

The reform of the law on the protection of cultural property in Germany

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PREVIOUS LEGAL SITUATION

German law previously differentiated between exports of cultural property between EU member states, and those to non-EU countries. Under Regulation (EC)116/2009 on the export of cultural goods, exports to non-EU countries required a licence from the competent authority if the age and value of the cultural goods exceeded certain thresholds (for example, for paintings, EUR150,000 and 50 years). These restrictions did not apply regarding exports between EU member states. In contrast to other jurisdictions, under the previous German law, cultural goods could be placed on the market and sold freely within the EU, unless they were listed on the Register of Cultural Property of National Significance (*Verzeichnis national wertvollen Kulturgutes*) (Register). So far, the Register's listings have been relatively few. The reason for this is likely to be that collectors refrained from requesting registration due to the trade restrictions imposed and the corresponding diminution in value of the artwork. In addition, in the past, the German federal states that were authorised to include cultural goods on the Register were not aware of planned exports of artworks to other EU member states.

If cultural goods were brought to other EU member states without any requirement for an export licence, they could be sold there, for example at auction, to collectors from non-EU countries. This did not require an export licence issued by a German authority. At that point, the law of the state in which the artwork was sold governed the export to non-EU countries, and its potential licensing. The foreign state was generally not interested in the preservation of German cultural property and therefore authorised the export. Consequently, there remained the possibility of indirect, unauthorised export of German cultural property to non-EU countries.

CHANGES UNDER THE RECENT AMENDMENT IN SUMMER 2016

In the past, it was difficult for the German Federal Republic to repurchase cultural goods of national importance, especially valuable ones, and to return them to Germany after they were sold abroad. The amended cultural property protection legislation includes stricter export restrictions to keep artworks of national significance in Germany.

The recent amendment preserves the general principle of free movement of cultural property. However, this principle is limited by various rules. For instance, cultural goods that are classified as national cultural property can only be exported, whether temporarily or permanently, with an appropriate licence. The necessary licence for the temporary export of national cultural property is granted if the exporter guarantees that the relevant national cultural property will be re-imported to Germany in undamaged condition by the due date. An appropriate licence for permanent export of national cultural property is refused if a significant cultural and public interest in German the cultural property outweighs the circumstances of the particular case.

National cultural property is defined as cultural property that is either:

- Listed in the Register.
- Publicly owned and held by a public institution that preserves cultural property.
- Owned and held by an institution that preserves cultural property and that is mostly publicly financed.
- Part of an art collection owned by the German Federal Republic or of a German federal state. Where privately owned cultural property forms part of such a collection, the status of national cultural property is subject to the lender's agreement.

Cultural property must be added to the Register if both:

- The work is of special significance for the cultural heritage of Germany, its federal states or of one of its historical regions and, as a result, provides a sense of identity for the German culture.
- Its export would constitute a substantial loss for German cultural heritage and, as a result, there is an outstanding cultural and public interest in keeping the work within the Germany.

For the authorities to add an artwork to the Register, the approval of a pluralist expert committee is required. This committee must be convened by the authority and be composed of five experts from institutions that preserve cultural property, academics, art dealers and private collectors.

In addition, even if cultural goods are not classified as national cultural property, exports to EU member states are only permitted if the cultural property either:

- Does not exceed a certain age and value (for example, for paintings, EUR300,000).
- Has its export authorised by the competent supreme federal state authority.

Before exporting artworks that exceed these limits, the vendor must apply for an export licence. The authority must make a decision within ten working days after receipt of the application. The export licence must be granted if no export ban is applicable. There are export bans on cultural property that:

- Is subject to procedures for entry into the Register.
- Has been imported illegally.
- Has been seized.
- Has been stopped by customs authorities.

The failure to adhere to these duties can trigger criminal liability.

The requirement for an export licence was highly contested during the reform process by collectors, artists and dealers alike.

In contrast to the position under the previous law, under the recent amendments the authorities will become aware of considerably more artwork and can consider whether the artworks should be considered national cultural property. Accordingly, the number of entries on the Register is expected to increase. Owners of cultural goods fear this entry, since the smaller market (restricted to within Germany) corresponds to a diminution of the value of their property. The government was accused of preparing a form of expropriation and, shortly after the unofficial draft bill was leaked, German artists such as the painter Georg Baselitz announced that they would withdraw their works from the museums and/or have already taken them abroad.

