

Art Law

Contributing editor
Pierre Valentin



2018

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Art Law 2018

Contributing editor
Pierre Valentin
Constantine Cannon LLP

Reproduced with permission from Law Business Research Ltd
This article was first published in May 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2018
First edition
ISBN 978-1-912377-14-5

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between February and April 2018. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Introduction	5	Italy	41
Pierre Valentin Constantine Cannon LLP		Giuseppe Calabi CBM & Partners – Studio Legale	
China	6	Spain	48
Angell Xi (Minjie) Jingtian & Gongcheng		Rafael Mateu de Ros and Laura Sánchez Gaona Ramón y Cajal Abogados, SLP	
Czech Republic	15	Sweden	54
Daniela Kozáková and Tereza Ditrychová Havel & Partners		Clas Romander, Jenny Sverker and Sofie Haggård Larsson Advokatfirman Delphi	
England & Wales	21	Switzerland	60
Pierre Valentin, Rose Guest, Fionnuala Rogers, Yulia Tosheva, Till Vere-Hodge and Emelyne Peticca Constantine Cannon LLP		Anne Laure Bandle and Arnaud Cywie Borel & Barbey	
France	29	Turkey	66
Jean-François Canat, Line-Alexa Glotin, Philippe Hansen and Laure Assumpção UGGC Avocats		Zeynep Hekim Bülbül and Zeynep Ökke Ökke Hekim Law Firm	
Germany	35	United States – California	72
Sebastian Graf von Wallwitz, Ilja Czernik, Dorothee Altenburg, Arndt Tetzlaff, Johannes Schäufele and Heiko Wunderlich SKW Schwarz Rechtsanwälte		Christine Steiner Law Office of Christine Steiner	
		United States – New York	78
		Amelia K Brankov Frankfurt Kurnit Klein & Selz PC	

Preface

Art Law 2018

First edition

Getting the Deal Through is delighted to publish the first edition of *Art Law*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Pierre Valentin of Constantine Cannon LLP, for his assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
April 2018

Germany

Sebastian Graf von Wallwitz, Ilja Czernik, Dorothee Altenburg, Arndt Tetzlaff,
Johannes Schäufele and Heiko Wunderlich
SKW Schwarz Rechtsanwälte

Buying and selling

1 When does ownership of art, antiques and collectibles pass from seller to buyer?

Ownership usually passes upon transfer of possession from the seller to the buyer. The parties are free to agree on a different time, for example upon receipt of payment in full.

2 Does the law of your jurisdiction provide that the seller gives the buyer an implied warranty of title?

The German Civil Code (CC) provides for the presumption that whoever has possession is the actual owner of the object (section 1006, CC). This presumption can, inter alia, be refuted by a previous owner if the object was stolen, lost or otherwise removed from his or her possession without his or her consent.

3 Can the ownership of art, antiques or collectibles be registered? Can theft or loss of a work be recorded on a public register or database?

There is no register for ownership of art. Theft or loss of a work can be recorded, for example on the Art Loss Register, or the Lost Art Database if the work was lost during the Third Reich period.

4 Does the law of your jurisdiction tend to prefer the victim of theft or the acquirer in good faith of stolen art?

German law tries to balance the interests of the victim of theft of art and the good-faith acquirer. In principle, there is no good-faith acquisition of title for stolen art (section 935(1), CC). However, a person who acquires the stolen work of art in good faith and has this work in his or her possession for at least 10 years, while continuing to be in good faith, acquires valid title. If a person, upon his or her death, was not in good faith but the heir is in good faith, the heir can acquire legal title after 10 years from the point of inheritance. Legal title of a stolen work of art will also transfer to the good-faith acquirer if the work of art is sold in public auction (section 935(2), CC; Federal Supreme Civil Court, decision of 5 October 1989 – IX ZR 265/88).

An acquirer is deemed to be not in good faith if he or she either positively knew, or should have known, that the seller was not the owner of the object. There is no general duty on the purchaser to investigate the validity of the seller's title. If the circumstances of the sale give rise to a concrete suspicion, an obligation to investigate may arise. If the purchaser disregards those suspicious signs and refrains from further investigation, he or she will not acquire good-faith title.

