the protection of the bona fide purchaser as laid down in the answer to question C.5 will apply.

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

Pursuant to Belgian law of title, quiet and good faith, possession of a chattel confers immediate ownership title unless the original owner involuntarily lost possession of his asset, in which case the original owner has three years to reclaim his asset. This rule is only applicable in cases of true possession (actual power on the good, with the conviction to possess on his or her behalf) and good faith, meaning that the buyer did not know or should not have known when he or she acquired the good that he or she was acquiring from a person without ownership title. Good faith is legally presumed. Nevertheless, whilst traditional case law and practice seems to favour a protective application of the law towards bona fide purchasers, more recently civil courts do not hesitate to rule in favour of the claimant if the current possessor is clearly in bad faith or fails to prove his or her good faith.

In any case, a purchaser can acquire ownership title by having quiet possession of a good during 30 years, provided his possession is continuous, undisturbed, public and unambiguous.

In both cases, the possessor will have become the indisputable owner.

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

Cultural property owned by foreign states or public entities should be distinguished from private cultural property. The Belgian Judicial Code provides that cultural property owned by foreign authorities is immune from execution (specifically, civil [conservatory or executory] attachment) when present in Belgium for the purpose of a public and temporary exhibition, provided such property is not used for economic or commercial activity of a private nature. Beneficiaries include state entities, provided they exercise some degree of sovereignty, and international governmental organisations. On the contrary, private cultural property lent to a Belgium-based exhibitor is likely to be the subject of attachment on the Belgian territory to support a title or restitution claim.

**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?**

We refer to the EU Import Regulation mentioned in question A.7 above.

No other specific regulation exists regarding the import of cultural property illegally exported from other countries, except for the regulations mentioned in question C.4 above.

## **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?**

There are no specific legal requirements regarding an artwork intended to be exported, except:

- that the seller or buyer should check whether any of the national or regional protection regulations apply (confer under the various protection decrees, there are certain notification requirements in the event of export or sale); and
- for the due diligence test under the EU Directive 2014/60 and UNESCO 1970 in order to qualify for a fair compensation.

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

Under current money-laundering legislation, auction houses, art dealers and art service providers may not accept cash for the payment of artworks in excess of €3,000. Any infringement must be reported in principle to the Financial Intelligence Processing Unit, but without implementing regulation this requirement cannot be enforced.

The art profession is under present legislation not subject to the anti-money laundering obligations to report suspicious transactions, unlike, for example, real estate agents and diamond traders. This will change once the Fifth EU Anti-Money Laundering Directive is implemented in Belgium.

# Brazil

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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?

Brazil's public administration is bound by Article 216 of Brazil's Constitution to promote and protect Brazilian cultural heritage. It has the authority to make use of such instruments as inventories, registers, vigilance, inscription (*tombamento*) and expropriation (*desapropriação*), as well as other forms of caution and protection within the existing legal framework, in collaboration with the community. The body in charge of this protection at a national level is the National Historic and Artistic Heritage Institute (Instituto do Patrimônio Histórico e Artístico Nacional) (IPHAN). The IPHAN is a federal public administration linked to Brazil's Ministry of Tourism, which absorbed the work, staff and resources of the former Ministry of Culture, abolished by President Bolsonaro in January 2019, as set out in Decree No 10,108, of 7 November 2019.

Brazil's current administration is also contemplating incentives set out by statute for the production and cognition of cultural goods and values, as well as penalties applicable in cases of loss or threat of Brazilian cultural heritage.

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

Brazil's cultural heritage comprises material and immaterial goods that, individually or as a whole, bear reference to the identity, action and memory of the different groups that form Brazilian society (Brazilian Constitution, Article 216). It includes: (1) forms of expression; (2) means of creating, doing and living; (3) scientific, artistic and technological creations; (4) works, objects, documents, buildings and other spaces destined to artistic-cultural manifestations; (5) urban settings and sites of historic, landscape, artistic, archaeological, palaeopathological, ecologic and scientific value.

In order to classify goods as cultural property, the IPHAN must observe the general criteria and procedures set out in Decree-Law No 25, of 30 November 1937 (the PHAN Law). In particular, the IPHAN must assess whether the conservation of a given material or immaterial good qualifies as a matter of public interest (*interesse público*) either for its linkage to memorable aspects of Brazil's history or for its exceptional value of archaeological or ethnographic, bibliographical or artistic nature.

Classification depends on an act of inscription (*tombamento*) of the goods by the IPHAN, separately or as a group, in one of the following register books (*livros do Tombo*):



- Archaeological, ethnographic and landscape heritage (*Tombo arqueológico, etnográfico e paisagístico*) – for the inscription of the objects pertaining to the categories of archaeological, ethnographic, Amerindian and popular art, as well as, by equivalence, of natural monuments, sites and landscapes that demand conservation and protection for their notable features, either by nature or human agency.
- Historic heritage (*Tombo histórico*) – for the inscription of the objects of historic interest and historic works of art.
- Fine arts heritage (*Tombo das belas artes*) – for the inscription of the objects of erudite art, national or foreign.
- Applied arts heritage (*Tombo das artes aplicadas*) – for the inscription of the works that belong to the category of applied arts, national or foreign.

Certain works of foreign origin located in Brazil are specifically excluded from the national historic and artistic heritage and, as such, not subject to the protection set out by the PHAN Law. This is the case for instance, of works of foreign origin that belong to diplomatic or consular representations or to commercial stores of historic or artistic objects in Brazil.

In cases of real estate properties, the IPHAN must notify the relevant real estate register (*registro de imóveis*) of the definitive inscription (*tombamento definitivo*) for registration in the respective record.

Cultural goods of immaterial nature are subject to a special register in Brazil introduced by Decree No 3,551, of 4 August 2000, in one of the following register books:

- Knowledges (*saberes*) – for the inscription of knowledges and ways of doing rooted in the routine of the communities.
- Celebrations (*celebrações*) – for the inscription of rituals and feasts that mark the collective livelihood of work, religiosity, entertainment and other practices of social life.
- Forms of expression (*formas de expressão*) – for the inscription of literary, musical, plastic, scenic and ludic manifestations.
- Places (*lugares*) - for the inscription of markets, fairs, sanctuaries, squares and other spaces where collective cultural practices are concentrated and reproduced.

### 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 the goods classified as cultural property belong to the federal, state or municipal governments, they are deemed incontrovertible in nature and can only be transferred among government entities (PHAN Law, Article 11). The acquirer must notify the IPHAN immediately after the transfer is concluded.

If the goods classified as cultural property belong to an individual or private sector entity, their owner can still transfer them subject to certain restrictions. The acquirer must notify the IPHAN within 30 days of the transfer, even if done in court or *causa mortis*, under penalty

of being fined at ten per cent of the value of the goods (PHAN Law, Article 13). Similar obligations punishable by the same fine apply in the event of: relocation of the goods, in which case the owner must seek inscription on the record of the destination within 30 days of the event; and loss or theft of the goods, in which case the owner must notify the IPHAN within five days (PHAN Law, Article 16).

Goods classified as cultural property cannot leave the Brazilian territory, except for a short period, with no transference of ownership and for the purpose of cultural exchange, at the discretion of the IPHAN (PHAN Law, Article 14; IPHAN Ordinance No 262, of 14 August 1992). In the event of an attempt to export cultural property from Brazil in violation of this rule, the owner will be subject to a fine of 50 per cent of the goods' value, which will be seized by the federal or state authorities in security for the payment (PHAN Law, Article 15). In cases of repeated offence, the amount of the fine is doubled to 100 per cent of the value of the goods. The owner may also be subject to criminal prosecution for smuggling (*contrabando*) under the Brazilian Penal Code, Decree-Law No 2,848, of 7 December 1940.

The owner of goods classified as cultural property is banned from destroying, demolishing or damaging goods in any circumstance. The owner must obtain special prior authorisation from the IPHAN before repairing, painting or restoring goods, under penalty of being fined at 50 per cent of the amount of the loss caused to the goods (PHAN Law, Article 17). If the owner is a government entity, the officer responsible for the act will be personally liable.

If the owner does not have the resources required for works of conservation and repair that a given item classified as cultural property may demand, they must inform the IPHAN of the need of such works, under penalty of being fined 200 per cent of the amount of the loss caused to the item (PHAN Law, Article 19). On receipt of such notice, if confirmed the need of conservation or repair works, the IPHAN will either: order the undertaking of requisite works at the expense of the federal government, commencing no later than within six months of the notice; or proceed with the expropriation (*desapropriação*) of the item. If the IPHAN does not take any such action, the owner of the item may request that the inscription is cancelled, a scenario that seldom materialises in practice. If the IPHAN determines that the conservation or repair works are urgent, it has authority to plan and implement such works at the expense of the federal government, even in the absence of a notice from the owner.

Furthermore, the IPHAN has the power to inspect any item classified as cultural property at any time, in the exercise of 'permanent vigilance' (PHAN Law, Article 20). Owners or responsible parties cannot impose obstacles to IPHAN's regular inspection, under penalty of being fined.

Finally, an offence committed against an item classified as cultural property is, by law, an offence committed against national property (*patrimônio nacional*) (PHAN Law, Article 21). As a result, the offender will be subject to Brazil criminal law, even if the offence was committed abroad (Brazilian Penal Code, Article 7, item I, subitem 'b'), and the damage caused to such an item will be prosecuted as qualified damage, subject to more severe penalties (Brazilian Penal Code, Article 163, sole paragraph, item III).

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

At the national level, the authority which defines cultural heritage is the IPHAN, a federal public administration body linked to Brazil's Ministry of Tourism (see question A.1 above; Decrees No 9,238, of 15 December 2017, and No 10,108, of 7 November 2019). The review and decision-making process initiates a proposal of inscription of goods as cultural heritage (*tombamento*) instructed by the relevant management within the IPHAN. The proposal is submitted to the IPHAN's Department of Material Heritage and Oversight (Departamento de Patrimônio Material e Fiscalização) for review and opinion (Decree No 9,238, of 15 December 2017, Article 20, item IV) and then to the IPHAN's Cultural Heritage Advisory Board (Conselho Consultivo do Patrimônio Cultural) for decision (Article 13, item I). The advisory board is led by the president of the IPHAN and comprises 22 members, namely: nine representatives of both public and private sector bodies and 13 civil society representatives, appointed by the president of the IPHAN and designated by Act of the Minister of Tourism. Following a favourable decision, the president of the IPHAN must sign the act of inscription and submit it to the Minister of Tourism for homologation (Article 26, item IX).

Acts of promotion and protection of cultural heritage can also be taken by relevant authorities at state or municipal level, subject to special regulations within their respective authorities in accordance with the same general principles set out in Article 216 of Brazil's Constitution. In the State of Rio de Janeiro, for example, the relevant authority is the State Cultural Heritage Institute (Instituto Estadual do Patrimônio Cultural) ('Inepac'), a state-level public administration entity linked to the State of Rio de Janeiro's Secretariat of Culture and Creative Economy. In the exercise of its statutory duties, the Inepac consults an expert advisory board led by the Inepac's director-general and composed of 11 other members: a representative of the Brazilian Historical and Geographical Institute (IHGB), a representative of the Brazilian Architectures Institute (IAB), a representative of the IPHAN and eight experts nominated by the state governor.

**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?**

Brazil approved the 1970 UNESCO Convention on 28 November 1972 (Legislative Decree No 71), deposited its instrument of ratification with UNESCO on 16 February 1973 and promulgated its content internally on 31 May 1973 (Decree No 72,312).

The authority in charge of maintaining and updating the national inventory of cultural goods under protection at the national level is the IPHAN, to which activity state or municipal authorities can concur within their respective spheres of authority.

Relevant national laws and regulations enacted in Brazil before the approval and ratification of the 1970 UNESCO Convention but have not been revoked include:

- the PHAN Law, which organises the protection of the national historic and artistic heritage (see question A.2 above);

- Decree-Law No 3,866, of 29 November 1941, which allows the President of Brazil to cancel the inscription (*tombamento*) with the federal public administration entity that today is the IPHAN, for reasons of public interest, of any given goods belonging to any entity of the public administration or to the private sector persons, by act of the President of Brazil;
- Law No 3,924, of 26 July 1961, which regulates archaeological and prehistoric monuments, banning the export of any object that presents archaeological or prehistoric interest, numismatic or artistic, without prior IPHAN authorisation;
- Law No 4,845, of 19 November 1965, which prohibits the permanent export of art works and traditional crafts produced in Brazil before the end of the monarchic period (ie, before 15 November 1889); and
- Law No 5,471, of 9 July 1968, which regulates the export of ancient Brazilian books and bibliographical sets.

Relevant national laws and regulations enacted in Brazil after the approval and ratification of the 1970 UNESCO Convention and remaining in force include:

- Decree No 3,551, of 4 August 2000, which introduces and regulates the special register for cultural goods of immaterial nature in Brazil (see question A.2 above);
- Decree No 9,238, of 15 December 2017, which approves the internal structure of the IPHAN (superseding previous decrees with similar scope) and attributes to the IPHAN the authority to introduce and regulate a national policy for the protection of the Brazilian material cultural heritage; and
- IPHAN Ordinance No 375, of 19 September 2018, which introduces and regulates the national policy for protection of the Brazilian material cultural heritage (*Política de Patrimônio Cultural Material*).

Within this national legal and regulatory framework, the 1970 UNESCO Convention is implemented in Brazil by the IPHAN. In addition to the authority and duty of regulating, evaluating potential impacts, supervising and conserving the Brazilian material cultural heritage, the IPHAN is the body in charge of reviewing and deciding on the cases of export of cultural goods that depend on prior authorisation, namely: (1) temporary export of art works and traditional crafts produced in Brazil before the end of the monarchic period (ie, before 15 November 1889); (2) temporary export of movable cultural goods protected by inscription (*tombamento*); (3) temporary export of archaeological goods; (4) consignment of archaeological material for analysis abroad; (5) temporary export of art works and traditional crafts originated in Portugal and incorporated to the national milieu during the colonial and imperial regimes (ie, before 15 November 1889); and (6) temporary export of art works and traditional crafts (painting, sculpture and graphic arts) that, although produced abroad before the end of the monarchic period (ie, before 15 November 1889), represent personalities that are either Brazilian or related to the history of Brazil, as well as the country's landscape and customs (IPHAN Ordinance No 375, Article 41).

In exercising its authority, the IPHAN must take steps to: avoid incidents of material cultural heritage becoming damaged and irregularities in the trade of works of arts and antiques; control the movement of protected cultural goods; monitor and support actions against illegal traffic in cultural goods; and promote the compensation of damages caused to Brazil's material cultural heritage, among other actions (Article 49).

**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?**

Brazil approved the 1995 UNIDROIT Convention on 21 January 1999 (Legislative Decree No 4), depositing its instrument of adhesion with UNIDROIT on 23 March 1999 and promulgating its content internally on 14 September 1999 (Decree No 3,166).

See question A.5 above, regarding the national implementation of this Convention in Brazil.

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

Brazil has ratified other international conventions, notably: (1) 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, including its first Protocol of 1954 (instrument of ratification deposited on 12 September 1958) and its second Protocol of 1999 (instrument of accession deposited on 23 September 2005); (2) 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (instrument of acceptance deposited on 1 September 1977); (3) 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (instrument of ratification deposited on 1 March 2006); and (4) 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (instrument of ratification deposited on 16 January 2007).

Brazil is also a signatory to bilateral agreements of technical cooperation with the following 15 countries: Angola, Benin, Bolivia, Cape Verde, Ecuador, France, Mexico, Mozambique, Nigeria, Panama, Paraguay, Peru, Spain, Uruguay and Venezuela. The purpose of these bilateral agreements typically involves technical consultancy, formation and training of national human resources, and complementation of infrastructure by donation of equipment, based on the shared interest in the conservation of goods and common memory. Brazil is currently in ongoing negotiations for similar bilateral agreements with three other countries: Colombia, the Netherlands and Portugal.

## **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 in the form of an authorisation issued by the IPHAN after an examination of the cultural property or artwork the owner wishes to export.

If the local superintendent of the IPHAN finds that the cultural property or artwork is protected under Brazilian law, either because of an inscription as cultural heritage or is subject to another cause of restriction, permanent export will not be permitted. In such cases, the IPHAN may authorise exceptional temporary export or exit of the goods (*saída temporária*), but this must be granted by an act of the president of the IPHAN, following a favourable decision of the IPHAN's Cultural Heritage Advisory Board (Decree No 9,238, of 15 December 2017, Articles 13, item III, and 26, item IX; IPHAN Ordinance No 375, of 19 September 2018, Articles 40 and 41).

If the local superintendent of the IPHAN finds that the cultural property or artwork is not (or not yet) protected under Brazilian law, permanent export will generally be authorised (Decree No 9,238, of 15 December 2017, Article 24, item VI; IPHAN Ordinance No 375, of 19 September 2018, Articles 40 and 41).

For more information, see questions A.4 and A.5 above.

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

See questions A.4, A.5 and B.1.1 above.

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

In cases of cultural property or artwork not protected under Brazilian law, the owner, acting directly or through an attorney-in-fact, must fill in an application form for authorisation of exit of art works from the country (*solicitação de autorização de saída de obras de arte do País*) and file it with the IPHAN superintendent located in the respective Brazil state. The applicant must indicate technical information about the object (type, title (if any), date, authorship, materials, dimensions and production techniques); and enclose photographs from at least two angles, a copy of personal identification and, if acting through an attorney-in-fact, of the power-of-attorney. Recently, the IPHAN has committed to respond to the application and issue the authorisation within 15 business days of the filing date.