However, the final amendment of the cultural property protection legislation is considerably more moderate than the 2015 leaked draft version. In particular, the following key points apply within the context of the new rules:

- During the lifetime of the artist, the export of work still owned by him to another EU member state does not require any licence. In addition, during his lifetime, the classification of artworks as cultural property of national significance is only possible if the artist agrees. In consequence, the legislation does not intrude on the creative phases of the artists.
- There are no changes in relation to the export of cultural property to a non-EU country and in this regard, the requirements of Regulation (EC) 116/2009 on the export of cultural goods still apply.
- For cultural property that was formerly permanently located in Germany, but which then was located outside Germany for more than five years and which should now be returned to Germany, the competent authority can give an assurance that the artwork will not be registered as cultural property of national significance. This assurance requires that the artwork will then remain in Germany for more than five years and will be publicly displayed or available for research purposes as a loan.
- Contemporary art that is not qualified as national cultural property is excluded from the requirement for a licence. Oil paintings, for instance, are only affected if they are more than 75 years old and have a value of at least EUR300,000. Watercolour paintings are affected if they are more than 75 years old and have a value of at least EUR100,000.
- The authority must grant an export licence if the export helps to return cultural property that was taken from its former owner as a result of Nazi persecution.
- If cultural property is exported unlawfully, this gives rise to a claim for return against the state to which the goods were exported.
- Where the authority's approval to export an artwork is denied, but the owner is forced to sell the artwork due to economic hardship, the state will attempt to provide relief for the loss of profit.
- Entries in the Register are still possible on request or by the authorities.
- Entries in the Register grant tax advantages under the German Income Tax Act and the German Inheritance and Gift Tax Act.

The statutory protections enhance the protection of public collections. This improves the possibilities for the recovery of cultural property that was illicitly exported or lost in any other way. Artworks lent to museums by private collectors can be classified as national property and may also enjoy statutory protection, if the lender approves. This approval is revocable at will.

DUTIES OF CARE WHEN PUTTING CULTURAL PROPERTY INTO CIRCULATION

A sophisticated system of duties of care helps combat illicit trade with cultural property, as well as illegal excavation.

There is a general duty of care for everyone who places cultural property on the market. Such a person must ascertain whether the work of art was lost or illicitly imported or excavated. However, since the general duty of care also applies to private individuals, on whom there should not be an excessive burden, the general duty of care only applies in cases in which the suspicion of illegal origin would be obvious to a reasonable person. A violation of the general duty of care renders the contract void. This means that anyone who fails to comply with the duty of care becomes personally liable for a potential claim for damages by the other contracting party.

However, stricter rules apply to art dealers. In addition to the general duty of care, the art dealer must, among other things:

- Record the name and address of both the vendor and the buyer.
- Provide a description and an image of the artwork that allows the identification of the cultural property and its provenance.
- Scrutinise the documents proving the work's lawful import and export.
- Record all inspections and their results, and retain those records for a period of 30 years.

A violation of the duties of care in commercial dealings is a non-criminal offence punishable by an administrative fine.

However, the recent amendment to the cultural property protection legislation also contains penal provisions. Criminal liability arises for persons who:

- Export cultural property without a licence, where a licence is required.
- Export cultural property that they know has been imported illegally.
- Import cultural property if they know that the importation of the property violates the regulations of the EU member states, those of the EU or the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.
- Place cultural property on the market that was lost in any way or in the knowledge that the property was excavated or imported illegally.
- Make illicitly exported cultural property the subject of a contract.

IMPORT CONTROLS AND SIMPLIFIED RETURN PROCEDURE

The new regulations facilitate the recovery and return of illicitly exported cultural objects to their country of origin. Instead of the previous "list method", which required an entry into the Register of the contracting states and, as a result, was ineffective in practice, there is now an import check. At the time of import, it is necessary to submit evidence of the legal export from the country of origin. Illicit exports of cultural property from EU member states or contracting states constitute illegal imports to Germany.

LIKELY EFFECTS

It is unlikely that the recent reform of the law will have any negative impact on artists. The current legislation contains certain restrictions for heirs, collectors and art dealers. However, these restrictions will presumably not be as draconian as was partially assumed after the leak of the unofficial draft bill. The recently implemented statutory regulations are also more liberal than those of other EU member states.

The new rules that restrict the principle of free movement of cultural property are to be interpreted restrictively. In addition, the conditions seem to indicate that there are high hurdles for the classification of cultural property of national significance. The German federal government estimates that 90% to 95% of the cultural property that requires an export licence is not "culturally significant".

Nevertheless, these legal concepts are indeterminate and require interpretation. The authorities are yet to decide on this interpretation, and therefore there is a lack of legal certainty. The risk that the competent supreme federal states' authorities may prefer an extensive interpretation cannot be ruled out. At the moment, it is impossible to predict the number of cultural goods that will lose their merchantability because of the registrations. Only future administrative practice will lead to clarification. The relief available for the diminution in value caused by registration will not play a major role in practice because of the requirement for economic hardship. It also remains to be seen whether the export applications can be processed quickly enough to guarantee smooth trade.

For the international market, the recent reform will probably lead to a decreasing supply of German artworks of a certain age and value.

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Publications

- *Private Banking & Wealth Management 2017: Chapter Germany. in: Private Banking & Wealth Management 2017, Ed: Shelby R du Pasquier, Stefan Breitenstein and Fedor Poskriakov, Lenz & Staehelin, Getting the Deal Through, Law Business Research, 2016, 35-39.*
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