5 If ownership in stolen art, antiques or collectibles does not vest in the acquirer in good faith, is the new acquirer protected from a claim by the victim of theft after a certain period?

A bad faith acquirer cannot obtain legal title. The claim for return of the stolen asset expires after 30 years from the day of loss (section 197(1), No. 1 CC). There is no obligation for the victim of theft to bring the claim at the earliest opportunity. If the circumstances are such that the victim has conveyed the impression that he or she has given up on the claim, the acquirer may hold this against a subsequent claim for return of the object.

6 Can ownership in art, antiques or collectibles vest in the acquirer in bad faith after a period?

No. The bad faith acquirer will not obtain valid title. However, the rightful owner may lose his or her right to claim for return of the work after the 30-year statute of limitations has expired.

7 When does risk of loss or damage pass from seller to buyer if the contract is silent on the issue?

The risk of loss or damage passes on transfer of possession to the buyer. The parties can contractually agree on a different point in time.

8 Must the buyer conduct due diligence enquiries? Are there non-compulsory enquiries that the buyer typically carries out?

Under the Cultural Goods Protection Act (CPPA) of 2016 anyone who engages in trade of cultural goods must exercise a reasonable duty of care to determine whether a piece was stolen or illegally excavated (section 41, CPPA). Additional obligations apply to professional dealers, such as the obligation to examine the identity of the seller, the provenance of the work, and the accuracy of any import and export papers (section 42, CPPA). A particular high standard of care is to be exercised if there are circumstances that suggest that the work may have been taken from the rightful owners during the Third Reich period (section 44, CPPA).

9 Must the seller conduct due diligence enquiries?

The obligations set forth under sections 41, 42 and 44 of the CPPA apply also to a seller.

10 Does the law provide that the seller gives the buyer implied warranties other than an implied warranty of title?

Generally, there are no implied warranties. Exceptions may apply to descriptions in auction catalogues (see Federal Supreme Civil Court, decision of 13 February 1980 – VIII ZR 26/79).

11 If the buyer discovers that the art, antique or collectible is a forgery, what claims and remedies does the buyer have?

In general, if the work of art is a forgery, it is defective if it has been sold as being genuine (Federal Supreme Civil Court, decision of 13 February 1980 – VIII ZR 26/79). In this case, the buyer can claim rescission of the contract or a reduction of the purchase price, as well as damages if the seller acted with intent or negligence (sections 434 and 437, CC).

If the buyer has been defrauded by the seller, he or she also has the right to void the contract and claim repayment of the purchase price.

12 Can a seller successfully void the sale of an artwork of uncertain attribution subsequently proved to be an autograph work by a famous master by proving mistake or error?

Section 119(2) of the CC provides for the right of any party to a contract to void the transaction if he or she erred with respect to a relevant property of the asset in question. It has been held that the authorship of a work of art qualifies as a relevant property (Federal Supreme Civil Court, decision of 8 June 1988 – VIII ZR 135/87) and that the seller can validly void the purchase agreement if, at a later stage, it turns out that the work was actually that of a master rather than only being a copy or

from the studio of the master. The seller bears the burden of proof of the origin of the work.

Export and import controls

13 Are there any export controls for cultural property in your jurisdiction? What are the consequences of failing to comply with export controls?

Under the CPPA certain categories of works of art are subject to export controls, irrespective of whether the export is to an EU member state or to a third country. The export controls apply if certain thresholds in terms of age and value of the piece are exceeded. Works that are sold by the creator and that are not registered in the register for nationally important cultural goods are not subject to export control provisions.

The main categories are as follows.

Category	Export to third country	
	Age (in years)	Value (€)
Paintings	50	150,000
Watercolours	50	30,000
Etchings, lithographs	50	15,000
Photographs	50	15,000
Archaeological items	100	0
Antiques (furniture, instruments, watches, ceramics, carpets, etc)	50	50,000
Category	Export to EU member state	
	Age (in years)	Value (€)
Paintings	75	300,000
Watercolours	75	100,000
Etchings, lithographs	75	50,000
Photographs	75	50,000
Archaeological items	100	0
Antiques (furniture, instruments, watches, ceramics, carpets, etc)	100	100,000

Any works which are listed in the register of nationally important cultural goods (www.kulturgutschutz-deutschland.de/DE/3_Datenbank/Datenbanksuche/datenbanksuche_node.html) are subject to an export prohibition, irrespective of age and value.