In cases of cultural property or artwork that are protected under Brazilian law, the owner or cultural institution must fill in an application form for authorisation of temporary export of protected cultural goods (*solicitação de autorização de exportação temporária de bens culturais protegidos*) and file it with the IPHAN superintendent located in the respective Brazil state at least 90 days prior to the intended exit date. The applicant must indicate all technical information about the object (type, title (if any), date, authorship, materials, dimensions, production techniques, marks, inscriptions, status of conservation), enclose three photos of the object and a copy of personal identification and, if acting through an attorney-in-fact, of the power-of-attorney. The applicant must also include in the form of application information about the exhibition, a detailed route of transportation of the goods, expected date of return to Brazil, an evaluation of the goods for insurance purposes, the indication of the parties responsible for packaging, for loading and unloading, for transportation and

for insurance, and the indication of the lots for shipping purposes (if applicable). The applicant will be required to deliver a copy of the insurance policy 15 calendar days in advance of the intended exit date. Recently, the IPHAN has committed to respond to the application and issue the authorisation within 90 calendar days of filing.

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

There are no monetary thresholds (*de minimis*), but the protection is expected to apply solely to cultural goods that have ‘national representativeness, signification or importance’ (IPHAN Ordinance No 375, of 19 September 2018, Article 29). Accordingly, the IPHAN must avoid protecting by inscription (*tombamento*): (1) material goods that do not enable cultural fruition; (2) complete sets of works of artists or architects; or (3) goods associated with the memory or life of personalities that are not related to social processes of collective interest (Article 30).

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

No. The only norm that considers the time of creation of the artwork as relevant is the ban on permanent export of art works and traditional crafts that date prior to the end of the monarchic period (ie, before 15 November 1889) and were: (1) produced in Brazil; (2) originated in Portugal but incorporated to the national milieu; or (3) produced outside of Brazil but representing personalities who are either Brazilian or related to the history of Brazil, as well as the country’s landscape and customs (Law No 4,845, of 19 November 1965; IPHAN Ordinance No 375, of 19 September 2018, Article 41). See question A.5 above.

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

No.

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

Special rules apply for the protection of the material cultural heritage of native peoples (*povos indígenas*), of traditional peoples and communities of African origin (*povos e comunidades tradicionais de matriz africana*), of maroon communities (*quilombos*) and certain other cases (IPHAN Ordinance No 375, of 19 September 2018, Article 61 ff.). See also questions A.4, A.5 and B.1.1 above.

**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 event of an attempt to export cultural property from Brazil in violation of restrictions, the person held liable by the IPHAN after an administrative inquiry proceeding will be subject to a fine of 50 per cent of the value of the goods (IPHAN Law, Article 15; IPHAN Ordinance No 262,

of 14 August 1992, Article 14). In cases of repeated offence, the fine will be doubled to 100 per cent of the value of the goods. The relevant Brazil government authorities will seize the goods and keep them as security until the conclusion of the proceedings and full payment of the fine.

The owner is responsible to the IPHAN for the integrity of the goods until their return to Brazil (IPHAN Ordinance No 262, Article 10). The owner is also required to notify the IPHAN within 30 calendar days from the date of return of the goods to Brazil, enclosing a technical report (*laudo técnico*) about their conservation status and the number of the import statement issued by Brazil's tax authorities (IPHAN Ordinance No 262, Article 13). In cases of non-compliance, the owner may be prohibited from obtaining new authorisations from the IPHAN for two years.

In addition to these legal consequences in the administrative sphere (IPHAN), the person held liable for the breach may also be subject to criminal prosecution for smuggling (*contrabando*) or other offences pursuant to the Brazilian Penal Code (Decree-Law No 2,848, of 7 December 1940), depending on the circumstances.

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

The IPHAN is the custodian of an integrated system of knowledge and management of Brazilian cultural heritage (*Sistema Integrado de Conhecimento e Gestão*) (SICG) and is required to keep it up-to-date (IPHAN Ordinance No 375, Articles 95 to 99). Among other data, the SICG was designed to serve as a repository of information about the status of cases of disappearance or theft of protected cultural property.

For the approval, ratification and implementation of the 1970 UNESCO Convention in Brazil, see question A.5 above.

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

See questions A.5 and C.2 above.

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

As a signatory of the 1970 UNESCO Convention (promulgated internally, after approval and ratification, by Decree No 72,312, of 31 May 1973), Brazil undertook,

‘at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.’ (1970 UNESCO Convention, Article 7(b) (ii)). See questions A.5 and C.2 above.



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

In general, a good faith purchaser of movable property is entitled to favourable legal treatment under Law No 10,406, of 10 January 2002 (Civil Code) in relation to certain legal effects, including the degree of liability in case of loss or damage to the property during the possession (Article 1,217) and the extent of compensation to which the purchaser may be entitled in case of dispossession (Article 1,219).

Even acting in good faith, however, a purchaser of cultural property is not expected to be able to retain ownership in case of a valid title claim made by a lawful owner who can demonstrate that the sale of the cultural property resulted, directly or indirectly, from illegal export or other illicit conduct under the 1970 UNESCO Convention, the 1995 UNIDROIT Convention or applicable Brazil laws. The dispossessed purchaser may be entitled to compensation depending on the circumstances. See question C.4 above.

**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?**

Brazilian law does not offer special protection to lenders in this scenario. See questions C.4 and C.5 above.

**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?**

See questions A.5, C.2 and C.4 above.

## **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?**

Generally, the buyer of artwork is expected to have reviewed the legal title that the seller claims to have over the property, including appropriate evidence of provenance, when available, to mitigate the risk of a potential title claim of restitution of cultural property due to illegal export or other illicit conduct under the 1970 UNESCO Convention, the 1995 UNIDROIT Convention or applicable Brazilian laws. The specific degree of due diligence expected from the seller/buyer depends on the value, origin and other characteristics of the artwork, the expertise and trustworthiness of the seller/buyer, and other circumstances of the purchase. See questions C.4 and C.5 above.

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

Generally, Brazil has a stringent anti-money laundering law that subjects anyone that conceals, dissimulates the nature, origin, localisation, disposition, handling or ownership of goods, rights or values resulting directly or indirectly from a penal contravention to criminal prosecution (Law No 9,613, of 3 March 1998) (Anti-Money Laundering Law). Conviction may result in severe penalties, including imprisonment. The Anti-Money Laundering Law subjects to the same penalties to anyone who, for the purpose of concealing or dissimulation: (1)

converts those goods, rights or values into licit assets; (2) acquires, receives, swaps, negotiates, gives or receives in guarantee, storage or deposit, handles or transfers these goods, rights or values; (3) imports or exports goods in amounts that do not correspond to their real value; (4) uses such goods, rights or values in economic or financial activity; or (5) participates in a group, association or office knowing that its primary or secondary activity is directed to the practice of money laundering.

Art dealers are listed among the legal entities and individuals that, due to the nature of their activity, either permanent or occasional, primary or secondary, are subject to special regulations that establish a ‘control mechanism’ (Anti-Money Laundering Law, Article 9, sole paragraph, item XI). The same special regulations apply to legal entities and individuals that promote, intermediate, sell, broker or negotiate rights of artists or fairs, exhibitions or similar events, among several other cases. Legal entities and individuals dealing with cultural property are subject to two levels of regulation, supervision and disciplinary action in this regard: the IPHAN, a federal public administrative body linked to Brazil’s Ministry of Tourism (see questions A.1 and A.4 above), as sector-specific authority in the field of national historic and artistic heritage; and the Financial Activities Control Council (Conselho de Controle de Atividades Financeiras) (COAF), a federal public administrative body linked to Brazil’s Central Bank (Banco Central do Brasil), restructured by Law No 13,974, of 7 January 2020, as the general authority for the regulation and supervision of anti-money laundering. The sector-specific anti-money laundering regulations established by the IPHAN are found in Normative Instruction No 01, of 11 June 2007, Ordinance No 396, of 15 September 2016, and Ordinance No 80, of 7 March 2017, all within the general framework of the IPHAN’s Material Cultural Heritage Policy (Ordinance No 375, of 19 September 2018).

The control mechanism set out in the Anti-Money Laundering Law requires legal entities and individuals active in the art trade and at art auctions to: (1) identify and maintain an updated register of their clients according to instructions set out by the IPHAN and the COAF, within their respective spheres of authority; (2) maintain a register of all transactions above the threshold amount set out by the IPHAN, (3) adopt internal policies, procedures and controls that are compatible with their size and volume of operations as required for fulfilling their statutory obligations; (4) register and maintain their information updated with the IPHAN’s Register of Art Works and Antiques Dealers (*Cadastro de Negociantes de Obras de Arte e Antiguidades*) (CNART); and (5) address requirements issued by the COAF (Article 10).

The control mechanism also requires legal entities and individuals active in the art trade and at art auctions to: (1) pay special attention to the transactions that, according to the instructions issued by the relevant authorities, may present ‘serious indications’ of money laundering or relate to its practice; (2) report to COAF all transactions that are subject to registration for having an amount above the threshold or that may present ‘serious indications’ of money laundering or relate to its practice; and (3) notify the relevant regulatory or oversight authority from time to time, according to applicable instructions, the absence of transactions to report (Article 11). Non-compliant individuals or, in the case of legal entities, their managers are personally liable to penalties ranging from warnings and fines to loss or suspension of authorisation to exercise their activities (Article 12).

# Canada

**Brian W Gray**

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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 main piece of legislation on national patrimony and cultural heritage is the Cultural Property Export and Import Act (CPEIA) and its accompanying regulations, the Canadian Cultural Property Export Control List and the Cultural Property Export Regulations.

The CPEIA deals with exporting cultural objects from Canada and importing cultural objects illegally exported from other countries into Canada. The CPEIA establishes a 'Control List', covering seven categories of objects:

- objects recovered from the soil or waters of Canada (mineralogy, palaeontology, archaeology);
- objects of ethnographic material culture;
- military objects;
- objects of applied and decorative art;
- objects of fine art;
- scientific or technological objects; and
- textual records, graphic records and sound recordings.

Each group has varying fair market value minimums in order to qualify for the Control List. The CPEIA gives the Governor in Council the discretion to include in the Control List any object that it deems necessary to control in order to preserve the national heritage of Canada.

Objects less than 50 years old or created by a living person are excluded from the Control List.

If the object is determined to be of cultural significance, the applicant can appeal to the Canadian Cultural Property Export Review Board (CCPERB). Even if the CCPERB agrees with the expert examiner, where it is unlikely a Canadian institution would be interested in obtaining the object, the permit will be issued. Otherwise, if CCPERB believes an institution (such as a museum) or a public authority would offer to purchase the object, it can set a two-to six-month delay period during which CCPERB may receive and review purchase offers. CCPERB can act as valuator if the applicant and the institution do not agree on a price. At the expiry of the delay period and if there is no purchase, the permit application will be granted.

The CPEIA also authorises CCPERB to approve objects as cultural property for income tax purposes.

In accordance with the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols (the 'Convention'), the CPEIA adopts the general prohibition that no person knowingly export or otherwise remove cultural property as defined in subparagraph (a) of Article 1 of the Convention from an occupied territory of a State Party to the Second Protocol, unless the export or removal conforms with the applicable laws of that territory or is necessary for the property's protection or preservation. The CPEIA deems any offence under it committed outside Canada to have been committed in Canada.

The CPEIA also prohibits the import into Canada of any foreign cultural property that has been illegally exported from a reciprocating country. Reciprocating countries include parties to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and any other country party to a relevant bilateral treaty with Canada.

Offences against the CPEIA carry a maximum CAD 25,000 penalty and five years' imprisonment. Officers and directors of corporations may be liable regardless of whether the corporation for which they act has been prosecuted or convicted.

While the CPEIA covers indigenous art that meets its cultural property requirements, various provincial legislation also deals with indigenous objects.

Some provinces and territories have legislation prohibiting the removal from that province of objects designated by the provincial government as heritage property or historical resources.

Canada is a party to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict as well as its Protocols as of 11 December 1998 when it acceded.

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

See question A.1 above. Cultural property as such is not defined but property that the Governor in Council (the 'Government') includes in the Control List is property that the Government deems necessary to control in order to preserve the national heritage of Canada.

Objects less than 50 years old or created by a living person are excluded from the Control List.

An object or collection may be deemed of outstanding significance by reason of any one or more of the following criteria:

- a close association with Canadian history;
- a close association with national life;
- aesthetic qualities;
- value in the study of the arts; and
- value in the study of the sciences.

In addition, as set out in the response to question A.1 above, certain property designated by a foreign government as foreign cultural property may be prohibited from import where illegally obtained or originating from war zones.

**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?**

See question A.1 above. The consequences are that the export of such property can be controlled as set out above. In addition, certification as cultural property as being of outstanding significance and national importance will allow determination of fair market value for tax purposes and certain other tax benefits when the property is donated. Placement on the control list as cultural property does not affect the right of ownership.

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

This authority is delegated to the CCPERB, which is an independent, quasi-judicial decision-making body that reports to Parliament through the Minister of Canadian Heritage. The CCPERB is made up of members of the public, representatives of universities, museums, art galleries and representatives from dealers and collectors. In addition, the CCPERB draws upon outside experts in the art field from universities and museums and other relevant institutions. Under the CPEIA, the CCPERB has a mandate to:

- certify cultural property as being of outstanding significance and national importance;
- establish export delays to provide designated organisations with an opportunity to acquire significant cultural property threatened with permanent export; and
- determine fair cash offers to purchase cultural property for refused export permits.

**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?**

Canada is a party to the 1970 UNESCO Convention. On 23 March 1978, Canada deposited its instrument of acceptance. The CPEIA is the enabling legislation.

As set out above, in accordance with the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols, the CPEIA adopts the general prohibition that no person knowingly export or otherwise remove cultural property as defined in subparagraph (a) of Article 1 of the Convention from an occupied territory of a State Party to the Second Protocol, unless the export or removal conforms with the applicable laws of that territory or is necessary for the property's protection or preservation. The CPEIA deems any offence under it committed outside Canada to have been committed in Canada.

The CPEIA also prohibits the import into Canada of any foreign cultural property that has been illegally exported from a reciprocating country. Reciprocating countries include parties to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and any other country party to a relevant bilateral treaty with Canada.

**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?**

Canada is not a party to the 1995 UNIDROIT Convention.

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

Canada is a party to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, as well as its Protocols as of 11 December 1998 when it acceded.

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

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

See, generally, question A.1 above. Property on the Control List requires an export permit from Canada Border Services Agency. The cultural property is placed on the Control List if it meets all of the following conditions:

- it is more than 50 years old;
- it was made by a person no longer living (if applicable); and
- it meets criteria established in the Canadian Cultural Property Export Control List.

The Control List criteria are detailed and establish categories (as set out in the answer to question A.1 and minimum age and value thresholds).

Canada Border Services will refuse an export permit for an object on the Control List if it concludes (on the advice of an expert) that an object or collection may be deemed of outstanding significance by reason of any one or more of the following criteria:

- a close association with Canadian history;
- a close association with national life;
- aesthetic qualities;
- value in the study of the arts; or
- value in the study of the sciences,
- and that the object or collection is of national importance. An object or collection may be deemed of national importance if its loss to Canada would significantly diminish the national heritage.

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

If an application for an export permit is refused by the Canada Border Services Agency on the advice of an expert examiner, the permit applicant may request a review by the CCPERB.

The CCPERB is responsible for reviewing refused export permits at the request of permit applicants. Refused permits will be reviewed at the next scheduled meeting.

The CCPERB may uphold the refusal and establish an export delay of two to six months if it determines that:

- the property in question is subject to export control (ie, is on the Control List);
- the property meets the criteria of outstanding significance and national importance as set out in the CPEIA; and
- a designated organisation might come forward with an offer to purchase the property.

In December 2016, Heffel Fine Art Auction House ('Heffel') applied for an export permit for the 1892 French painting '*Iris bleu, jardin du Petit Gennevilliers*', by Gustave Caillebotte. After review by an expert examiner, the Canada Border Services Agency refused to issue the permit. Heffel requested a review of the refusal by the CCPERB, but the Board upheld the refusal and set a delay period of six months in July 2017. Heffel then sought a judicial review of the Board's decision and related issues in Federal Court.

As the department responsible for the administration of the *legislation*, Canadian Heritage worked closely with the Department of Justice throughout the judicial review process. On 12 June 2018, the Federal Court ruled that Board used an unreasonable interpretation of 'national importance' in its determination and that its decision that the Caillebotte was of 'national importance' to Canada was also unreasonable. The Court quashed the Board's decision and referred the matter back to the Board for reconsideration.

The Attorney General appealed the Federal Court decision. In its decision of 16 April 2019, the Federal Court of Appeal overturned the Federal Court ruling and restored the Board's original decision. The interpretation of national importance remains unchanged.

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

The CCPERB. See question A.1 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 CCPERB holds a hearing to determine whether the refusal to issue an export permit is justified, but the CCPERB can only delay the export from two to six months unless there is a Canadian buyer.

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

Yes, the various categories of works on the Control List have their own thresholds. In general, works by Canadians or made in Canada or which have a Canadian theme are subject to lower monetary thresholds and thus fewer exemptions. The categories are numerous and the amounts varied. Some representative samples are reproduced below. In all cases it is recommended that the regulations be checked.

For instance, for works of fine arts the thresholds are as follows:

- in the case of drawing or print, has a fair market value in Canada of more than CAD 5,000 or, if made outside Canada by non-Canadian and without a Canadian theme, CAD 15,000;
- in the case of a painting or sculpture, has a fair market value in Canada of more than CAD 15,000 or if made outside Canada by a non-Canadian and without a Canadian theme, CAD 30,000; and
- in the case of works of fine art in media other than those listed above or works of art in multi-media, has a fair market value in Canada of more than CAD 5,000 or if made outside Canada by a non-Canadian and without a Canadian theme CAD 20,000;
- articles of applied decorative art such as glassware, ceramics, textiles and jewellery made in Canada and over 100 years old with a fair market value of over CAD 1,000;
- furniture made in Canada and over 100 years old with a fair market value over CAD 4,000.