A violation of the obligation to obtain an export licence (for the listed goods) or the export ban (for the goods registered in the register of nationally important cultural goods) carries a sentence of up to five years' imprisonment.

14 Does any liability to pay tax arise upon exporting or importing art, antiques or collectibles?

There is no specific tax liability for exporting or importing art. However, value added tax (VAT) might apply, as well as customs. The latter is determined on a case-by-case basis. Regarding VAT, see question 15.

Direct and indirect taxation

15 Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.

The two main types of tax liability are income tax (including corporate income tax and trade tax) and VAT.

Income tax will be triggered if art, antiques or collectibles are sold by a business and a profit is generated from the sale. The biggest potential issue in this regard is determining whether or not a collector holds the work in his or her private collection or whether he or she has a business income as a result of dealing in art. However, private persons buying and selling within one year might also incur tax if the acquisition was made with the speculative intention of making a profit.

As regards VAT, it must be determined whether the person who is exporting art qualifies as an entrepreneur (ie, a dealer) under German VAT law. The VAT rate will be 19 per cent or 7 per cent, or no VAT will apply, and is determined on a case-by-case basis according to the VAT code.

16 Outline any tax exemptions or special conditions applicable to art, antiques and collectibles.

German tax law offers exemptions for income tax, inheritance and gift tax, and certain other taxes, such as real estate tax, if a collection of art qualifies as being of public importance.

For instance, sponsorship or promotion of art is generally accepted as qualifying for a tax exemption under income tax law. Moreover, offering public access to collections generally qualifies for a tax exemption under inheritance tax law if the collection is qualified as being of public importance. Determining whether a collection of art is of public importance requires cooperation with the fiscal authorities.

According to article 43 of Council Regulation (EC) No. 1186/2009 of 16 November 2009 on Exemption from Customs Duty, an exemption from customs duties applies to goods of an educational, scientific or cultural nature, which are listed in Annex II of the Regulation.

Borrowing against art

17 In your jurisdiction what is the usual type of security interest taken against art, antiques and collectibles?

The usual type of security interest is a pledge, which normally entails the lender taking physical possession of the work. There is also the possibility of transferring title of the work to the lender as collateral. In this case, the work can remain with the borrower. However, there is a presumption of legal title for the possessor of the work (section 1006, CC), which entails a risk for the lender.

18 If the borrower borrowing against art assets in your jurisdiction qualifies as a consumer, does the loan automatically qualify as a consumer loan, and are there any exemptions allowing the lender to make a non-consumer loan to a private borrower?

If the borrower is a consumer, the terms of the CC on consumer lending apply, subject to certain exceptions (section 491, CC). Two exceptions may apply to borrowings against art: (i) if the recourse of the lender is limited to the pledged work of art (section 491(2), No. 2, CC); or (ii) if the loan is for a maximum of three months and only minimal costs are involved (section 491(2), No. 3, CC).

19 Is there a public register where security interests over art, antiques or collectibles can be registered? What is the effect of registration? Is the security interest registered against the borrower or the art?

No.

20 If the borrower defaults on the loan, may the lender sell the collateral under the loan agreement, or must the lender seek permission from the courts?

The lender may proceed with the sale if he or she has obtained a valid court order to do so. This requires a court process unless there is a notarial deed of acknowledgment of debt. This instrument is rarely used in this context.

21 Does the lender with a valid and perfected first-priority security interest over the art collateral take precedence over all other creditors?

In German law, the concept of a perfected security interest does not exist. German law operates on the concept of priority. However, if, for example, the work of art that has been pledged to the lender ultimately becomes the possession of the borrower, a third party can acquire good-faith title to the work if it is sold by the borrower.

If the lender has obtained a valid first-priority security interest in the work of art, he or she will be entitled to the full proceeds of the sale up to the value of the loan. If a liquidator has been installed over the estate of the borrower, then the sale will be made through the liquidator. Prior to disbursement of the sale proceeds to the borrower, the liquidator's fees will be deducted.