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

Yes, there is no export control for living artists.

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

No, but the government has a fund to help subsidise in part the purchase of cultural property of outstanding significance and national importance to prevent its export. However, if no purchaser is found, permission to export will be given.

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

Yes, export is permitted for exhibitions and for other prescribed purposes for limited time, less than five years.

**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?**

See question A.1 above. Offences against the CPEIA carry a maximum CAD 25,000 penalty and five years' imprisonment. Officers and directors of corporations may be liable regardless of whether the corporation for which they act has been prosecuted or convicted.

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

See also question C.4 below. There is no protection against restitution claims for the buyer who has violated the foreign export restrictions and has committed an offence against section 40 of the CPEIA. There is no protection against restitution claims for the buyer who has



violated the illegal import restrictions and has committed an offence against section 43.

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

See also question C.4 below. The federal government has not published any policy regarding assistance to states seeking restitution of cultural objects. Such assistance is provided under section 37 of the CPEIA as implementing the 1970 UNESCO Convention, section 7(b) (ii) requiring party states to:

‘take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.’

The procedure outlined in the CPEIA is that upon written request from a reciprocating state to the Minister of Heritage, the federal Attorney General may institute an action to recover property illegally exported from that reciprocating state after 1977, when the CPEIA came into force. If the court is satisfied that the property was illegally imported and that any compensation owed to the person in possession in Canada has been paid, the court can order the recovery of the property or make any other order to ensure the safe return of the property to the reciprocating state. The court can also order appropriate safe-keeping measures for the property and the Minister will issue an export permit to any person authorised by the reciprocating state to accompany the property in transit.

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

There is no protection against restitution claims for the buyer who has violated the foreign export restrictions and has committed an offence against section 40 of the CPEIA. There is no protection against restitution claims for the buyer who has violated the illegal import restrictions and has committed an offence against section 43.

The CPEIA provides for compensation only to persons in possession of property that is the subject of a restitution claim where that person (individual, institution or public authority) can demonstrate that it was a bona fide purchaser for value of the property and had no knowledge at the time the property was purchased that the property had been illegally exported from the reciprocating state. In those circumstances, the court can determine fair compensation to be paid to the individual by the reciprocating state.

The federal government has not published any policy regarding assistance to states seeking restitution of cultural objects. Such assistance is provided under section 37 of the CPEIA as implementing the 1970 UNESCO Convention, section 7(b) (ii) requiring party states to:

‘take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.’

The procedure outlined in the CPEIA is that upon written request from a reciprocating state to the Minister of Heritage (the 'Minister'), the federal Attorney General may institute an action to recover property illegally exported from that reciprocating state after 1977, when the CPEIA came into force. If the court is satisfied that the property was illegally imported and that any compensation owed to the person in possession in Canada has been paid, the court can order the recovery of the property or make any other order to ensure the safe return of the property to the reciprocating state. The court can also order appropriate safe-keeping measures for the property and the Minister will issue an export permit to any person authorised by the reciprocating state to accompany the property in transit.

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

A person cannot pass on better title than that person has. If an item has been stolen, the person in possession does not have title and cannot pass along title when selling it to someone else. If the thief is prosecuted and convicted, the property in the goods goes back to the original owner. Similarly, if the person selling is not the owner and not selling with the owner's authority to do so, the purchaser will not acquire good title.

Under the Criminal Code, an offender may have to pay restitution to an innocent purchaser of property stolen by the offender and since returned to the original owner.

In cases where the title to the item is voidable (and has not been voided), because of fraud or something else short of theft, the purchaser may be able to protect title against any claims so long as the purchaser can demonstrate that they were an innocent or good faith purchaser who gave value for the item and who had no notice of the problem with title to the item.

In this case, good faith is essential to demonstrate lack of knowledge or suspicion. Under the provincial sale of goods legislation, something is done in good faith if it is done honestly.

Good faith will be considered in the particular context on a case-by-case basis.

In case of fraud the contract is voidable or void *ab initio*. The injured party can cancel the contract and recover the property (if possible). The injured party may also be entitled to damages.

When someone alleges fraud they must prove actual fraud and show that the alleged fraudster made a false representation knowing the representation was false or not caring whether it was true or not, and by the false representation intended to deceive the person alleging fraud to act on that misrepresentation.

Every province has some form of consumer protection legislation protecting purchasers from being taken advantage of by suppliers. A basic remedy for vendors having engaged in unfair practice is the rescission of the agreement or damages where rescission is impossible.

In Canada it is a criminal offence to make a false document with the intention that the document should be used as genuine or that other people should act believing the document to be genuine and thereby to defraud the public or an individual of money. In addition to civil remedies, which may lie against the seller, criminal penalties may also lie against the original fraudster and the seller, if it is the same person or if the seller was privy to the fraud.

**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?**

Anti-seizure guarantees exist but they are a provincial matter. Alberta, British Columbia, Manitoba, Ontario and Quebec have legislation dealing with foreign cultural property immunity.

Under these pieces of legislation, when a work of art or cultural significance comes to the province pursuant to an agreement between the foreign owner and the provincial government or another cultural or educational and (in Alberta) research institution in the province for temporary exhibition or display, there can be no proceeding that would deprive the government or appropriate institution of control of the work, so long as the provincial government determines the work to be of cultural significance for display in the province.

There is no such legislation in the other provinces.

**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?**

See questions A.1 and C.1 to C.5 above.

## **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?**

Purchasers must be cautious about stolen, forged and illegally imported objects and confident that someone other than the seller does not have title to, or security over, the object.

See the answer to question C.5 above regarding protection against titles and the relevance of a purchaser's good faith.

With regard to the seller, suggested due diligence includes:

- obtaining a proper bill or warranty of sale from the seller in order to have legal rights clearly identified; and
- identifying the seller and getting a sense of their reputation by obtaining references and by making bankruptcy and personal property security searches.

With regard to the object, suggested due diligence includes:

- comparing the sale price to the object's fair market value;
- investigating whether the object has been reported stolen or lost;
- consulting the relevant police agencies, the International Foundation for Art Research, the Art Loss Register, or other appropriate organisations;
- determining the object's provenance and investigating any gaps in provenance. If there are gaps or no provenance, investigating the object's source and history to ensure that it has not been stolen or illegally exported from another jurisdiction, including objects looted from occupied territories or territories at war;

- determining whether the object is cultural property, either in Canada or another jurisdiction – especially if the object’s export is being considered;
- consulting provincial personal property security registers to determine if there are any security charges on the object;
- obtaining an appraisal and an independent legal opinion; and
- securing warranties from the seller for the object’s provenance and clear title.

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

Canada’s anti-money laundering and terrorist financing laws apply only to financial institutions and other persons that engage in specified activities. Buying or selling works of art is not in itself one of the specified activities that would make a person subject to these laws.

However, persons who, in the course of their business activities, buy or sell precious metals and stones, including jewellery, in amounts of CAD 10,000 or more are subject to these laws. Therefore, a dealer or an auction house may have certain obligations when they deal in works of art that contain precious metals or stones or that are jewellery.

Essentially, a dealer in precious metals, stones and jewellery must send a report to the designated financial intelligence agency of any receipt of CAD 10,000 or more in cash in single transaction. Two or more transactions occurring within a 24-hour period are aggregated for this purpose. The dealer will also have to obtain certain identifying information from the customer.

A dealer must also send a report to the agency if it has reasonable grounds to suspect that a transaction or attempted transaction, regardless of its amount, is related to a money-laundering or terrorist-financing offence. Customer information, to the extent that it can be obtained without signalling that a report will be made, must also be obtained.

Dealers that engage in transactions of CAD 10,000 or more (whether in cash or otherwise) are also expected to maintain a compliance programme that supports their reporting obligations.

# England and Wales

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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 UK does not have any overarching legislation which deals with cultural heritage and national patrimony. There are, however, specific rules concerning the protection, ownership and dealing in cultural property, such as rules in relation to treasure found in the ground, the conservation of monuments and archaeological sites, exporting cultural property and recovering stolen property.

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

The criteria for classifying goods as cultural property vary according to their context. In the export control context, the Export Control Act 2002 and the Export of Objects of Cultural Interest (Control) Order 2003, capture 'any objects of cultural interest manufactured or produced more than 50 years before the date of exportation', subject to exceptions such as postage stamps and certain personal documents and correspondence belonging to the exporter.

### 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?

Generally, the classification of an asset as cultural property does not affect the right of ownership although it may restrict the owner's rights in relation to the property, for example the right to move the property freely across borders. In the export control context, a determination that an object is of national cultural importance has no bearing on the private ownership of that object, although it may affect the owner's ability to export the object. The export of objects of cultural interest is prohibited except under the authority of a licence granted by the Secretary of State for the Department for Culture, Media and Sport (DCMS). Export controls are also currently imposed by Council Regulation (EC) No 116/2009 which requires a Community licence to export out of the European Union 'cultural goods' as defined in Annex I of that Regulation.

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

In the export control context, the Arts Council England is the competent authority to issue export licences. Its Export Licensing Unit (ELU) relies on the expertise of Expert Advisers and the members of the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest (Reviewing Committee) to determine whether any item of cultural property is of particular importance to the nation and whether efforts should be made to keep it within the UK.

**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?**

The UK ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in 2002. The UK government took the view at the time that it had sufficient powers under existing national legislation to implement the requirements of the UNESCO Convention although shortly afterwards it brought in the Dealing in Cultural Objects (Offences) Act 2003 to make it a criminal offence to deal dishonestly in ‘tainted’ (eg, illegally excavated or removed) cultural objects, including importing or exporting them. It is a defence to liability under the Act that the person dealing in such objects is unaware that they are tainted.

**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?**

The UK has not ratified the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Although the House of Commons Select Committee recommended that the UK become a party to the UNIDROIT Convention in their report titled ‘*Cultural Property: Return and Illicit Trade (1999-2000)*’, the government chose to adopt the 1970 UNESCO Convention shortly afterwards instead.

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

By introducing the Cultural Property (Armed Conflicts) Act 2017 (the ‘Act’), the UK was able to ratify the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Act also enabled the UK to accede to the two Protocols of 1954 and 1999. Under the Protocols, the UK undertakes various obligations in relation to preventing the export of cultural property from an occupied territory and, if in occupation of a territory itself, banning any ‘illicit export, other removal or transfer of ownership of cultural property’. The Act also introduced a new offence for dealing in cultural property unlawfully imported to the UK from occupied territory on or after 12 December 2017.

At present, the UK is subject to the requirements of Directive 2014/60/EU which recast Directive 93/7/EEC, (see further in section C.2 below). It remains to be seen whether the UK will enter into any bilateral agreements relating to the export of cultural objects post Brexit.

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

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

The UK generally restricts the export of cultural property in one of two ways. First, restrictions may be imposed because the cultural property being exported contains material such as ivory, which can only be commercially traded if it meets certain conditions under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). CITES is currently directly applicable in the UK at least until the UK has formalised its exit with the EU. In the meantime, the Ivory Act 2018, which will ban all trade and cross-border movement of ivory with very limited exceptions, was due to be implemented in late 2019 but the subordinate legislation required to bring it into effect has not yet been introduced.

Second, restrictions can be placed on cultural property that is deemed of particular importance to the nation. If an item is found to be of national importance, the export control regime operates by temporarily deferring the granting of an export licence to allow national collections or, in certain circumstances, private collections that meet certain criteria, an opportunity to make a matching offer to purchase the item from the owner at a fair market price. If a matching offer is not made, the item will be granted an export licence. If a matching offer is made but not accepted by the owner, the item is unlikely to be granted an export licence but the owner is not compelled to sell the item.

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

Different categories of export licence may be available depending on the type of cultural object in question, its age and value, and how long it has been in the UK. Many objects will be exported under an Open General Export Licence (OGEL) if they do not meet the applicable value and age thresholds to require an individual export licence. If an OGEL applies, the exporter does not need to apply for a licence from the ELU but should refer to the fact that an OGEL is being relied on in the export documentation.

If the age and value of an object exceeds the applicable thresholds for an OGEL to be sufficient, the exporter will need to apply for an individual export licence. In such cases, export permission is likely to be granted unless the object is deemed to be of 'national importance' under one or more of what are known as the Waverley criteria:

- is it closely connected with our history and national life;
- is it of outstanding aesthetic importance; or
- is it of outstanding significance for the study of some particular branch of art, learning or history?

If the ELU Expert Adviser objects to the export, the application will be referred to the Reviewing Committee, which then reviews evidence presented by the Expert Adviser and the exporter, determines whether one or more of the Waverley criteria are satisfied and advises the Secretary of State on whether a decision to grant an export licence should be temporarily deferred and, if so, on what terms.

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

The ELU within Arts Council England is responsible for issuing export licences. Expert Advisers, who are usually directors, senior keepers or curators at national institutions, advise the ELU on whether objects are of national importance. The Reviewing Committee is an independent body made up of eight experts in different fields that advise the Secretary of State, who then determines whether the decision to grant an export licence should be temporarily deferred.

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

If an object is not referred to the Reviewing Committee by an Expert Adviser, in normal circumstances a licence is likely to be granted within five days.

If an object is referred to the Reviewing Committee, the applicant for the export licence is given the opportunity to submit a written statement explaining why the object does not meet the Waverley criteria. The Expert Adviser also submits a statement. A meeting of the Reviewing Committee is convened, at which the applicant and the Expert Adviser are invited to make oral representations and answer questions from the Reviewing Committee. Following the presentation of evidence, the Reviewing Committee determines whether the object meets any of the Waverley criteria and, if so, recommends to the Secretary of State what the fair market price should be and the length of the deferral period in order to allow institutions to make matching offers for the object. If the Reviewing Committee deems that the object does not satisfy any of the Waverley criteria, it will recommend to the Secretary of State that an export licence be granted. The applicant is informed on the same day of the Reviewing Committee's decision.

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

There are different applicable monetary thresholds depending on the type of cultural property being exported. Some objects such as archaeological objects which are more than 100 years old, or manuscripts that are more than 50 years old, will require a licence regardless of their value, whereas paintings, for example, do not require a licence unless their value exceeds a certain threshold.

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

Objects do not require an individual licence unless they are at least 50 years old. The artist being alive is in itself immaterial to an application. In practice, historic objects and artworks are more likely to be subject to expert scrutiny and potentially meet one of the Waverley criteria than modern ones.

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

There is no compulsory purchase system in the UK. The Secretary of State may decide to place a temporary export bar on an artwork but this is not an outright ban and, if a UK public



institution does not make a matching offer at the fair market price within a specified time period, the bar will be lifted and the artwork can be exported.

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

Open Individual Export Licences (OIELs) may be available to exporters who regularly send certain classes of cultural goods within the EU for art fairs or temporary exhibition. An OIEL can also be obtained for objects of cultural interest that were imported into the UK within 50 years of the intended export, which in most circumstances are not then subject to expert review.

**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 a breach of export restrictions?**

If an exporter has failed to obtain a licence when required, they may be subject to penalties including criminal prosecution under the Customs and Excise Management Act 1979 and the object may be seized at customs.

**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 Objects Regulations 1994 (amended by the Return of Cultural Objects (Amendment) Regulations 2015) implements Directive 93/7/EEC as recast by Directive 2014/60/EU and compels the Secretary of State to notify another EU Member State if a cultural object is found in the UK which has been unlawfully removed from the territory of that Member State and respond to requests from Member States for the return of cultural objects.

The status of this legislation, which depends on mutual cooperation between EU Member States, is uncertain following the end of the Brexit transition period, post 31 December 2020. The DCMS has, in its explanatory memorandum to the Return of Cultural Objects (Revocation) Regulations 2018, set out Parliament's intention to revoke the domestic regulations implementing Directive 2014/60/EU in order to avoid the UK being subject to a one-sided obligation to return cultural objects to EU Member States without having any reciprocal rights if the UK and the EU do not reach a deal. The DCMS has indicated that its preferred option, however, is to agree a continuation of the current restitution arrangements with the EU after Brexit.

Under the 1970 UNESCO Convention and the 1954 Hague Convention, the UK is obliged to assist foreign governments with the repatriation of cultural property that has arrived illicitly in the UK. The influence of the 1970 UNESCO Convention was clearly demonstrated by the Court of Appeal in the case of *Republic of Iran v Barakat Galleries* [2007] EWCA Civ 1374 in which the Republic of Iran successfully asserted its patrimonial claim to illegally excavated and exported archaeological objects.

Repatriation is not the only remedy available in relation to illegally exported cultural property. The Dealing in Cultural Objects (Offences) Act 2003 (see A.5 above) and Cultural Property (Armed Conflicts) Act 2017 (see A.7) both impose criminal sanctions.

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

Under the 1970 UNESCO Convention and the Return of Cultural Objects Regulations 1994 (as amended), the UK government will assist foreign governments in recovering cultural property by contacting the current owner or possessor if evidence is produced that the conditions in the relevant convention or legislation are met.

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

A buyer does not enjoy statutory protection from restitution claims and should carry out thorough due diligence in relation to any purchase, including by requesting and auditing any import and export paperwork. The buyer is also advised to ensure that any contract for purchase of an object or artwork includes suitable warranties from the seller in relation to the seller's compliance with import and export laws. Although the buyer may need to yield possession of the item if it has been illegally exported, they will at least have a claim in damages against the seller.

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

A buyer can only obtain the title that the seller passes to the buyer under a contract of sale. If the seller does not have good title to a work, the buyer will not enjoy good title either and the only recourse for the buyer is to sue the seller for breach of warranty.

Under the Limitation Act 1980, however, a buyer is protected from a claim in conversion if six years have passed since the date of the purchase, at which point any competing title claims can become extinguished.