Intellectual property rights

22 Does copyright vest automatically in the creator, or must the creator register copyright to benefit from protection?

According to section 7 of the Copyright Act (CA), all copyright vests automatically in the creator. The 'work made for hire' principle is not applicable in Germany, therefore legal entities will under no circumstances be regarded as creators. They can, however, be owners of related rights (most prominently for the release of posthumous works or the production of moving pictures), and might be granted exclusive or non-exclusive rights of use by the creator (section 31, CA).

Germany knows no registration formalities. However section 10(1) of the CA provides for a presumption of authorship based on designation. In the absence of proof to the contrary, a person is regarded as the creator of an artwork if he or she is identified as its creator on the original of the artwork.

23 What is the duration of copyright protection?

In general, copyright expires 70 years after the creator's death (section 64, CA). However there are some specific regulations that deviate from this rule. For example, where several persons have jointly created a work without the possibility of separately exploiting their contribution (section 8, CA), copyright expires 70 years after the death of the last surviving joint author (section 65(1), CA).

German copyright law provides specific regulations for anonymous works in section 66 of the CA, which states that copyright expires 70 years after publication of the anonymous work. If it was not published during that period then the copyright expires 70 years after its creation.

Where German copyright law provides for related rights, particular provisions apply. In general, related rights are protected for 50 years from the creation of the underlying work. However, if the work is published during that term, the term of protection will restart and an additional protection term of 50 years is added, calculated from the first publication date.

According to section 69 of the CA, the term of protection is not calculated from the actual date of death or publication but commences at the end of the calendar year in which the event giving rise to it occurs. Therefore, if the author died on 1 January 1949, the copyright does not expire on 1 January 2019 but on 31 December 2019 at 12 am.

24 Can an artwork protected by copyright be exhibited in public without the copyright owner's consent?

The owner of the original of an artwork is authorised to exhibit it physically in public even if it has not yet been published (section 44(2), CA). The qualification of an artwork as an original depends on the criteria applied by professionals in the art trade. This plays a decisive role, particularly for serial productions of graphics and castings. With regard to these types of work it is presupposed that the author himself or herself must have contributed to their production, for example by giving instructions. Indications of the status of an original artwork may be numbering, or a signature or foundry stamp on the graphic or casting.

The exhibition right may also be invoked by third parties (eg, museums) to whom the owner has provided the original work (eg, by way of loan). However, it is required that the first owner has legally obtained the work from the creator.

The author may explicitly rule out the exhibition right, but this must occur at the time of the sale of the original and the exclusion must be made expressly (ie, it cannot later be inferred from the circumstances).

25 Can artworks protected by copyright be reproduced in printed and digital museum catalogues or in advertisements for exhibitions without the copyright owner's consent?

According to section 58(1) of the CA, the reproduction, distribution and making available to the public of artistic and photographic works that are exhibited in public or intended for public exhibition or public sale by the organiser shall be permitted for advertising purposes to the extent necessary for the promotion of the event.

Making available to the public comprises, inter alia, digital offline media such as DVDs, CD-ROMs and online usage, such as the advertisement of exhibitions on the internet. Advertising material and invitation cards using exhibited artistic works in preparation for an

exhibition are permissible, but this does not apply to postcards, calendars or other merchandising, as such materials would constitute an independent gain of profit, as opposed to direct promotion of the event.

If an artistic work is used on the basis of section 58 of the CA, the source of the work must always be cited, in particular the artist's name.

26 Are public artworks protected by copyright?

Public artworks, including street art, are protected by copyright. Copyright protection arises irrespective of whether rights of third parties are violated. Consequently house owners generally have to observe copyright law despite the unwanted imposition of a change to their buildings. A moral right issue may arise when it comes to refurbishment of the building in question. Whereas the complete destruction of the building would be permissible, visible changes that affect the work of art may not be permissible. The same applies to changes of location in the case of site-related art, which can also be regarded as a violation of the author's moral rights. Removing street art from a building and selling it separately is also inadmissible under the right of distribution (section 17, CA).

27 Does the artist's resale right apply?

Section 26 of the CA provides for a resale right for originals of artistic or photographic works where the net sales price amounts to at least €400. Architectural works and works of applied art, as well as simple photographs, do not fall under this provision. The term 'originals' covers all works that have been produced by the artist or under his or her control, which therefore includes multiples (eg, casts, prints or copies to the extent that they have been made from the template of the work with the consent of the author).

The duration of the resale right coincides with the general copyright duration.

Beneficiaries are the author and co-author, their heirs and successors in right.

The resale royalty is limited to a maximum of €12,000 and amounts to:

- 4 per cent for the portion of the selling price up to €50,000;
- 3 per cent for the portion of the selling price from €50,000.01 to €200,000;
- 1 per cent for the portion of the selling price from €200,000.01 to €350,000;
- 0.5 per cent for the portion of the selling price from €350,000.01 to €500,000; and
- 0.25 per cent for the portion of the selling price exceeding €500,000.

The royalty becomes due from the seller if the work is resold and an art dealer or an auctioneer is involved as purchaser, seller or intermediary. If the seller is a private person, the art dealer or the auctioneer, involved as purchaser or intermediary, is jointly and severally liable in addition to the seller; in their internal relationship, however, the seller is solely liable for payment.

The beneficiary may only collect the payment claim directly, whereas the information rights in relation to the art dealer or auctioneer as to which of the author's works have been resold with their involvement during the past three years or as to the name and address of the seller, and regarding the selling price, must be pursued by a collecting society, generally VG Bild-Kunst.

The resale right is subject to the general statute of limitations, which is three years from the end of the year when the author was first entitled to his or her claim and he or she gained or could have gained knowledge thereof without gross negligence.

28 What are the moral rights for visual artists? Can they be waived or assigned?

The moral rights of the author are the right of (first) publication (section 12, CA), the right of recognition of the authorship (section 13, CA) and the right to prohibit distortion of the work (section 14, CA). These moral rights may also be invoked by foreign artists, independent of whether their home country adheres to respective international conventions or is party to a bilateral agreement with Germany.

The following rights can be distinguished:

- The right of publication, which gives the author the right to determine whether and how his or her work will first be published, and to communicate or describe the content of his or her work to the public as long as neither the work nor the essential content or a description thereof has been published with his or her prior consent. The consent must cover the original form of the artwork, and the specific time and place of the work's publication. Therefore, the first publication of an adaptation of the work would affect the author's usual rights if he or she had given consent for it. The same applies if the work was published at a different time or place as determined by the author. An exception to this right is the exhibition right that is automatically granted to the purchaser of an original work of art (even if it is published) according to section 44(2) of the CA.
- The right of recognition as the author of the work in relation to any use made of the work. The artist may determine whether and which designation of authorship the work shall bear. Authors, co-authors and publishers are entitled to the recognition right. While this right may not be entirely waived, the author may, depending on the case, agree to refrain from pursuing his or her right for a limited period of time (eg, in the case of a ghostwriter). However, permanent waiver of the recognition right has been rejected by German courts. Rather, there is a right to terminate such agreement after five years. The right of recognition allows the author to remain anonymous or to later dissociate himself or herself from the work.
- The right to prohibit the distortion or any other derogatory treatment of the work, which might prejudice the author's legitimate intellectual or personal interests in the work. This moral right also applies to any alterations during usage of the work that are capable of affecting the author's legitimate interests.

Moral rights expire 70 years after the author's death (see question 23).

Agency

29 Does the law require the agent to account to the principal for any commission or other compensation received by the agent while conducting the principal's business?

The agent is generally obligated to continuously keep the principal informed on the status of any transaction, including any fees received (sections 666 and 675, CC). This includes the information on compensation received by the agent. This information obligation can be contractually excluded.

30 Does disclosure to the principal that the agent will receive a commission allow the agent to keep the commission unless the principal objects?

In the absence of an agreement to the contrary, the agent is obligated to disgorge any commission that he or she has received, or will receive, from a third party to the principal (section 667, CC; Federal Supreme Civil Court, decision of 30 May 2000 – IX ZR 121/9). This disclosure is not sufficient for the agent to retain the commission. In order to do so, the agent must acquire the express or implied consent of the principal. The agent bears the burden of proof.