Exceptions apply to the six-year limitation period and there are various rules about when it begins to run, including in the case of theft. If an item has been stolen, the limitation period will not start running unless the buyer can prove that the item has been purchased in good faith, in which case the six-year limitation period will run from the date of the good faith purchase. A gift will not start the limitation period running; it must be a good faith purchase.

**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?**

Under Part 6 of the Tribunals, Court and Enforcement Act 2007, objects on loan to approved museums in the UK are not protected from seizure by the UK courts if they have been imported in contravention of a ban or restriction on import. This would apply, for example, to objects imported in breach of sanctions orders. Currently, the Iraq (United Nations Sanctions) Order 2003 prohibits the import or export of cultural property illegally removed from Iraq since 6 August 1990 and the Export Control (Syria Sanctions) (Amendment) Order 2014 prohibits the import or export of cultural property illegally removed from Syria since 15 March 2011.

**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 sanctions orders referred to at C.6 above ban the import of cultural property illegally removed from Iraq or Syria after certain dates.

The Return of Cultural Objects Regulations 1994 (as amended) apply in the event that cultural objects illegally removed from EU Member States are located in the UK (see C.2 above).

The UK is also currently obliged to comply with Regulation (EU) 2019/880 which came into force on 27 June 2019 and which, as of 28 December 2020, will ban the import into the EU of certain categories of cultural objects which have been illegally removed from their non-EU country of origin and are deemed of archaeological, historic, literary, artistic or scientific importance. Subject to certain exceptions, cultural objects that have arrived in the EU by legal means and meet certain age and value thresholds will require a licence or importer statement on their introduction. The Regulation also requires the creation of a central electronic database for the licensing and registration of cultural goods which must be implemented by no later than 28 June 2025.

## **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?**

If an exporter is planning to export a cultural object that has been in the UK for less than 50 years, the application must be accompanied by provenance details and, where possible, import documentation showing when it arrived in the UK. If such documentation cannot be obtained, the provenance needs to date back to at least 1 January 1993, or in the case of objects from Iraq or Syria, prior to the relevant dates under current sanctions orders (see C.6).

If the cultural object has been in the UK for more than 50 years, provenance information is also highly relevant as it will assist the Expert Adviser and the Reviewing Committee in determining whether the object meets the Waverley criteria.

If there are any problems with an object in relation to its title, provenance, authenticity, previous cross-border movement or other matters, they are likely to come to light during the application process given that the object may be subjected to expert scrutiny and therefore it is in the exporter's interests to have completed due diligence prior to making the application.

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

The Fifth EU Money Laundering Directive (5MLD) came into force in the UK on 10 January 2020. The effect on art market participants (AMPs) who act as intermediaries or trade in artworks where the transaction is valued at or greater than €10,000 is to bring them within the 'regulated' sector for anti-money laundering purposes pursuant to the Money Laundering and Terrorist Financing (Amendment) Regulations 2019. AMPs include dealers, auction houses and agents.

The 5MLD requires that AMPs carry out ongoing risk-based customer due diligence when they establish a business relationship with a customer, carry out an occasional transaction, or suspect money laundering. The scope of due diligence will depend on the circumstances of each transaction and whether there are any 'red flags' present that might trigger enhanced due diligence but, at its most basic, requires AMPs to obtain identity information and verification from their clients and conduct document or electronic checks to satisfy themselves that they know who they are dealing with. AMPs are further required to register with HM Revenue & Customs (HMRC), put in place anti-money laundering policies and procedures, comply with record keeping and reporting obligations and monitor and train their staff. Failure to comply with the regulations is an offence, which can result in a range of sanctions including fines, suspension from dealing in high value transactions and imprisonment. HMRC is responsible for the regulatory supervision and oversight of AMPs and enforcement of the regulations.

# Germany

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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 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).

# India

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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?

India has a rich and dynamic cultural history, with external influences over the centuries resulting in the creation of innumerable cultural traditions and forms of artefacts, monuments, paintings, sculptures, lithographs, cave paintings, manuscripts, books and textile traditions, *inter alia*. Article 49 of India's Constitution imposes an obligation on the state to protect monuments, places, and objects of artistic and historic significance. Considering the large commercial, political and economic interests attracted by art and antiquity, India enacted the Antiquities and Art Treasures Act, 1972 (Antiquities Act) along with the Antiquities and Art Treasures Rules, 1973 ('Antiquities Rules'), falling within the authority of the Archaeological Survey of India, Ministry of Culture. As a key feature of these regulations, is not only the ownership of art or antiquity but also control or possession that mandates registration before the officer under section 14 of the Antiquities Act.

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

The age of the item is taken into consideration while classifying it as an 'antiquity' under section 2(1) (a) of the Antiquities Act. There are also certain prominent artists and personalities of eminence whose works are considered national treasures and which cannot be exported out of the country.

### 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?

One of the immediate consequences of classifying a good as cultural property is the associated restriction on its movement outside India, without the prior consent/licence from the appropriate authority under the Antiquities Act. Therefore, any private individual or institution which owns cultural property classified as a 'national treasure' may own the property within the geographical territory of India. The individual may choose to sell it to other individuals who are not resident in India, on the condition that the work does not leave India. The classification of an asset as cultural property does not affect the rights of ownership in the property. It only limits the asset being taken out of the country.

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

The Archaeological Survey of India (ASI) is the principal authority defining and assessing cultural property. This body is advised by its Director-General and experts who have been appointed by the ASI from time to time.

**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?**

India has been a signatory to the 1970 UNESCO Convention since 24 January 1977. The Antiquities Act 1972, complies with the Convention and put in place the legal framework that was a requirement of countries in complying with the Convention's basic principles. The Act provides for the legal framework on the ownership, transfer and sale for antiquity as defined in section 2(a) of the Antiquities Act. In accordance with the Antiquities Act, it is mandatory for every person who owns, controls, or is in possession of any antiquity to register it with a registering officer. The antiquities can only be sold and purchased by a licensed person. Furthermore, according to section 3 of the Antiquities Act, export of antiquity is prohibited by anyone other than central government or its agencies.

**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?**

India is not a signatory to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

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

India is a party to the following international conventions relating to the export of cultural objects:

- Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague, 14 May 1954.
- Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954.
- Convention concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972.
- Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 17 October 2003.

Furthermore, India has also signed memoranda of understanding and bilateral agreements with various countries, including: Afghanistan, Algeria, Anguilla, Argentina, Armenia, Australia, Austria, Bahrain, Bangladesh, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei, Bulgaria, Burkina Faso, Cambodia, Chile, China, Colombia, Congo, Croatia, Cuba, Cyprus, Czech Republic, Cote D'ivoire, Djibouti, Ecuador,

Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guyana, Hungary, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Libya, Lithuania, Luxembourg, Madagascar, Malaysia, Maldives, Malta, Mauritius, Mexico, Moldova, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, the Netherlands, Nicaragua, Nigeria, North Korea, Norway, Oman, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russian Federation, Rwanda, Senegal, Serbia, Seychelles, Singapore, Slovak Republic, Slovenia, Somalia, South Africa, South Korea, Spain, Sri Lanka, Sudan, Suriname, Syria, Tajikistan, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, Uzbekistan, Venezuela, Vietnam, Yemen, Zaire, Zambia and Zimbabwe, on illegal export protection, documentation of arts, museum objects and production of cultural resources.

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

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

The Foreign Trade (Development and Regulation) Act, 1992 and the Import-Export Policy 2015–2020 count in detail, goods that can be freely exported or imported. The Import Export Policy 2015–2020 has been extended until 31 March 2021 under Notification no 57/2015-2020, 31 March 2020.

The classification is based on the Indian Trade Classification-Harmonised System as explained below:

- *Restricted goods*

Before exporting any restricted goods, an exporter must first obtain a licence explicitly permitting them to do so. The restricted goods must be exported through a set of procedures/conditions which are detailed in the licence.

- *Prohibited goods*

These are items that cannot be exported. The vast majority of such items include wild animals and animal articles that may carry a risk of infection.

- *State Trading Enterprise*

Certain items can be exported only through designated State Trading Enterprises. The export of such items is subject to the conditions specified in the Export-Import Policy.

Antiques are placed in the restricted category, therefore making their import or export deemed banned under section 11 of the Customs Act, 1962 and section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992.<sup>1</sup>

Moreover, to enable customs authorities to identify an object as an antique, in the context of export, the ASI has posted an archaeologist of the rank of deputy superintending

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<sup>1</sup> *Department of Customs v Sharad Gandhi Crl Appeal 174/2019 (SC)* re prosecution under Customs Act and Antiquities Act.

archaeologist (Group-A) to examine objects referred by customs authorities. The ASI has also constituted an Expert Advisory Committee at Circle level to issue non-antiquity certificates.

In case there is any question about the authenticity of the art object, the ASI's Director-General has the power to determine whether or not an article is an antiquity or art treasure. In the event of seizure of any object by any enforcing agency, it is required to be presented before the ASI's Director-General for examination, according to section 24 of the Antiquities Act, 1972. Subsequent further action is undertaken by enforcing agencies.

In case of theft of any antique from a centrally protected monument, a look out notice is issued to all Circle offices of the ASI and India's enforcing agencies, and efforts are made to recover the object.

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

Export permission is granted subject to strict compliance with the procedure set out by the ASI's Director-General, as defined under the Antiquities Act 1972, to individuals who possess the importers-export code number issued by the Director-General or any officer authorised by the Director-General.

The permission for exporting artwork for exhibition, educational and research purposes is only granted for a six-month period. It may be extended by another six months on the request of a borrowing institution or organisation and following approval of the Inter Ministerial Committee for Exhibition (IMEC), headed by the Culture Secretary. It can be loaned to a foreign institution/museum for a three-year period, which may be extended by another two years on request of the borrowing institution and the IMEC's approval.

It is relevant to mention that a Draft Antiquities and Art Treasures Regulation, Export and Import Bill of 2017 has been pending approval. This draft Bill proposes to ease the trade of art and antiques within the country by repealing the licence requirement under the current Antiquity Act. This draft Bill has yet to see the light of day.

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

Permission to export antiquities or art treasure can only be given by the ASI's Director-General in consultation with the Culture Secretary, Ministry of Culture, Government of India, and the Inter-Ministerial Committee as set up from time to time.

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

The proceedings for penalties are covered under section 26 of the Antiquities Act. The Court of a Presidency Magistrate or a Magistrate of the First Class will take cognisance in matters and issue penalties. For offences relating to export trade in antiquities and art treasures, the proceedings take place under the Customs Act, 1962. The provisions under the Antiquities Act and Customs Act, 1962, related to export of artwork and penalties, are independent of each other. Consequently, the offender may be charged with penalties under both these laws. 'The prosecution

under Section 132 and 135 of the Customs Act, 1962 is not barred in regard to antiquities or art treasures'.<sup>2</sup>

Section 23(2) of the Antiquities Act further states that the provisions of the criminal code relating to search and seizure, that is, sections 102 and 103 of the Code of Criminal Procedure, 1898 (5 of 1898), now Code of Criminal Procedure, 1973 (2 of 1974), section 100, shall apply. Section 27 stipulates that it shall be lawful for any Presidency Magistrate or any Magistrate of the First Class to pass any sentence under this Act in excess of his power under section 32 of the Code of Criminal Procedure.<sup>3</sup>

Criminal proceedings involve the following steps:

1. Filing a First Information Report (FIR), or a complaint by the police.
2. Once the FIR is registered by the police, the investigation into the case commences by the police, who collect and examine evidence, interrogate witnesses, record witness statements, obtain court orders to prevent the article or individual from leaving the country.
3. Once the investigation has been completed, a charge sheet is filed before the jurisdictional magistrate.
4. The magistrate then hears the preliminary issues and frames charges on the basis of the evidence presented before the court. Once the charges are framed, the case goes to trial before the magistrate.
5. Detailed evidence is led through documents and witnesses by the prosecution as well as the defence.
6. On conclusion of evidence, the final arguments are submitted by the counsels and the judgment is pronounced by the court.

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

There are no monetary thresholds for the export of art in India.

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

Yes, the artist being alive is material to whether a work can be considered an antique or not. Section 2(1)(II)(b) of the Antiquities Act, while defining 'art treasure', also states that an artwork shall not be declared as an 'art treasure' under the said clause so long as its author is alive. Therefore, any human work of art, declared by the central government by notification in the *Official Gazette*, as being an art treasure shall not materialise until the artist's death.

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<sup>2</sup> See n 1.

<sup>3</sup> Now the Code of Criminal Procedure, 1973 (2 of 1974), Section 100.

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

There is no express provision under Indian law mandating the state's buying out of artworks where export permission has been denied.

However, the Antiquities Act does permit the sale of antiquities to other 'licensees' in case of revocation of the licence of the person possessing the antiquity. While the Antiquities Act empowers the government to sell certain items of antiquities to the exclusion of all others by making a declaration to that effect in the *Official Gazette*, it does not contemplate the state buying out antiquities where export permission is denied.

On a connected note, in instances where central government is of the opinion that certain art treasures/antiquities are desirable to be conserved, it may proceed to pass an order for 'compulsory acquisition' under section 19 of the Antiquities Act. Although the government is not obligated to purchase such art treasures/antiquities, it shall be bound to compensate such acquisition. Compensation is arrived at through mutual agreement. Failing that, central government shall appoint an arbitrator who is, or has been, or is qualified for appointment as, a judge of a high court. The decision of the arbitrator shall be final, subject to an appeal within 30 days before the jurisdictional high court.

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

In the case of Indian artwork going out of the country, the permission for exporting artwork for exhibition purposes, educational purposes and research will only be granted for a six-month period. It may be extended by a further six months on the request of a borrowing institution or organisation and on approval of the Inter Ministerial Committee for exhibition (IMEC), headed by the Culture Secretary. It can be loaned abroad to a foreign institution/museum for three years, which may be further extended by two years on request of the borrowing institution and on approval of the IMEC.

The following categories of antiquities cannot be loaned within the country or abroad:

1. Antiquities and art treasures are classified under the 'AA' category.
2. Works of art under worship in any form, irrespective of their location and placement.
3. Embedded antiquities and art objects.
4. Antiquities/art treasures which have not been documented by the concerned museum.
5. Antiquities/art treasures displayed in specific context of the site/monument.
6. Antiquities/art treasures that are not in a good state of preservation and not fit for movement.
7. Antiquities and art treasures cannot be taken for exhibition unless at least three years has elapsed since they were returned from a previous exhibition. However, this provision may be relaxed in exceptional cases, with the specific written permission of the IMEC, headed by the Culture Secretary, Government of India.



## **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 a breach of export restrictions?**

The penalties for breach of any export restriction under the Foreign Trade Act are seizure and confiscation of goods, penalties on the exporter and suspension or cancellation of the export licence. If any person is found exporting or attempting to export any antique in contravention of the provision of the Foreign Trade Act, they shall be liable to a minimum six-month prison sentence, extendable to three years along with a fine. Furthermore, contravention of any provisions of the Foreign Trade Act by a licensee may also result in their licence being revoked.

The export of antiques is also covered by the ban imposed under section 11L of the Customs Act, the violation of which is charged with a penalty of up to three times the value of the goods, along with confiscation of the goods in certain cases.

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

Section 11 of the Customs Act contemplates the central government's power to ban either absolutely or subject to certain conditions, as may be notified by them, for the protection of national treasures of artistic, historic or archaeological value. Section 11 (I) of chapter IV(B) of the Customs Act further states that, if the central government is satisfied that 'to check the illegal export or facilitate the detection of goods which are likely to be illegally exported', it may notify such goods as 'specified goods' which cannot then be exported, and those caught exporting such goods will face heavy penal sanction.

Since, India has signed the 1970 UNESCO Convention, it has successfully restituted several antiquities and artefacts such as: the statue of Sri Devi from the Chola dynasty belonging to Tamil Nadu from the US; a statue of Uma Parameshwari from Singapore; a Mahishasuramardini idol belonging to Kamu Kashmir from Germany; a bronze statue of Saint Mannikkavachaka; metal images of Ganesha, Bahubali and Parvati, a terracotta female figure from the Mauryan period; and a floral tile of Kashmir and Yogini Vrishanana from Paris, to name but few. Furthermore, the Court of Appeal in the case of *Bumper Development Corporation Ltd v Commissioner of Police of the Metropolis*, [1991] 4 All Er 638, has upheld the decision of the House of Lords, to repatriate the 12th-century bronze Nataraja to the Union of India. This judgment has set a precedent for repatriation of illegally exported cultural property. Recently the Indian High Commission in London has made a request to the Ashmolean Museum, Oxford for restitution of a 15th-century bronze idol of Saint Tirumankai Alvar made in Tamil Nadu.

In most cases, the Government of India has mediated under the auspices of the UNESCO Convention, UNESCO, and the diplomatic missions of India and the country where the property is found. The provenance of the work of art considered stolen or illegally exported is looked at along with the manner it was illegally exported and the money trail to buy the work is also examined.

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

India cooperates with foreign countries seeking repatriation of cultural property/artwork as it is a signatory to the 1970 UNESCO Convention. This Convention provides for the contracting state to take measures to prevent the illicit import of cultural property stolen from their territory.

Apart from the above Conventions, India has also signed various bilateral, multilateral and unilateral agreements with several countries that exempt documentation and rates of import tax and duties when the cultural property is brought into the country for cultural exchange and public exhibitions. These agreements also impose a mutual obligation on the repatriation of cultural property/artwork.

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

No, the buyer does not enjoy protection against the restitution claims for violation of the foreign export restriction.