31 If a third party pays a commission to an agent that is not disclosed to the principal, can the principal claim the commission from the third party?

The principal can claim the commission from the agent.

Consigning items

32 How can consignors of artworks to dealers protect their interest in the artwork if the dealer goes into liquidation?

The consignment of an artwork does not change ownership of the work. If the dealer goes into liquidation, the owner can demand return of the property from the administrator. If a creditor or the liquidator attempts to sell the work, the owner can ask the court to intervene (section 771, Code of Civil Procedure).

Auctions

33 Are auctions of art, antiques or collectibles subject to specific regulation in your jurisdiction?

German law contains certain privileges for public auctions. For an auction to qualify as public, it must be conducted by either a bailiff or a licensed auctioneer (section 383(3), CC). The main effects of a public auction are that the good-faith purchaser can acquire title in good faith even for stolen goods (section 935(2), CC) and that the specific provisions on purchases by consumers do not apply (section 474(2), CC).

34 May auctioneers in your jurisdiction sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

Yes. However, in this case the specific privileges that accompany a public auction do not apply. If a dealer engages into frequent lending, he or she may be required to obtain a banking licence.

Spoilation during the Nazi era

35 In your jurisdiction, in what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court accepts jurisdiction and applied local law to a claim to art lost during the Nazi era?

The prospects of success depend on whether a public body, such as a museum, archive or library, or a private person or institution, is in possession of the art. Against the latter the heirs may legally assert a claim for restitution, however owing to the lengthy period of time that has passed since the Nazi era, claims of the heirs are likely to be time-barred. The possessor may also argue that the art was acquired in good faith. Although this significantly reduces the chances of any legally enforceable claim for the return of the work, the possessor typically has an interest to amicably settle the heirs' restitution claim. Art labelled as potentially Nazi-looted becomes difficult, if not impossible, to sell.

The question of whether art can be successfully reclaimed from a public institution tends to be one of politics rather than legal principle. Germany signed the Washington Principles of 1998, to which German public institutions normally adhere, though they are not legally binding. The Principles were further implemented via two national soft-law regulations. In practice, the heirs will typically prevail over a public body as the current possessor if the art was allocated to the institution by previous 'state bodies', such as the Gestapo (secret state police). If the art was sold to a public body, it is crucial to determine whether the loss of possession was caused by Nazi persecution. The guidelines establish the presumption that Nazi persecution was the reason for the sale of art from a person persecuted by the Nazis. Accordingly, the current possessor bears the burden of proof that the art was sold 'under normal circumstances', which increases the heirs' chances of success.

36 Is there an ad hoc body set up to hear claims to Nazi-looted art?

In 2003 the government established the Limbach Commission, a panel of up to 10 honorary members that gives recommendations on restitution claims regarding art stolen or purchased under duress by the Nazis. The Commission's resolutions are based on the Washington Principles. A decision is reached by conducting preliminary proceedings, followed by an oral hearing. A decision by the Commission requires a two-thirds majority. The Committee's decisions are not legally binding and can be categorised as mediation in disputes over provenance. As such, they cannot be appealed or enforced by either party. However, public bodies normally adhere to the Committee's resolutions.

Lending to museums

37 Who is responsible for insuring art, antiques or collectibles loaned to a public museum in your jurisdiction?

There is no typical insurance arrangement in Germany relating to loaned art in public museums. It is possible to insure art on the part of the lender or the public museum. The insurance premium is determined by the risk of damage, which in turn is affected by the exhibition venue. The evaluation of the imminent risks at the exhibition venue is usually more difficult for the insurer of the lender, which may lead to

an increased premium. To obtain coverage under the museum's insurance is therefore often preferable. In both variations it is necessary to determine the art's market value. Since it is often difficult to assess the objective value of art, the insurer and the insured typically stipulate an amount contractually. To protect the parties against sudden increases in value (eg, if the artist dies) insurance contracts normally include an escalation clause and stipulate the need for yearly re-evaluations.

In light of rising insurance premiums, a number of federal states are issuing guarantees in the event that the loaned work is damaged during transport or during the exhibition, thereby dispensing of the need to involve an insurer.