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

On first principles, all purchasers are required and assumed under the law to have exercised reasonable due diligence while making a purchase. The legislation governing the duties and obligations of 'buyers' and 'sellers' is the Sales of Goods Act, 1930, which specifically holds that the buyer acquires no better title to the goods than the seller had unless the buyer acts in good faith and has not at the time of the contract of sale noticed that the seller has no authority to sell. It is important also to mention that the Sales of Goods Act contemplates a 'buyer beware principle' which shifts significant accountability of the authenticity of the purchased item on the buyer; wherein the absence of any inquiry from the buyer, the seller is not bound to disclose every defect in goods (perhaps including title) of which he might be aware. This principle corresponds with the English Law doctrine of *caveat emptor*.

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

No, a foreign lender does not enjoy immunity or protection against seizure of items on loan to local exhibitors if the goods fail to have a proper export licence.

**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?**

In accordance with section 11 of the Custom Act, central government has the power to ban either absolutely or subject to certain conditions, import and export of goods for the purpose of protection of national treasures of art and works of historic or archaeological value. Section 11 B of the Customs Act also grants powers to central government for the detection of illegally-imported goods and the prevention of their disposal.

India has signed various memoranda of understanding and bilateral agreements for the protection of cultural property with several countries which protect cultural property which may have been illegally exported from its country of origin and brought to India.

India has also ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of the Ownership of Cultural Property.

The Convention provides that the contracting parties would take steps to prevent the illicit import of stolen cultural property into their territories.

## **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 most important seller's obligation prior to selling the artwork is that they must ensure that the item is sold under a valid licence in accordance with the Antiquities Act. Section 3 of the Antiquities Act bans the export of antique products by anyone other than the state or its agencies. A contravention of this provision is punishable by a fine and at least six months' imprisonment, which could be extended by a further three years.

A seller must also ensure the artwork being sold matches the description provided to the buyer. They must ensure that the artwork is in the condition disclosed as described by the seller in terms of quality and fitness. The seller must also ensure that the artwork is not damaged beyond repair prior to making the sale.

Interestingly, the *caveat emptor* 'let the buyer beware' doctrine, is supplemented with *caveat venditor*, that is, 'let the seller always be cautious', therefore making the seller accountable for the goods sold. This balances the duty, interests and obligations of the seller and buyer in the sale and purchase of artwork.

From a buyer's perspective, it is imperative to trace the provenance of the article being sold. The buyer must confirm the provenance by checking the historical documentation relating to its chain of custody. The seller's history and reputation should also be verified to ensure they have the licence to sell antiques and are not selling stolen items.

As discussed in C.5 above, a buyer acquires no better title to the goods than the seller (Section 27, Sale of Goods Act, 1930), therefore necessitating a careful physical examination and verification of title in the artwork by the buyer to ensure that it corresponds with the seller's description. Section 15 of the Sale of Goods Act, 1930 entitles a buyer to receive a description of the goods supplied by the seller, where the contract is for sale by description.

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

No, there are no specific anti-money laundering regulations applicable to the above entities. The Prevention of Money Laundering Act, 2002 (PMLA, 2002), which is the principal legislation dealing with the framework of anti-money laundering in India, has the concept of reporting entities (RE's) (Section 12, PMLA, 2002). The Prevention of Money Laundering Act, 2002 empowers the Government of India to notify any business or profession and these individuals or entities notified as reporting entities are required to maintain certain records (Section 2(1)(a)(iii) of PMLA, 2002). Although individuals who are dealing with art objects have not been categorised as reporting entities under PMLA, 2002 currently, the possibility cannot be precluded in future.

# Italy

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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 Italian cultural heritage legal framework traces its origin back to centuries before the country's unification in 1861. Scholars believe that the first legislation setting forth a control on the exportation of cultural objects is the Decision dated 24 October 1602 by Ferdinando I de' Medici, Grand Duke of Tuscany.<sup>1</sup> In that Decision, the Tuscan ruler provided that the exportation of artworks made by non-living artists from the territory of the Grand Duchy required an export licence to be granted by the Academy of the Arts of Drawing (*Accademia del Disegno*). The Decision listed 18 artists (including Leonardo, Michelangelo Buonarroti, Raphael, Correggio), whose works could not be exported from the Grand Duchy's territory.

The first comprehensive Italian cultural heritage law was approved by the Italian parliament in 1909 (Law No 364/1909). During the Fascist era, Law No 364/1909 was replaced by Law No 1497/1939, which was abrogated by the Decree 490/1999. Fifteen years later, the Italian Parliament approved by Legislative Decree No 42 of 22 January 2004, the current Cultural Heritage Code (CHC).

According to Article 10 of the CHC, any object with a 'cultural interest', from an artistic, historical, archaeological or ethno-anthropological viewpoint, may be declared of cultural interest and, consequently, classified as 'cultural property', whether it is owned by a public entity (state, region, municipality), a private entity (corporation or not-for-profit organisation) or an individual.

More specifically:

- As a general rule, objects with a cultural interest made by non-living authors more than 70 years ago may be declared of cultural interest. Conversely, objects made by living artists or by non-living artists less than 50 years ago cannot be declared of cultural interest and are not subject to cultural heritage protection. Objects with a cultural interest made by a non-living author between 50 and 70 years ago may be declared of cultural interest only if they show an exceptional interest for the integrity and completeness of the Italian cultural heritage.
- If an object is declared of cultural interest, its private owner is entitled to sell or donate it but he/she has an obligation to notify the contract to the Italian State within 30 days of the date of the transaction. In case of sale, the State has a pre-emption right to be exercised within 60 days of the date of receipt of the sale notice (Article 59 of the CHC).

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<sup>1</sup> Carugno, Mazzitti e Zucchelli, *Codice dei Beni Culturali annotato con la giurisprudenza* (Milan: Giuffrè 2006), p 1.

- Classified objects may be moved within the Italian territory, but their movement must be authorised by the Ministry. Furthermore, any restoration of a classified work needs to be authorised by the Ministry (Article 21 of the CHC).
- Objects made by non-living authors more than 70 years ago may be exported provided that an export licence is granted by one of the Export Offices of the Ministry of Cultural Property.
- Artworks made by a non-living artist, older than 70 years and with a value of less than €13,500 do not need an export permit. However, if they are exported, they must be accompanied by a unilateral declaration by the exporting party detailing their nature, author and the year of creation. The €13,500 threshold has, at the time of writing, not yet been applied.<sup>2</sup>
- If an export licence is denied with respect to an artwork, the latter is automatically declared to be of cultural interest (Article 68(6) of the CHC).

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

Pursuant to Article 2 of the CHC, goods may be classified as cultural property if they have an artistic, historical, archaeological, ethno-anthropological, archival or bibliographical interest, whether they belong to the State (or any other public entities) or to a private owner.

Goods with an artistic, historical, archaeological, ethno-anthropological, archival and bibliographical interest belonging to the State (or any other public entities) or a not-for-profit organisation are presumed to be cultural property, unless the Ministry acknowledges that they do not have such a cultural interest.

If the same goods belong to a private individual (or a private entity other than a not-for-profit organisation), the cultural interest must be assessed by the Ministry through an administrative procedure in which the private owner is entitled to participate.

Collections or series of objects may also be classified as cultural property, but they must show an ‘exceptional’ cultural interest (Article 10(3)(e) of the CHC).

The assessment by the Ministry is largely discretionary. Neither the law, nor the Ministry provides any guidelines on how the notion of ‘cultural interest’ should be interpreted.

## **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 a good owned by an individual or a private entity is classified as cultural property, the owner is under an obligation to preserve its integrity (Article 20(1)(a) of the CHC). Furthermore, an authorisation by the Ministry is required for moving the good from its current location, for example, for showing it at an exhibition (Article 20(1)(b) of the CHC)<sup>3</sup> and for restoring it (Article 20(4) of the CHC).

<sup>2</sup> On 9 July 2018, the Ministry of Cultural Heritage issued Decree No 305, which suspended the application of the monetary threshold until 31 December 2020. Although the aforesaid term has elapsed, the threshold is still not applied by the Export Offices.

<sup>3</sup> If the listed good is only moved from one domicile of the owner to another also located in Italy, the Ministry must only be informed in advance of the object’s relocation.

A privately owned cultural property may be sold, but the seller has an obligation to notify the contract to the Italian State within 30 days of the date of the sale. In case of sale, the State has a pre-emption right, to be exercised within 60 days of the date of receipt of the sale notice (Article 59 of the CHC).

A cultural property shall not be exported from the national territory on a permanent basis.

This prohibition is deemed to determine a reduction in the commercial value of the good in the region of two-thirds of the international market value of the relevant property.

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

Pursuant to Article 14 of the CHC, the authority entitled to declare a good as cultural property is the Ministry of Cultural Property at the initiative of one of its local offices (Soprintendenza archeologica, belle arti e paesaggio). Normally, the Ministry relies on the expertise of its officers, but it may happen that the opinion of external advisers (art historians, university professors, etc) is sought.

Decisions declaring an object as cultural property must be adequately motivated and may be challenged in court (regional administrative courts) if they violate a law provision (eg, if an object made by a living artist is declared to be of cultural interest) or if their motivation is incoherent or illogical (for instance, a painting attributed to artist X is declared cultural property and then it results that the attribution is wrong).

**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?**

On 2 October 1978 (Law No 873/1978), Italy ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, without adopting any specific reservations or declarations and the Convention became effective on 2 January 1979. The Convention is expressly mentioned in Article 87 of the CHC. The Convention did not have any particular impact on Italian cultural heritage law: as a source country, Italy already provided for a very strict control over exportation of artworks and antiquities.

**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 artworks: what are the main characteristics of the national implementation?**

On 1 April 2000, Italy ratified the 1995 UNIDROIT Convention. The UNIDROIT Convention introduced the following relevant changes:

- while according to the general provisions of the Civil Code (Article 1153 of the Italian Civil Code), which states that a good faith purchaser of a stolen property may become the legitimate owner of that property if they have acquired possession of the property and the ownership was transferred in accordance with an adequate title (eg, sale, donation), a plaintiff bringing a claim under the 1995 UNIDROIT Convention against the possessor

of a stolen item may prevail over a good faith buyer but is obliged to pay him or her a compensation; and

- in the case of an illegally exported cultural object, a possessor who acquired the object after it was illegally exported shall be entitled, at the time of its return, to payment by the requesting state of fair and reasonable compensation, provided that the possessor neither knew nor reasonably ought to have known at the time of acquisition that the object had been illegally exported. The requesting state shall make its request for return within a period of three years from the time it knew the location of the cultural object and the identity of its possessor, and in any case within a period of 50 years from the date of the illegal exportation.

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

Further to the UNIDROIT Convention, Italy ratified several other international conventions related to the export of cultural objects, namely:

- 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage;
- 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage;
- 1969 European Convention on the Protection of the Archaeological Heritage;
- 1954 European Cultural Convention; and
- 1954 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

Furthermore, Italy entered into the following bilateral agreements:

- 2017 Bilateral Agreement between Italy and Greece to fight the illicit traffic of cultural property;
- 2008 Bilateral Agreement between Italy and Switzerland on the import and repatriation of cultural property; and
- 2001 Memorandum of Understanding against the art trafficking between Italy and the US, concerning the imposition of import restrictions of archaeological material representing the pre-classical, classical and imperial Roman periods of Italy (the Memorandum was amended in 2016);

Italy also signed agreements with several museums, including the following:

- 2018 Agreement between Italy and the Speed Art Museum of Louisville in the US for the restitution of a krater of the IV century BC (2 February 2018);
- 2016 Agreement between Italy and the Ny Calsberg Glyptotek of Copenhagen in Denmark for restitution of archaeological pieces to Italy (5 July 2016);
- 2013 Agreement between Italy and the Dallas Museum of Art in the US for the restitution of six archaeological pieces to Italy (31 October 2013);

- 2010 Agreement between Italy and the Museum of Fine Arts of Boston in the US for the restitution of a medieval embroidery to Italy (20 December 2010);
- 2006 Agreement between Italy and the Museum of Fine Arts of Boston in the US for the restitution of thirteen archaeological pieces to Italy (28 September 2006); and
- 2006 Agreement between Italy and the Metropolitan Museum of Art of New York in the US for the restitution of five archaeological pieces to Italy (21 February 2006).

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

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

Pursuant to Articles 10 and 65 of the CHC, the following categories of goods shall not be exported on a permanent basis from the Italian territory:

- works with an artistic, historical, archaeological, ethno-anthropological interest owned by the State (or any other public entities) non-profit private organisations (ie, foundations, associations and ecclesiastic legal entities) and made by non-living authors more than 70 years ago, whose export could be harmful for the cultural heritage in relation to the objective characteristics and the provenance of the aforesaid goods and to the milieu to which they belong; and
- privately owned goods made by non-living authors more than 70 years ago, provided they were classified as cultural property (see question A.1 above).

Privately owned works with a cultural interest made by non-living authors more than 70 years ago and not classified as cultural property may be exported on a permanent basis from the Italian territory provided that an export permit be granted by one of the Export Offices of the Ministry of Cultural Property.

If the exportation of the good is to an EU Member State territory, the document issued by the Export Office is a certificate of free circulation (*Attestato di libera circolazione*: Article 68 of the CHC). Furthermore, according to the Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods, if the exportation is towards a third country (non-EU Member State), in addition to the aforesaid certificate, an export licence must be obtained (Article 74 of the CHC).

Works by living artists or made by non-living artists less than 70 years ago and works realised more than 70 years ago whose value is lower than the €13,500 threshold established by Law No 124/2017 can be exported on the basis of a unilateral declaration (*autocertificazione*) by the interested party addressed to one of the Export Offices of the Ministry detailing the work, the author and the year of creation.<sup>4</sup>

According to the Ministerial Decree of 17 May 2018, No 246, which implemented Law No 124/2017, the declaration can only be filed online through the website of the Ministry.<sup>5</sup>

<sup>4</sup> See n 2 above.

<sup>5</sup> At [www.beniculturali.it](http://www.beniculturali.it) – *Sistema informativo degli Uffici Esportazione* (SUE).



The Ministry must acknowledge receipt of the declaration by applying an official stamp and delivering the original to the interested party within five days.

Privately owned objects with a cultural interest made by a non-living author between 50 and 70 years ago may be exported on the basis of the *autocertificazione* but the Ministry may declare the exceptional cultural interest of the object for the integrity and completeness of the Italian cultural heritage within 60 days from the day of the *autocertificazione* and, consequently, their exportation would be prohibited.

Furthermore:

- within ten days after the submission of the declaration, the competent Export Office can demand the physical delivery of the good;
- within 20 days after the submission of the declaration, the competent Export Office can exercise the compulsory purchase of the good in agreement with the competent General Direction;
- within 30 days after the submission of the declaration, if the Export Office declares the exceptional cultural interest of the object, it can open the declaration procedure and give notice to the interested party and to the competent General Direction; and
- within 60 days after the submission of the declaration, the General Direction adopts the final decision.

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

In order to determine whether the exportation of an artwork or any other object with a cultural interest should be granted or denied the Ministry relies on guidelines, which were released in 1974<sup>6</sup> and amended in 2017.<sup>7</sup>

In applying the 2017 guidelines the Export Offices of the Ministry exercise a very wide discretionary power because the guidelines refer, in particular, to the following criteria: the aesthetic quality of the artwork, its rarity from a quantitative and qualitative point of view (ie, whether or not artworks by the same artist are present in public collections), the particular meaning of what is being represented in the artwork, the historical, artistic, archaeological or monumental relevance of the object, its importance for the history of collecting and for the intercultural relationships.

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

The authority granting export permissions is the Ministry of Cultural Property (Ministero dei beni e delle attività culturali e del turismo or MiBACT) through its 18 local Export Offices. There is no clear indication as to which local Export Office is empowered to grant (or deny) an export licence (eg, the Export Office of the

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6 Circular of the Ministry of public Education issued on 13 May 1974, General Direction for antiquities and fine arts – Section VI – prot No 2718: *Criteri generali per valutare quando l'esportazione di cose di interesse storico, artistico, archeologico ed etnografico costituisce danno per il patrimonio storico e culturale nazionale.*

7 Ministerial Decree of 6 December 2017, No 537: *Indirizzi di carattere generale per la valutazione del rilascio o del rifiuto dell'attestato di libera circolazione da parte degli uffici esportazione delle cose di interesse artistico, storico, archeologico, etnoantropologico.*

place where the artwork is normally located or of the domicile of the owner or of the shipping agency in charge of the exportation of the artwork): this uncertainty gives rise to a forum shopping that is widely criticised.

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

The export proceeding must be initiated by the interested party online through SUE (see question A.1 above). The Export Office (Ufficio Esportazione), after assessing the cultural relevance of the item for the national patrimony, will decide whether to release the export permission. The Export Office must physically examine the artwork for which an export licence is filed.

The Export Office has a timeframe of 40 days to conclude the proceeding upon the date of presentation of the artwork for a physical inspection but this is not a mandatory term (ie, no legal consequences would arise in case the term elapses without the MiBACT's releasing or denying an export licence).

If the MiBACT decides not to release the permission, it must inform the interested party with a preliminary notice of its intention not to release the licence and the party wishing to export the artwork is entitled to file a memorandum within ten days of the MiBACT's preliminary notice.

If the Export Office decides to issue an export licence, the interested party must take the artwork out of the country within the next five years, lest the licence becomes ineffective. If the Export Office denies the export licence, the interested party is entitled to file a petition to the General Director of the Ministry in charge of Fine Art and Archaeology within 30 days and the latter is empowered to reassess whether there are sufficient grounds to deny an export licence or whether an export licence should be granted because the export denial was affected by a violation of law or was not justified with regard to the protection of cultural heritage. If the General Director does not reply within 30 days of the date the petition is filed, the petition is presumed to be rejected (so-called tacit rejection).

If the petition is rejected, whether by express provision or tacitly, the interested party is entitled to challenge the rejection by filing a claim before the competent administrative regional tribunal (Tribunale Amministrativo Regionale – TAR). The decision of the TAR may be appealed before the State Council (Consiglio di Stato) within 60 days from the date of service of the TAR's decision.