38 Are artworks, antiques or collectibles loaned to a public museum in your jurisdiction immune from seizure?

Yes. It is long-settled case law that works of art that are on loan from a foreign country to a museum in Germany cannot be attached by a creditor of that country. Under general international law, the foreclosure of assets belonging to a foreign country is not permissible to the extent that the property serves public (as opposed to commercial) needs of that country (Berlin High Court, decision of 5 March 2010 – 18 W 2/10). This includes works of art belonging to a foreign country (Federal Supreme Civil Court, decision of 1 October 2009 – VII ZB 37/08).

Cultural patrimony

39 Is there a list of national treasures?

There are 16 registers for cultural property of national significance. According to section 7 of the CPPA, cultural property has to be entered into a register of cultural property of national significance (i) if it is particularly significant for the cultural heritage of Germany, its states or one of its historical regions, and is therefore a formative part of Germany's cultural identity; and (ii) if its removal would be a significant loss for Germany's cultural heritage so that keeping it in the federal territory is of outstanding cultural public interest. An aggregation of individual items (in particular archival holdings, library holdings, estates, collections or parts thereof) must be entered into a register of cultural property of national significance even if the individual items do not necessarily fulfil these criteria. Decisive factors for the classification of national cultural property are the local reference to Germany and the history of reception of the cultural property. This does not necessarily mean that the cultural property must have been created in Germany or by a German artist; however, a short stopover of said cultural property in Germany is not enough.

The registration has the following consequences:

- the direct possessor must notify the competent authority of any change of location;
- no person (not even the owner or legitimate possessor) may destroy, damage or change the appearance of the cultural property in a substantial and permanent way, unless for the purposes of professional conservation and restoration or research. Consequently any loss, destruction, damage or any change to the appearance of the cultural property in a way that is not trivial and not temporary must be notified to the authorities;
- if the ownership changes, the new owner of the cultural property, alternatively the former owner, is obliged to immediately notify the competent authorities; and
- most importantly, any temporary or permanent export of a registered cultural property is dependent on the permission (license) of the authorities. This is the case even when the procedure to enter the cultural property in a register of cultural property of national significance has only been initiated and the decision on the registration has not yet become incontestable. To secure the remaining cultural property, the government may order seizure to keep such items inside Germany. Any export of registered cultural property without a permit is a criminal offence.

There is no compensation obligation other than certain tax concessions. Even if a permanent export licence is refused with final and binding effect, and the owner of the registered cultural property of national significance is then forced to sell it owing to economic hardship, the CPPA does not provide a legal compensation obligation. The competent authority is only obligated to seek a fair settlement. This, however, does not mean that the state is obligated to buy the cultural property, but must give support in finding potential buyers.

40 If the state is interested in buying an artwork for the public collections, does it have a right of pre-emption?

No.

41 In what circumstances does ownership in cultural property automatically vest in the state?

Under section 984 of the CC, when a treasure is found, half of the property is acquired by the discoverer and the other half by the owner of the object in which the treasure was hidden. However, most of the federal states (except Bavaria) deviate from this provision under section 73 of the Introductory Act to the Civil Code. This provision grants a state a claim for an appropriation right under the various State Heritage Protection Acts. Under the provision, mobile monuments that are abandoned or have been hidden for so long that their owners can no longer be identified become the property of the state if they are discovered during government investigations or in protected excavation areas, or if they have an outstanding scientific value.

Additional possibilities for the state to acquire ownership exist under the CPPA as well as under tax and criminal laws.

42 How can a foreign state reclaim in your jurisdiction cultural property illegally exported from its territory?

The CPPA provides for various repatriation claims with slightly different procedures and conditions. These claims for return of cultural property pursuant to the CPPA are considered claims under public law. However, civil law claims can be raised independently and are not affected by these rules. In each case, there is either the possibility of administrative mediation or legal action before the competent courts.

If judicial proceedings before an administrative court are initiated, the following documents must be attached to the statement of claim:

- an adequate description of the cultural property including information about:
 - its identity and provenance;
 - the actual or presumed date of removal; and
 - the actual or presumed location in the federal territory;
- a declaration stating that, under national law or according to administrative proceedings of the requesting member state or state party, the item is national cultural property; and
- a declaration by the requesting member state or state party that the cultural property has been unlawfully removed from its sovereign territory.