As indicated above in the answer to question A.1, the export licence denial automatically triggers the declaration of cultural interest of the object whose exportation was denied.

Finally, if the State determines that an artwork for which an export licence was filed is particularly relevant for the national heritage, it is entitled to carry out a forced sale of such artwork.

The forced sale is for a consideration equivalent to the value declared by the owner at the time of the filing of the export licence. However, the private owner is entitled to withdraw from the export licence procedure until the moment the forced sale decree is notified by the State and, in such event, the State cannot force the owner of the object to sell it.

However, should the owner decide to withdraw from the export licence procedure, the State would preserve its right to declare the artwork of cultural relevance.

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

Yes, Law No 124/2017 set a *de minimis* monetary threshold of €13,500 for cultural objects made by non-living authors and older than 70 years. If the aforementioned artworks are worth less than the monetary threshold, they do not need an export permit. The threshold does not apply to archaeological goods, incunabula (books printed pre-16th century), manuscripts and archives. The €13,500 threshold has, at the time of writing, not yet been applied.<sup>8</sup>

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

Yes. Works by living artists are not subject to heritage protection and can be freely exported on the basis of a unilateral declaration (*autocertificazione*) by the interested party addressed to one of the Export Offices of the Ministry detailing the work, the author and the year of creation. See question B.1 above.

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

The State is not obliged to buy an artwork in cases where the export licence is denied. While the State has no obligation to buy, it is entitled to carry out a forced sale, in cases where it believes that the artwork, for which an export licence is requested, is particularly relevant for the national heritage. See question B.1.3 above.

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

Pursuant to Article 66 of the CHC, temporary licences may be granted for artworks, whether or not they are classified as cultural property, in order to show them at exhibitions or other events of high cultural interest, provided that their integrity is preserved. The temporary licence shall not exceed the duration of 18 months.

Furthermore, according to Article 67 of the CHC, a temporary licence with respect to an artwork may also be granted in the following cases: (i) when the temporary export is in compliance with a cooperation agreement with a foreign museum for the exchange of artworks and for a maximum four-year term, renewable only once; and (ii) when the artwork requires analyses or conservation activities that may only be conducted abroad.

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8 See n 2 above.

The circumstance that owners may move their domiciles to a foreign jurisdiction does not justify either a temporary or permanent export licence of the artworks they own.

## **C. Consequences 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?**

Italian legislation provides both administrative and criminal sanctions in the case of a breach of export restrictions.

Pursuant to Article 165 of the CHC, anyone violating the provisions on international circulation of cultural heritage shall be subject to an administrative fine ranging from €77.50 up to €465.

Pursuant to Article 174 of the CHC, anyone illicitly exporting cultural property without an export licence is subject to a prison term of one to four years or to a criminal fine of €258 up to €5,165.

The violation of the criminal law provision determines the forfeiture of artwork, unless the latter belongs to a third party who is not involved in the alleged illegal exportation.

Furthermore, if the offender is a professional art dealer or someone generally involved in the art market, the wrongdoer shall be banned from exercising his professional activity.

On 24 October 2017, Italy signed the Council of Europe Convention on Offences relating to Cultural Property, the so-called Nicosia Convention, which aims at fighting illicit traffic of cultural property and their illicit import and export by introducing new and uniform criminal sanctions.

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

Italy has transposed into national law the Directive of the European Union No 2014/60 (Restitution Directive) of 19 December 2015, on the return of cultural objects unlawfully removed from the territory of a Member State, which only applies to cultural objects unlawfully removed from the territory of a Member State on or after 1 January 1993 (Article 75 *et seq* of the CHC).

Italy also ratified the 1995 UNIDROIT Convention (see question A.6 above).

While Italy has been particularly active in pursuing repatriation of works illegally exported from the Italian territory, there is no significant Italian case law on repatriation to countries from which a work was illegally exported.

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

Pursuant to Article 77 of the CHC, EU Member States are entitled to a restitution claim aimed at repatriating a cultural property that was illegally exported from the territory of the requesting Member State.

The action must be brought before the court of the place where the good is located.

In addition to the general requirements set out in the Italian code of civil procedure for any civil claim, a restitution claim shall be supported by the following documents:

- a document describing the good and qualifying it as cultural property; and
- a declaration by the competent authority of the requesting state with regard to the illicit exportation from the national territory.

The statement of claims must be served on the possessor of the good and the Ministry of Cultural Heritage, in order to be recorded in the Ministry's restitution claims' registry.

Restitution claims are time-barred if they are initiated after three years of the day the requesting state had knowledge of the location of the illicitly exported good and the identity of the possessor. Restitution claims are subject to a statute of limitation of 30 years from date of the illicit exportation.

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

Pursuant to Article 79 of the CHC, the competent court may order that a fair and equitable compensation be paid to the bona fide possessor of an illegally exported good. The requesting state obliged to pay the aforesaid compensation may have recourse against the subject responsible for the illicit exportation.

The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects was ratified by Italy by Law No 213/1999 which is currently in force. When applicable, Law No 213/1999 obliges the possessor of a stolen cultural object to return it to its rightful owner, entitling the good faith acquirer to compensation (Article 4, paragraph 1). The buyer has to prove his or her good faith (Article 4, paragraph 2).

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

According to Article 1153 of the Italian Civil Code, a good faith purchaser of a stolen property may become the legitimate owner of that property if the buyer has acquired possession of the property and the ownership was transferred in accordance with an adequate title (eg, sale, donation).

However, the aforementioned provision is derogated if a plaintiff brings a claim under the 1995 UNIDROIT Convention against the possessor of a stolen item. Under this Convention a plaintiff may prevail over a good faith buyer but is obliged to pay them a compensation.

Furthermore, according to the Italian Supreme Court uniform case law,<sup>9</sup> the Italian State always prevails over title disputes against the private possessor of an alleged stolen work claimed by the State, regardless of whether such possessor acquired the work in good faith.

**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?**

There is no legislation on immunity from seizure.

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<sup>9</sup> Cass, 10 February 2006, No 2995, in *Juris Data Online-Cassazione Civile*; Cass, 7 April 1992, No 4260, in *Giur. Italy*, p 1242.

**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?**

Export Offices can grant import certificates in relation to art objects with a foreign provenance (eg, artworks purchased abroad by an Italian private collector) with a validity of five years upon request (Article 72 of the CHC). Import certificates are issued within 40 days from the submission of the application, which must include documentation identifying the work and providing information on its provenance. The import certificate allows the owner of the artwork to re-export it during the five-year timeframe, which may be renewed prior to its expiry, without any need of an export licence. The Export Office of the country from where the artwork was illegally exported (ie, country of origin or the country in which it was sold) shall file a report to the police and seize the artwork.

Illegally exported artworks may be subject to a restitution claim against the current possessor of an artwork illegally exported. The claim may be brought by a state adhering to the 1995 UNIDROIT Convention from which territory the artwork was illegally exported. Member States could also bring a restitution claim against the current possessor of an artwork illegally exported from its territory pursuant to Article 77 of the CHC (implementing the Restitution Directive: see question C.2, above).

Furthermore, by the end of December 2020, the new European Regulation No 880/2019 on the introduction and import of cultural good, will be enforceable.

Regulation 880/2019 aims at introducing common import rules across Member States, in order to *‘ensure the effective protection against illicit trade in cultural goods and against their loss or destruction, the preservation of humanity’s cultural heritage and the prevention of terrorist financing and money laundering through the sale of pillaged cultural goods to buyers in the Union’*.

This Regulation shall not apply to cultural goods which were either created or discovered in the customs territory of the Union.

Article 2(1) of Regulation 880/2019 provides that “cultural goods” means any item which is of importance for archaeology, prehistory, history, literature, art or science’ as listed in the Annex to the Regulation. Part A of the Annex lists the 12 categories of cultural objects, whose import into the EU is strictly forbidden in cases of cultural objects ‘were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country’.<sup>10</sup> Parts B and C list the categories of cultural goods, which require an import licence and a statement by the importer.

The content of each category is based on the definitions used in the 1970 UNESCO Convention and the 1995 UNIDROIT Convention are familiar with them.<sup>11</sup>

The range of objects included in the Annex is extremely broad and includes archaeological finds, remains of historical monuments, works of art, liturgical icons, antiquarian books and manuscripts.

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<sup>10</sup> Art 3(1) of Regulation No 880/2019: ‘The introduction of cultural goods referred to in Part A of the Annex which were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country shall be prohibited’.

<sup>11</sup> Seventh recital of the Preamble of the Regulation No 880/2019 approved on 17 April 2019 by the European Parliament and the Council of Europe.

Furthermore, the Regulation introduced the following age and money thresholds:

- an age threshold of more than 250 years for certain archaeological finds and dismembered elements of artistic or historical monuments; and
- an age threshold of more than 200 years plus a minimum financial value of €18,000 or more per item, below which they can continue to be freely imported into the EU.

The only categories which are not covered by the additional criteria of the financial value are: ‘(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries on land or underwater; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered’.<sup>12</sup>

Accordingly, cultural property most likely to be affected by the Regulation includes property from civilisations in the Near East, including Turkey and Iran, Far East, the Americas, Africa and Australasia.

Under Article 3 and Part A of its Annex, the Regulation establishes that particular categories of cultural goods,<sup>13</sup> that were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country, are prohibited from entering the EU.

Article 4 of the Regulation states that the import of cultural goods listed in Part B of its Annex shall require an import licence issued by the competent authority of each Member State.

This applies to:

- products of archaeological excavations (including regular and clandestine) or of archaeological discoveries on land or under water that are more than 250 years old; and
- elements of artistic or historical monuments or archaeological sites that have been destroyed that are more than 250 years old.

The issue or refusal of an import licence needs to take place within 90 days from receipt of the application. Pursuant to Article 4, paragraph 7 of the Regulation, the competent authority shall reject the application where:

- it has information or reasonable grounds to believe that the cultural goods were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country;

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<sup>12</sup> PE-CONS 82/1/18 REV 1 final ANNEX 1 approved on 17 April 2019.

<sup>13</sup> These are the twelve categories listed in the Part A of the PE-CONS 82/1/18 REV 1 final ANNEX 1 approved on 17 April 2019: ‘(a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries on land or underwater; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) objects of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula; (i) old books, documents and publications of special interest (historical, artistic, scientific, literary, etc) singly or in collections; (j) postage, revenue and similar stamps, singly or in collections; (k) archives, including sound, photographic and cinematographic archives; (l) articles of furniture more than one hundred years old and old musical instruments’.

- evidence that the cultural goods in question have been exported from the country where they were created or discovered in accordance with the laws and regulations of that country is not provided;
- it has information or reasonable grounds to believe that the holder of the goods did not acquire them lawfully; or
- it has been informed that there are pending claims for the return of the cultural goods by the authorities of the country where they were created or discovered.

The categories of cultural goods listed in Part C of the Annex to the Regulation do not require an import licence but a statement from the importer (Article 5 of the Regulation, not yet applicable). The statement, which needs to be submitted through a specific electronic system, must include:

- a declaration signed by the holder of the goods stating that the cultural goods have been exported from the country where they were created or discovered in accordance with the laws and regulations of that country at the time they were taken out of its territory; and
- a standardised document describing the cultural goods in question in sufficient detail for them to be identified by the authorities and to perform risk analysis and targeted controls.

## **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?**

According to Article 1337 of the Italian Civil Code the parties of a contract are required to conduct negotiations in good faith.

Pursuant to the aforementioned provision, the seller of an artwork should disclose to the buyer (especially if the buyer is domiciled abroad) that the exportation of the artwork requires a free circulation certificate and/or an export licence if the artwork was made by a non-living artist more than 50 years prior to the transaction.

Italian courts interpret the seller's obligation in a more rigorous way if the seller is an art market professional (eg, an auction house or a dealer: see Article 1176, paragraph 2 of the Civil Code).

If the artwork is declared of cultural interest, not only would the seller be required to disclose this circumstance to the buyer and inform them that the work cannot be permanently exported from the Italian territory, but it would also need to send a notice to the Italian Ministry in order to allow it to exercise its pre-emption right (see question A.1 above). Failure by the seller to notify the sale transaction to the state makes the sale null and void, vis-à-vis the state (Article 164 of the CHC). Furthermore, the same violation is punishable with a prison term of up to one year and a fine up to €77,469 (Article 173 of the CHC).

Buyers (especially buyers domiciled abroad) would normally need to check: (i) whether the relevant artwork was classified as cultural property (and in cases where the buyer states that



the work was not declared of cultural interest, request that a corresponding representation be made in the sale contract); and (ii) whether the object can freely circulate (if it was made by a living artist or less than 50 years prior to the transaction if the artist is no longer alive) or needs an export permit in order to be permanently exported from the Italian territory.

Normally, export permits are requested by the buyers, but if the sellers are intermediaries or professionals, they may offer the artwork for sale with an export permit in order to enhance the possibility to sell it and negotiate a higher sale price.

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

Art dealers and auction houses in Italy are subject to Legislative Decree No 231 of 21 November 2007, as subsequently amended, on anti-money laundering (AML Decree; Articles 10(2) (e), 4 and 5).

Pursuant to Article 41 of the AML Decree, art market intermediaries shall report any suspect transactions to the competent authority (Unità di Informazione Finanziaria) if they know, suspect or have reason to suspect that money laundering or activities supporting terrorism were carried out or are being carried out. They shall refrain from carrying out the transaction until they have filed the report. Failure to comply with the aforesaid obligation is sanctioned with a prison term of up to one year and a fine from €100 up to €1,000 against the person(s) responsible for the compliance with the AML Decree provisions.

Professional art dealers and auction houses shall not accept payments in cash exceeding €3,000 and the violation of this prohibition is sanctioned with a fine from one per cent up to 40 per cent of the cash payment transaction.

Furthermore, pursuant to Articles 648-*bis* and 648-*ter* of the Italian Criminal Code, money laundering is subject to the following sanctions: a prison term of four to twelve years, and a criminal fine up to a maximum of €25,000. According to Article 648 of the Criminal Code, in the case of conviction, the profit deriving from the crime shall be seized.

The Fifth Anti-Money Laundering Directive has been transposed into Italian national law by Legislative Decree No 125 of 4 October 2019, which amended both the Legislative Decree No 231 of 21 November 2007 (the AML Decree) and the Legislative Decrees Nos 90 and 92 of 25 May 2017.

According to the Fifth Anti-Money Laundering Directive, the following subjects are ‘other non-financial operators’ that are subject to AML obligations:

- persons who trade in antique goods, persons who trade in works of art or who act as intermediaries in the trade of works of art, even when such activity is carried out by art galleries or auction houses referred to in Article 115 of the Consolidated Law on Public Security (TULPS) when the value of the transaction (even if fractioned) or of any related transactions is equal to or greater than €10,000 (Article 3, 5(b), letter b of the AML Decree); and
- persons who keep, or trade in, works of art or who act as intermediaries in the trade of works of art, when such activity is carried out within freeports and the value of the

transaction (even if fractioned) or of any related transactions is equal to or greater than €10,000 (Article 3, paragraph 5(c) of the AML Decree).

In particular, they must carry out customer's due diligence, keep record of any documents, data and information necessary to prevent, identify or ascertain possible money-laundering activities – or financing terrorism and refrain from carrying out any transaction if they are not able to carry out the prior customer's due diligence.

Furthermore, the Ministry of Economy and Finance, based on a proposal by the Financial Security Committee, may exempt from reporting obligations established by the AML Decree<sup>14</sup> persons engaged in a financial activity on an occasional or very limited basis where there is a low risk of money laundering or terrorism financing, and where such financial activity is not carried out as the main activity (Article 4, paragraph 3 of the AML Decree).

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14 The AML Decree requires that art market professionals comply with the following obligations:

1. carry out adequate customer due diligence by identifying the customer and the beneficial owner (Art 17 *et seq*);
2. conduct ongoing monitoring of the business relationship, which encompasses scrutiny of transactions undertaken throughout the course of the relationship to ensure that the transactions being conducted are consistent with the knowledge of the customer and the business and risk profile, including where necessary the source of the funds and ensuring that the documents, data or information held are kept up to date (Art 19);
3. store documents, data and information on possible money laundering activities (Art 31);
4. communicate the suspect transactions to the Financial Intelligence Unit at the Bank of Italy (Art 35); and
5. a prohibition to communicate to the interested client or third-party information on the communication of the suspect transaction (Art 39).

# Russia

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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 Russian regulation of cultural and art objects includes legislative acts of general application, such as the Constitution of the Russian Federation (the 'Constitution'), the Law on Protection of Consumers' Rights, as well as specific rules which are prescribed in the Fundamental Principles of Legislation of the Russian Federation on Culture, special federal laws, laws of constituent entities of Russia and subordinate legislation on culture.

In addition, acts of the Eurasian Economic Union (EAEU) are binding in Russia. In particular, the Regulations on export of cultural property, documents of national archive funds and originals of archive documents from the customs territory of the EAEU (Annex No 8 to the Decision of the Board of the Eurasian Economic Commission of 21 April 2015, No 30) are currently in effect. This act determines the procedure for export of cultural property, documents of national archive funds and originals of archive documents from the customs territory of the EAEU, which are subject to special preferential measures.

As for Russian legislation, the main social and cultural rights of individuals are established by the Constitution, which states that everyone has the right to participate in cultural life, to make use of institutions of culture as well as to have access to items of cultural value. The Constitution also states that for the purposes of protection of items of cultural value certain restrictions on movement of goods and services may be imposed.

The Fundamental Principles of Legislation of the Russian Federation on Culture govern the activities in the spheres of research, protection, usage and restoration of historical and cultural monuments, literature, cinematography, architecture and design. The document defines items of cultural value in their broad meaning as moral and aesthetic ideals, rules and model of behaviour, languages, dialects and mode of speech, national traditions and handicrafts, works of culture and arts, results and methods of scientific research of the cultural activities, buildings, constructions, objects and technologies which have historic and cultural value as well as territories and objects that are unique in historical and cultural respect.

Among the federal laws of specific use, the following are worth mentioning:

- the Federal Law on Items of Cultural Heritage (Monuments of History and Culture) of Peoples of the Russian Federation regulates preservation, usage, popularisation and state protection of items of cultural heritage and defines items of cultural heritage as real estate objects (including objects of archaeological heritage) and other objects historically related

to their territories, works of arts, sculpture and crafts, objects of science and technics and other objects of material culture that have been created as a result of historical events and being of special value from historical, archaeological, architectural, urban construction, arts, science and technics, aesthetic, ethnologic, anthropologic or social cultural point of view and being the evidence of epochs and civilisations, original sources of information on cultural origination and evolution;

- the Federal Law on Export and Import of Items of Cultural Value sets forth rules on crossing border for items of cultural value and state control over them. At the same time, it is important to note that this Federal law regulates only import into and export of cultural property from Russia to states that are not members of the EAEU, as well as providing tax benefits to non-governmental organisations that import cultural property;
- the Federal Law on the Museum Fund of the Russian Federation and Museums in the Russian Federation (the ‘Museums Law’) establishes a special legal status for the museum fund and the procedures for creating museums in Russia and their legal status; and
- the Federal Law on Archive-Keeping in the Russian Federation regulates storing, gathering, listing and using documents of the Archive Fund of Russia.

Rules applicable to the items of cultural heritage connected with the land use and town planning activities can be found in the Land Code, the Town Planning Code and other related laws.

The list is not exhaustive and the rules on cultural and art objects are set forth in other pieces of legislation of the Russian Federation.

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

According to the Fundamental Principles of Legislation of the Russian Federation on Culture, ‘cultural property’ shall mean moral and aesthetic ideals, standards of behaviour, languages and dialects, national traditions and customs, historical toponyms, folklore, art crafts, works of culture and art, the results and methods of scientific research of cultural activities, buildings with historical and cultural importance, territories and objects, which are historically and culturally unique.

The Federal Law on Export and Import of Items of Cultural Value applies the term ‘items of cultural value’ in its strict interpretation as movable items of a material world, irrespective of the time of their creation, which have historical, artistic, scientific or cultural significance.

The Federal Law on Items of Cultural Heritage (Monuments of History and Culture) of Peoples of the Russian Federation defines the cultural heritage objects as objects of immovable property (including archaeological heritage objects) and other objects with historically related territories, works of painting, sculpture, decorative and applied art, objects of science and technology and other objects of material culture that were created as a result of historical events and are of historical value.

**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?**

Generally, Russian law does not restrict private property in the civil circulation. As distinct from the said general rule, items recognised as cultural property become subject to a different regulation irrespective of the nature of ownership (state, public or private). This regulation mostly affects export and sale of the cultural property by either prohibiting export or requiring a special export permission granted by an authorised body.

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

Pursuant to Russian law, a decision on whether an item belongs to cultural property is made upon an expert opinion issued by a certified expert institution.

The Ministry of Culture maintains a register of experts in cultural property and takes a decision on the attestation, on suspension of the attestation, on termination of the attestation of experts in cultural property.

The procedure for conducting an expert examination of cultural property, including criteria for attributing objects to cultural property is regulated by the Government of the Russian Federation and the Ministry of Culture.

Further, the Council for the Preservation of Cultural Heritage and Development of the International Exchange of Cultural Property is intended to assist the Ministry of Culture in performing its functions of regulating the export, temporary export, import and temporary import of cultural property, preserving cultural heritage, promoting international cultural cooperation and mutual acquaintance of the peoples of the Russian Federation and other states with each other's cultural property.

The Ministry of Culture also maintains a register of immovable objects of cultural property.

**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?**

The Union of Soviet Socialist Republics (USSR) ratified the 1970 UNESCO Convention in 1988. Russia being a legal successor of the USSR is currently a party to the Convention.

The most distinguishing features of the Russian implementation legislation are as follows:

- first, in accordance with its Fundamental Principles of Legislation of the Russian Federation on Culture, Russia has adopted and implemented the policy aimed at returning items of cultural value illegally exported from its territory. Moreover, Russia elaborates and takes the required actions for the preservation of its cultural heritage;
- second, the Ministry of Culture of the Russian Federation is a state authority that exercises supervision over import and export of items of cultural value in Russia; and

- third, the Ministry of Culture is in charge of registering events of loss, forfeit and theft of items of cultural value, arranging and informing state authorities and the public of Russia on such events pursuant to the 1970 UNESCO Convention.

**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?**

Russia signed the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects on 29 June 1996. However, as of today, Russia has not ratified this Convention and it is, therefore, not in effect in Russia.

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

Russia has ratified a number of other international conventions relating to cultural property and the relevant trading activities, among them are: the Convention for the Protection of Cultural Property in the Event of Armed Conflict and Protocol to the Hague Convention (the Hague, 14 May 1954); the Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972). Moreover, in 2018 Russia signed the European Convention on Offences against Cultural Property (CETS No 221), which had been concluded in Nicosia on 19 May 2017. However, this Convention has not yet entered into force.

Russia is also a party to various bilateral treaties in the sphere of cultural collaboration, for instance, the bilateral Treaty between the Government of the Russian Federation and the Government of the Republic of Estonia on Cooperation in the Sphere of Cultural Property Preservation (Tallinn, 4 December 1998).

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

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

The Federal Law on Export and Import of Items of Cultural Value sets forth a list of items of cultural value, which are not allowed to be exported from the territory of Russia without the obligation of their return:

- items of cultural value of a special historical, artistic, scientific or other cultural significance (for example, art objects created before 1917), except from the export of such objects by the person who created it;
- items of cultural value permanently stored in state and municipal museums, archives, libraries, other state and municipal institutions of the Russian Federation that carry out permanent storage of cultural property;
- items of cultural value included in the Archive Fund of the Russian Federation, the Museum Fund of the Russian Federation, as well as in the National Library Fund, including those in private ownership; and
- archaeological items.

Exports of cultural property for which the EAEU has established a permit procedure for export are carried out by individuals for personal use on the basis of a permit document for the export of cultural property, and by individuals registered as individual entrepreneurs and legal entities on the basis of an export licence for cultural property.

The items of cultural value can be exported by their legal owner (the person authorised by such owner) or the author of such items of cultural value.

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

Export permission for permanent and temporary export is granted based on the results of mandatory expert evaluation of cultural values; submission of the certain package of documents to the authorised state agency; and checking of the items of cultural value in the database of stolen and lost items of cultural value.

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

The territorial bodies of the Ministry of Culture grant permission for export of the items of cultural value. In its activity, the state agencies follow the results of an expert opinion issued by one of the certified expert organisations.

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

The procedure of granting the export permission (licence) includes the following stages:

#### *Stage 1: Examination performance*

Obligatory examination of cultural property is carried out in respect of movable objects declared as cultural property and for export of which an export permission (licence) is needed. Cultural property is examined at the request of an individual or legal entity and at the request of the authorised body, customs or other law enforcement agency. The examination of cultural property is carried out on a contractual basis by certified experts in cultural property. The time limit for the examination of cultural property is 15 calendar days.

#### *Stage 2: Collection of the documents required for export/temporary export*

For the purpose of getting the export permission, one shall collect and submit to the authorised body an application accompanied by the following documents:

- expert opinion (see Stage 1 above);
- a copy of a foreign trade agreement with annexes, and in case of absence of a foreign trade agreement, a copy of another document confirming the intentions of the applicant in respect of exported cultural property signed by the applicant;
- copies of documents confirming the possession right with respect to the exported cultural property signed by the applicant;

- the written consent of the owner of the cultural property to the export of the cultural property in the case of a declaration for the export of cultural property not owned by the applicant;
- a list of the cultural property in duplicate with its description; and
- photographs of the cultural property in two copies in colour.

*Stage 3: Application*

Apply with the request for export accompanied by the said documents to the authorised body (the Ministry of Culture).

*Stage 4: Granting the export permission (licence)*

The decision on granting the export permission (or refusal to grant the said export permission) shall be made within 20 working days upon registration of the application and the provision of all documents.

It is also worth mentioning that the export of the items of cultural value requires payment of a state duty.

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

No monetary threshold is provided by Russian law.

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

The time of creation of the artwork and the circumstance of the artist still being alive does not matter.

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

Refusal to grant the export permission does not oblige the state to buy out the respective artwork.

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

Russian law aims at the protection of the cultural heritage. Therefore, neither a temporary export of items of cultural value for exhibitions abroad, nor an export for conservation, nor an export for private reasons of owners, is free from compliance with certain formal requirements.

For instance, the temporary export of items of cultural value for exhibition is subject to a similar procedure of getting export permission from the Ministry of Culture. The time limit for the temporary export of cultural property, taking into account extensions of the temporary export of cultural property, is five years. The said procedure additionally requires collection of the following documents by an applicant: ownership documents, insurance documents, contract with the host party, expert opinion, inter alia. The procedure of temporary export requires the applicant to notify the Ministry of Culture on the return of the cultural objects with attachment of the expert opinion within ten days after return.



## **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?**

Pursuant to the Federal Law on Export and Import of Items of Cultural Value, a breach of export restrictions shall be considered as an act of smuggling that may lead to administrative and criminal liability: both for the illegal import and export of items of cultural value, and for the non-return to the territory of the Russian Federation of temporarily exported items of cultural value. A penalty for such illegal action might be rather severe including a prison sentence.

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

The Fundamental Principles of Legislation of the Russian Federation on Culture establish that Russia conducts a focused policy on return of illegally exported items of cultural value. All illegally exported items of cultural value recognised as cultural domain of the people of Russia shall be returned to Russia irrespective of their current location, time and circumstances of export. Russia elaborates and performs measures on protection of cultural inheritance of the people of Russia. The Russian Federation ensures that the burial sites of the Russian compatriots are not destroyed and are properly sustained.

Similar rules are set forth in the Federal Law on Export and Import of Items of Cultural Value, which provides that cultural property illegally exported from Russia shall be returned in accordance with the international treaties, regulations of EAEU and the Russian legislation.

The Ministry of Culture is a competent authority for claiming back unlawfully exported or stolen items of cultural value to Russia.

For prevention of the illegal export and import of items of cultural value and the transfer of ownership rights, as well as restituting illegally exported and imported items of cultural value to their legitimate owners, the Ministry of Culture regulates the export and import of items of cultural value in cooperation with similar authorities, governmental and non-governmental organisations in other countries.

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

Repatriation of items of cultural value moved to USSR in the course of the Second World War is subject to separate regulation by the Federal Law on Items of Cultural Value Moved to the USSR as a Result of the World War II and Located in the Territory of the Russian Federation, dated 15 April 1998, No 64-FZ.

The aforementioned law provides for three regimes of repatriation of items of cultural value depending on the applicant:

(i) *Belarus, Estonia, Latvia, Lithuania, Moldova and Ukraine (simplified procedure)*

Repatriation is subject to following conditions: consent of listed countries to ensure the repatriation of Russian items of cultural value on the basis of reciprocity and compensation of the expenses borne in regard with identification, expertise, storage, restoration and transportation of items of cultural value.

(ii) *Other interested states*

For the purposes of repatriation an interested state shall file a claim to return items of cultural value and officially confirm that it did not receive any consideration from Germany or its military allies: Bulgaria, Hungary, Italy, Finland and Romania ('former enemy states').

Moreover, it should provide evidence that one of the following conditions is satisfied:

- items of cultural value of interested states were forcibly confiscated and illegally removed from their territory by former enemy states;
- items of cultural value were the property of religious organisations or charitable institutions and did not serve the interests of militarism and/or Nazism (or fascism); and
- items of cultural value belonged to individuals who were deprived of these items because of their active struggle against Nazism (or fascism) and/or because of their race, religion, or national affiliation.

(iii) *Former enemy states*

Former enemy states are also entitled to claim the return and repatriation of items of cultural value in case of proving that items of cultural value were either the property of religious organisations or charitable institutions and did not serve the interests of militarism and/or Nazism (or fascism) or belonged to individuals who were deprived of these items of cultural value because of their active struggle against Nazism (or fascism) and/or because of their race, religion, or national affiliation.

The claim to return and repatriate items of cultural value may be filed at any time as soon as the interested state becomes aware of any illegally exported items of cultural value being located in the Russian Federation, but not later than 18 months from the date of publication of the respective information on the website <http://lostart.ru/ru>, which is the official source defined by the Russian Government to post information on such items of cultural value.

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

The previous version of the Federal Law on Export and Import of Items of Cultural Value provided that a bona fide purchaser of cultural property, with the seizure of cultural property from him, was entitled to fair compensation. In the current version of the law this provision is repealed.

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

A good faith purchaser is protected under Russian law. In general, a purchaser enjoys a good faith defence in case of vindication claims. In order to protect his rights, a purchaser

should provide evidence in respect of two facts: payment for the property and good faith (the fact that he or she took all reasonable measures to verify the seller's rights to dispose of the property). However, the above protection will be lost in cases where the property acquired by a purchaser was earlier lost by its owner or a person to whom it was transferred by its owner and/or the property was stolen from these persons and/or possession of the property was lost against the will of the owner.

**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?**

There is no special legislation on anti-seizure guarantee or immunity from seizure in Russia, with the exception of items of cultural values directly owned by foreign states; such items of cultural values enjoy the immunity of a foreign state.

As indicated above, violations related to the movement of items of cultural value across the state border may result in criminal liability for smuggling – in this case, an object can be seized as material evidence or, if there is a special value, it is transferred to the property of the Russian Federation.

**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?**

According to the Federal Law on Export and Import of Items of Cultural Value illegally imported items of cultural value are subject to detention and may be transferred to the authorised body to ensure their examination.

In cases of theft and export of items of cultural value, the Ministry of Culture assists the owners in filing claims for the removal of items of cultural value from illegal possession to foreign courts in accordance with the laws of these respective states, and also facilitates the return of these items of cultural value to the Russian Federation or to the owner. In order to identify stolen or illegally imported items of cultural value, the Ministry of Culture of the Russian Federation organised the maintenance of a register of facts of loss and theft of cultural property ([https://opendata.mkrf.ru/opendata/7705851331-heritage\\_lost\\_objects](https://opendata.mkrf.ru/opendata/7705851331-heritage_lost_objects)).

## **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?**

Due diligence requirements with regard to the items of cultural value being exported are focused on the Federal Law on Export and Import of Items of Cultural Value and EAEU law.

Accordingly, the buyer should comply with the following due diligence procedure and obtain, in particular, the following information in order to verify the status of the items of cultural value:

- information on the origin of the items (whether illegal acquisition and import into Russia might have taken place);
- data on whether pieces are of historical, artistic, scientific or any other value;

- data on whether the items are permanently stored in state and municipal museums, archives, libraries and any other state storage facilities; and
- details about the date of creation of the relevant item of cultural value (check whether it was created 100 or more years ago).

If any of the aforementioned circumstances are present, the relevant items of cultural value can be sold and exported from the territory of Russia only in compliance with the following special procedures and obtaining special permissions:

- expert evaluation of the items of cultural value to be exported. In Russia, such examination is conducted by experts accredited by the Ministry of Culture; and
- verification of legal capacity of the seller, the ownership title to the items and the lack of third-party rights over the relevant piece of art (for example, the pre-emptive right of Russia).

The seller is recommended to obey the following rules when intending to sell items of cultural value:

- a seller shall verify and ensure the legal status and transferability of an item of cultural value;
- with regard to transactions on donation or purchase and sale in respect of museum items and museum collections belonging to the private part of the Museums Fund of the Russian Federation, a donee or purchaser shall comply with all the obligations of the donor or seller. Nevertheless, with regard to items of cultural value of this category, the state has a pre-emptive right of purchase; and
- if the sale and purchase of items of cultural value is performed for the subsequent import thereof, then the restrictions set forth in the Federal Law on Export and Import of Items of Cultural Value should also be taken into account.

The transaction should also be in writing.

Furthermore, the seller shall conduct due diligence in respect of the buyer and verify the buyer's legal capacity to enter into the transaction.

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

Pursuant to the Federal Law on Combating Legalisation of Illegally Gained Income and Financing of Terrorism, information on operations with monetary funds or other property is subject to obligatory control if the value of the transaction is equal to or exceeds RUB 600,000 (approximately €7,500) or its equivalent in foreign currency. Information on such transactions shall be provided to the Federal Service for Financial Monitoring.

In addition, Russian authorised bodies participate in international exchange of information with other states for the purposes of detection and confiscation of criminally gained incomes.

# Spain

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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?

Spanish regulations on historical heritage are contained in Spanish Law 16/1985, of 25 June 1985, on the Spanish Historical Heritage (the 'Heritage Law'), developed by Royal Decree 111/1986 of 10 January. Some autonomous regions have their own regulations on historical heritage, which complement the protection of items of historical or cultural interest in those specific regions.

The most important items must be included in an inventory (the National Heritage General Inventory) of declared items of cultural interest in accordance with the terms provided by law, which afford them a higher level of protection.

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

According to sections 1.2 and 9 of the Heritage Law, in order to classify goods as cultural property, two criteria must be met: (i) to be a movable or immovable object of artistic, historical, palaeontological, archaeological, ethnographic, scientific or technical interest; and (ii) to be declared as such by the competent administration.

Items declared as cultural property can also be: documentary and bibliographical heritage, archaeological sites and areas, as well as natural sites, gardens and parks that have artistic, historical or anthropological value.