If the direct possessor exercised due diligence when acquiring the cultural property, he or she may refuse to return the cultural property until the requesting member state or state party has awarded him or her fair compensation. In determining the amount of compensation, consideration shall be given to the expenses incurred for acquiring the cultural property and for taking the measures necessary for its preservation. The compensation must not exceed the expenses. No compensation shall be paid for lost profits.

Anti-money laundering

43 What are the anti-money laundering compliance obligations placed on the art trade?

Art dealers are subject to the Anti-Money Laundering Act (AMLA) of 2017. In order to comply with the obligations under the AMLA, art dealers must obtain and store information on their contract partners, representatives, the ultimate economic beneficiary and the transaction as such (section 8(1), AMLA). With regard to a natural person, the art dealer must take note of his or her first or last name, place of birth, date of birth, nationality and place of residence. With regard to a legal entity, the art dealer must take note of its corporate name, legal form, register number and place of business, and the names of its legal representatives.

The dealer must take a copy of the identification document (passport or identification card) of the contract party or the representative and verify whether the contract partner or ultimate beneficiary qualifies as a politically relevant person. In addition, the dealer must continuously monitor the business relationship.

Endangered species**44 Is your jurisdiction a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)?**

In Germany, the CITES Convention has been implemented by Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora, as well as the German Federal Regulation for the Protection of Species. The Convention and the respective implementation laws are enforced by the Federal Agency for Nature Conservation (BfN), which is charged with granting import and export permits for protected species and the products derived from them.

45 Is the sale, import or export of pre-CITES endangered species subject to a licence?

The sale of antiques is generally permissible. Antiques are specimens processed into objects before 1 June 1947, for example, into jewellery, decoration, art or objects of daily use (including musical instruments) that no longer require any further processing (blank objects are not included). Import and export is subject to a licence provided by the BfN.

46 Is the sale, import or export of post-CITES worked or antique endangered species authorised? On what conditions?

The sale, import and export of post-1947 worked endangered species is subject to strict regulations, and is generally prohibited unless specific permits are obtained. Exceptions may apply for private, non-commercial import and export.

47 Are there any special rules for works of art made of elephant ivory, rhino horn or other specific endangered animal products?

Yes. With regard to these species, additional restrictions apply. For example, private, non-commercial import and export is more restricted.

Consumer protection**48 In what circumstances may consumers cancel the sale of art, antiques or collectibles?**

Consumers may cancel contracts on the sale of art in specific circumstances.

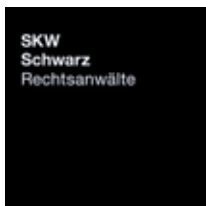
In case of distance contracts (online sale, etc) consumers generally have a 14-day right of withdrawal that cannot be excluded from the contract. According to this right, consumers may cancel the sale for any reason. An exception only applies for specific auctions, which does not include platforms such as eBay.

In addition, consumers may cancel contracts if the purchased item is defective, for example, if it was attributed to a certain period or a certain artist but transpires to be inauthentic.

49 Are there any other obligations for art businesses selling to consumers?

With regard to distance contracts, comprehensive obligations under consumer protection laws apply. In particular, information obligations regarding price, shipping and contract details, including information on the statutory right of withdrawal and warranties, apply. For example, full contract details must be provided in a durable medium.

In addition, in the case of online sales, comprehensive formal requirements regarding the online store and its functionalities apply.



Sebastian Graf von Wallwitz
Ilja Czernik
Dorothee Altenburg
Arndt Tetzlaff
Johannes Schäufole
Heiko Wunderlich

s.wallwitz@skwschwarz.de
i.czernik@skwschwarz.de
d.altenburg@skwschwarz.de
a.tetzlaff@skwschwarz.de
j.schaeufele@skwschwarz.de
h.wunderlich@skwschwarz.de

Wittelsbacherplatz 1
80333, Munich
Germany

Tel: +49 89 286 400
Fax: +49 89 280 94 32
www.skwschwarz.de

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com