### 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 a good as cultural property will imply the following main legal consequences:

- the cultural property will be in the public domain (ie, an individual may own the cultural property but the Administration will protect the artistic, historical, spiritual value of said property – therefore indirectly affecting the right of ownership);
- registration of the cultural property at issue in a general registry;
- the cultural property will need authorisations for any work or modification to be done in it;

- the cultural property will have an obligation to facilitate inspection, public visitations and investigation;
- the cultural property will be inseparable from their surroundings and non-exportable; and
- in the case of real estate, it will be mandatory to write a special plan or protect them with any other planning figure.

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

At a national level, the Council of Ministers at the proposal of the Ministry of Culture (by Royal Decree) and at an autonomous region level the Governing Council of that autonomous region (by Decree).

In the first case, a favourable report from one of the following advisory institutions should also be available: the Board for the Certification, Valuation and Export of Property of the Spanish Historical Heritage (the ‘Board for Historical Heritage’), the Royal Academies, the Spanish Universities, the Higher National Council for Scientific Research and any Higher Boards officially determined by State Administration; and, with regard to the autonomous regions, the institutions recognised by them. This shall be irrespective of any advice received from other professional bodies and cultural entities.

**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?**

Spain is indeed a State Party to the 1970 UNESCO Convention. The Convention’s ratification instrument was adopted on 13 December 1985 and published in *Official State Journal* No 31, on 5 February 1986.

Since Spain ratified the UNESCO Convention before the adoption of the Heritage Law, the main measures for implementing the Convention are contained in the Heritage Law.

**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?**

Spain is also a State Party to the UNIDROIT Convention. The Convention’s ratification instrument was adopted on 9 May 2002 and published in *Official State Journal* No 248, on 16 October 2002. However, a number of declarations were made by Spain under certain Articles of the Convention, as indicated below:

- Article 3, sections 5 and 6: ‘A claim for restitution of a cultural object forming part of Spain’s National Heritage shall not be subject to any time limitation, pursuant to Spanish law’. This declaration is based on Articles 28 and 29 of the Heritage Law;
- Article 13, section 3: ‘Since Spain is a Member State of the European Union, it is hereby declared that, in connection with Contracting States which are also members of the European Union, it will apply the internal rules of the European Union and will therefore not apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules.’; and

- Article 16: ‘Claims for the restitution, or requests for the return, of cultural objects brought by a State under Article 8 of the Convention may be submitted under the procedure provided for in Article 16, section (b) of the Convention. The competent authority for these purposes shall be the Spanish Ministry for Education, Culture and Sport (Directorate-General for Fine Arts and Cultural Assets)’.

Some European Union rules on the protection of cultural goods must also be considered in Spain:

- Council Regulation (EC) 116/2009 on the export of cultural goods;
- Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast), implemented through Spanish Law 1/2017, 18 April, on the return of cultural objects unlawfully removed from the Spanish territory or the territory of a Member State of the EU.

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

Spain has also ratified the 1954 Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflicts.

## **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?**

For exporting this type of goods, owners or holders must obtain the specific authorisation of the administration when the goods in question are more than 100 years old or included in the National Heritage General Inventory. On the contrary, the export of goods declared as items of cultural interest and other goods forming part of Spain’s national heritage (and therefore classified as non-exportable by the administration) will be prohibited as an interim measure until a procedure is initiated to include the item in question under any of the special protection categories.

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

At a national level, the authority granting the export authorisation regarding cultural property are both the Board for Historical Heritage and the Director-General of Fine Arts, Cultural Heritage and of Archives and Libraries. However, at an autonomous region level, each region has their own rating commissions for the assets located within their territories.

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

The application for export authorisation must be specific and beforehand. In this regard, the export application must be submitted by the owner or the person with the

capacity to dispose of said asset/s or duly authorised for that purpose. This application must be submitted to: (i) the autonomous regions having regional Credit Rating Committees, for goods within their territory; or (ii) directly to the Board for the Certification, Valuation and Export of Spanish Historical Heritage.

Export applications will then be analysed by the Board for Historical Heritage who shall issue an opinion on that matter. Giving consideration to their opinion, the Director-General of Fine Arts, Cultural Assets and Archives and Libraries, will decide on the export application.

In the event that export is authorised, the person concerned must: (i) submit the authorisation to the Customs Office (for movements outside the boundaries of the EU); and (ii) include the transport roadmap (for movement within the EU).

There is no fixed duration for this export proceeding, it will depend on each particular case and the characteristics at issue.

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

An export authorisation is needed for goods that are between 50 and 100 years old, provided that their value exceeds the following:

- drawings, prints and photographs: €15,000;
- watercolours, gouaches and pastels: €30,000;
- sculptures: €50,000; and
- paintings: €150,000.

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

Yes, as far as the work of a living author cannot be declared as cultural property, unless there is an express authorisation of its owner or if the Administration has mediated in its acquisition (section 9.4 of the Heritage Law).

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

No. The refusal of the export permission does not imply acceptance of the offer, which, according to the Heritage Law, must always be explicit.

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

Personal property forming part of Spain's national heritage that is not exported with the required authorisation will belong to the state. These goods are not transferable and will not be subject to any time limit. The state will be responsible for taking all steps needed to recover any unlawfully exported goods. If the former owner of the goods can provide evidence of their loss or theft before their unlawful export, he or she can request recovery of the goods from the state. He or she must undertake to pay all expenses incurred for the



recovery of the goods and, where applicable, to reimburse the price paid by the state to the acquirer in good faith. An illegally exported item must be presumed to be lost or stolen when its former owner is a public law entity.

An export authorisation is not mandatory (although the export applicant must present an affidavit or other analogous document) in the following cases:

- goods that are between 50 and 100 years old whose value is below the specific amounts (see question B.1.4 above); and
- goods that are less than 50 years old, both from living and deceased authors.

## **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?**

The Heritage Law sets forth that the unauthorised export of a property from the Spanish Historical Heritage may constitute a contraband offence (if the value is more than €50,000) or an administrative infringement (if it is less than €50,000).

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

Spanish Law 1/2017, of 18 April 2017, governs this question. The EU Member State from whose territory the cultural object has been unlawfully removed is entitled to request the return of the unlawfully removed cultural object. Civil actions must be brought under certain conditions before the Spanish courts against the person physically holding or having in its possession the object claimed. The court may order the physical return of the cultural object to the territory of the requesting Member State from the territory of the requested Member State.

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

The Spanish government will assist foreign governments to recover objects pursuant to its obligations under both the 1970 UNESCO Convention and the Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of an EU Member State as implemented through Law 1/2017 mentioned above. In such circumstances, the Spanish Government will require evidence that the conditions in the relevant Convention are met before taking steps to contact the current owner. In order to cooperate and consult with each other, the central authorities may use the Internal Market Information System.

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

The court may award the possessor any compensation considered fair, provided that the judge deems that the possessor exercised due care and good faith when acquiring the object. In order to assess whether the possessor exercised due care, the judge may analyse all the circumstances, such as the documentary evidence regarding the origin of the object, any export authorisation requested by the requesting Member State, the position of each party,

the price paid, the consultation made by the possessor to the available inventories of stolen goods or any other information that might be reasonably obtained.

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

See the response to questions B.1 and B.3 above.

For personal property, the main rule on buyer protection is found in the Spanish Civil Code, whereby possession of personal property acquired in good faith is equal to having title to it. If a person loses any personal property or is unlawfully deprived of it, he or she can claim it from whoever is in possession of the property in question. But if the possessor of the lost or stolen property acquired it in good faith at a public sale, the original owner will not be entitled to claim restitution without reimbursing the price paid.

**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?**

No specific regime is provided for in the Heritage Law or in Royal Decree 111/1986.

**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?**

Legally imported works of art must be backed by documentary evidence so that the imported item can be perfectly identified. Works of art imported in this way cannot be declared to be items of cultural interest in the ten years following the date of import, this period may be extended at the request of the holder and such extension will be granted by the Administration, as many times as they are requested, provided that said request fulfils the conditions required. However, no tax will be payable on the import of personal property items when such items are declared to be of cultural interest with the owner's consent, or included in the National Heritage General Inventory. Any application filed by the owners for these purposes will have the effect of suspending tax obligations.

Relevant actions may be brought as described in the responses to questions A.6 and C.4 above.

## **D. Due diligence obligations**

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

*For the buyer:*

No specific due diligence requirements are applicable to art buyers under Spanish law, other than the general requirements to be met by real property buyers (set forth by Spanish Mortgage Law) and personal property buyers (included in the Spanish Civil Code).

Additionally, personal property acquired at a fair or market or from a legally established trader who regularly trades in similar objects (which will often be the case with works of art) will be subject to the Spanish Code of Commerce, which sets forth that the prior owner's rights over the acquired goods will expire, without prejudice to his rights to bring any civil or criminal actions against the person who unlawfully sold the goods.

The Heritage Law also contains certain prohibitions concerning the sale of works of art:

- items of cultural interest and included in the National Heritage General Inventory that are in the possession of church-related institutions can only be transferred or sold to the state, public law entities or other church-related institutions;
- items forming part of Spain's national heritage will not be subject to any time limitations whatsoever. The acquisitive prescription of this kind of property is also prohibited by law; and
- personal property forming part of Spain's national heritage cannot be transferred or assigned by public administration bodies, other than for the benefit of other public administration bodies.

*For the seller:*

No particular due diligence is required from a seller when selling works of art.

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

Art trade and art auctions fall under the money laundering legislation:

- Law 10/2010, of 28 April 2010, on Prevention of Money Laundering and Terrorist Financing;
- Royal Decree 304/2014, of 5 May 2014, approving the Regulation on the Prevention of Money Laundering and Terrorist Financing.

# 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.

# 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.

# United States

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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?

United States regulation on cultural heritage and national patrimony can be divided into two categories: (i) protection of cultural property; and (ii) repatriation of cultural property. While the US has adopted extensive laws and regulations barring the import of stolen and pillaged cultural properties of foreign nations, US national policy generally favours free export of cultural material and thus its legal system does not specifically regulate the export of cultural material.

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

For the purposes of foreign cultural patrimony, the Convention on Cultural Property Implementation Act (CPIA) broadly defines the term 'cultural property' as 'includ[ing] articles described in Article I (a)–(k) of the [1970 UNESCO] Convention whether or not any such article is specifically designated as such by any State Party for the purposes of such article'.

For the purposes of cultural heritage within the US, the US has several federal laws that define cultural property, including the Native American Graves Protection and Repatriation Act 1990, Archaeological Resources Protection Act 1979, National Historical Preservation Act 1996, National Environmental Policy Act 1969, the Federal Land Policy and Management Act 1976, the Surface Mining Control and Reclamation Act 1977 and the National Stolen Property Act 1934. Each federal legislation defines cultural property protected within the scope of the law differently.

### 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?

A property classified as 'cultural property' is afforded special legal status and is conferred the benefit of certain privileges and protections in the US.

Classification of a private asset as cultural property may affect the right of ownership in a sense that even a privately owned asset may be subject to forfeiture and repatriation to the rightful owner if it is deemed to have been illegally imported.

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

In May 2016, the Protect and Preserve International Cultural Property Act was signed into law and established the Cultural Property Advisory Committee (CPAC) whose main role is

to advise the President and recommend US action in response to State Party requests for US cooperation in protecting their cultural heritage from importation.

**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. The US ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in 1972.

The Congress implemented two provisions of the 1970 UNESCO Convention by enacting the CPIA in 1983: (i) Article 7(b) (i), which requires State Parties to undertake to prohibit the importation of stolen cultural property and return it to the source nation; and (ii) Article 9, which allows State Parties to request assistance (including the control of exports and imports and international commerce) from other State Parties to protect its cultural property which is in jeopardy of pillage. The CPIA, however, limited its recognition of foreign export restrictions by embodying a policy of prohibiting the importation of cultural property and returning it to the source nation only if: (i) it was previously identified and subsequently stolen from an institution or public monument; or (ii) pursuant to a request from a Party State, the cultural property of which is in jeopardy of pillage if the country can prove that it has taken measures to protect its cultural property and that the requested US cooperation will benefit the international community in the ‘interchange of cultural property among nations for scientific and educational purposes’ (19 USC, section 2602 (a1)).

**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?**

No. The US is not party to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

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

Yes. The US has bilateral agreements with Belize, Bolivia, Bulgaria, Cambodia, China, Colombia, Cyprus, El Salvador, Egypt, Greece, Guatemala, Honduras, Italy, Libya, Mali, Nicaragua and Peru. Further, the US imposes import restrictions on Iraqi and Syrian 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?**

With only few and limited exceptions, the US does not impose export restrictions regarding cultural property. The few exceptions apply to archaeological objects removed from federal or Native American lands (see the Native American Graves Protection and Repatriation Act and the Archaeological Resources Protection Act) or protected wildlife (see Convention on International Trade in Endangered Species of Wild Fauna and Flora).

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

N/A.

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

N/A.

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

N/A.

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

N/A.

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

N/A.

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

N/A. The US does not issue export permits for cultural property.

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

N/A. The US does not issue export permits for cultural property.

**4. Does your country dispose of any ‘free ports’ and, if so, how are they arranged?**

Yes. Foreign Trade Zones (FTZs) are US free ports located near a US port of entry where domestic and foreign merchandise can be admitted for the purposes of storage, manipulation, manufacturing, destruction, exhibition or temporary removal free of customs duties or other ad valorem taxes. The US Customs and Border Protection and US Homeland Security monitor the FTZs by means of audits and spot checks.

**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?**

The US, in general, does not impose export restrictions on its cultural property. Violation of certain export restriction provisions (eg, the Archaeological Resources Protection Act of 1979) may result in forfeiture and/or fines.

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

The CPIA regulates illicit import of cultural property through the promulgation in the US Federal Register of Designated Lists of categories of the types of cultural property restricted

from entering the US unless accompanied by an export certificate issued by the country of origin or other appropriate documentation. Promulgation of such import restrictions is contingent upon the existence of a bilateral agreement between the US and another State Party seeking such restrictions pursuant to the requirements of the CPIA. Countries may also invoke US anti-theft laws (eg, under the National Stolen Property Act or the Uniform Commercial Code) for the restitution and repatriation of cultural property under the theory that it is stolen property.

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

The US prohibits the importation of cultural property only if: (i) it was previously identified and subsequently stolen from an institution or public monument; or (ii) pursuant to a request from a Party State, the cultural property of which is in jeopardy of pillage if the country can prove that it has taken measures to protect its cultural property and that the requested US cooperation will benefit the international community in the ‘interchange of cultural property among nations for scientific and educational purposes’ (19 USC, section 2602 [a1]).

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

No. The US recognises the common law *nemo dat* rule that someone ‘who purchases property from a thief, no matter how innocently, acquires no title to the property’. Thus, it is difficult for the buyer, no matter how innocent, to oppose governmental seizure or repatriation of such property unless the buyer can prove that the property was lawfully exported from its country of origin or that it lacks a sufficient nexus to the predicate crime (ie, it was exported from the source nation at least ten years before its arrival in the US and the importer owned it for less than a year before such arrival).

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

There are no regulations in place that provide protection of the buyer against title claims. However, the buyer may assert certain affirmative defences (eg, the expiration of the statute of limitations, the innocent owner defence, laches defence or abandonment by original owner).

**6. Are there any regulations, such as anti-seizure guarantees, in favour of lenders from abroad regarding the return of their items on loan to local exhibitors?**

Yes. The Foreign Sovereign Immunity Act 2016 protects artwork loaned to US museum exhibitions by foreign governments and museums from seizure by private plaintiffs. The law extends the doctrine of sovereign immunity over artworks in the collection of a foreign government or foreign state museum imported into the US for the limited purpose of exhibition or display are not part of ‘commercial activity’ and are therefore immune from US litigation. The legislation carves out exceptions for Nazi-looted artwork. Further, the Immunity from Seizure Act allows foreign states and institutions to apply to the US State Department for grants of immunity that guarantees their cultural objects will not be judicially seized while on the loan. The grant of immunity, however, may not protect loaned artworks from third-party civil claims.

**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?**

See question C.2 above.

**D. Due diligence obligations**

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

*Seller*

No duty of diligence is imposed by law but it is advisable that a seller take reasonable steps to verify that the buyer is reputable and financially stable and to confirm the material terms of the transaction (eg, amount of the sale commission, minimum consignment period, allocation of risk of loss, responsibility for insurance and scope of any warranties) in writing.

*Buyer*

No duty of diligence is imposed by law but a prudent buyer should take reasonable steps to confirm the authenticity of the artwork by obtaining an original certificate of authenticity (if available) and checking the various databases that list stolen works and conduct Uniform Commercial Code (UCC) lien searches in applicable states.

**2. Are there any special due diligence standards applicable to the trade (eg, dealers, auction houses), that also extend to collectors?**

No duty of diligence is imposed by law but a prudent dealer or auctioneer should do more than relying on the consignee's expertise as to the work's authenticity and value, and independently ascertain the authenticity of the work by checking whether the work is listed in the Art Loss Registry of the International Foundation for Art Research and conducting UCC lien searches in applicable states. Further, auction houses should check the credit worthiness of prospective buyers before granting the right to bid.

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

Yes. The US has several federal anti-money laundering laws, two of which concern the art world: (i) the Currency and Foreign Transactions Reporting Act 1970 (also known as the Bank Secrecy Act or BSA); and (ii) the Money Laundering Control Act 1986 (MCLA).

The BSA governs both bank and non-bank institutions, including dealers in precious metals, stones or jewels. Although the BSA does not explicitly list auction houses and art dealers as institutions covered by the law, it does not mean that they are free from legislation; the US Bureau of International Narcotics and Law Enforcement Affairs specifically lists art and black market antiquities dealers as examples of non-financial sectors that should be monitored.

The MCLA covers non-financial institutions and individuals and applies to both domestic and international transactions that violate its anti-money laundering rules.







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