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Rules for the art trade

A guide on the Cultural Property Transfer Act for the art trade and auctioning business

Introduction

Switzerland joins the US, France, England and Germany as one of the world's largest art markets. The new Cultural Property Transfer Act (CPTA) adapts Swiss legislation regulating the art trade and exchange of cultural property to minimum standards under international law. A milestone in this regard is the ☞ *UNESCO Convention from November 14, 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. The UNESCO Convention is a multilateral international treaty which formulates the fundamental principles governing the protection of cultural property, containing minimum requirements for legislative, administrative, treaty-related measures, which states' parties are required to undertake to prevent the illegal trade in cultural property. To date, some 100 countries have joined the Convention, including Italy, Greece, Great Britain, Japan, Spain, France, and the US.

On June 20, 2003, the chambers of parliament discharged the ☞ *Federal Act on the International Transfer of Cultural Property (CPTA)*, implementing measures under the 1970 UNESCO Convention into Swiss Law and clearing the way for the Convention's ratification. (Switzerland ratified the Convention on October 3, 2003; it entered into force for Switzerland on January 3, 2004.) The CPTA contains provisions on the import and export of cultural property, the repatriation of illegally imported cultural property to its country of origin and the commercial trade in cultural property. It further contains measures to protect the cultural heritage of Switzerland as well as to improve the cultural heritage of other countries and to promote the international exchange of art. The Act and the corresponding implementing provisions (☞ *Cultural Property Transfer Ordinance, CPTO*) entered into force on June 1, 2005.

The CPTA and CPTO consider the *principle of individual responsibility* within the art trade to the greatest extent possible. At the same time, persons active in the art trade and auctioning business in Switzerland are subject to new duties of diligence related to the import and transfer of ownership of cultural property. The sections below present the *most important provisions* with a view toward the *art trade and auctioning business*, and answer a few practical questions arising from the art trade and auctioning business. Additional information is available by contacting the Specialized Body for the International Transfer of Cultural Property at the Swiss Federal Office of Culture (www.bak.admin.ch).

Scope

Who?

The CPTA and CPTO affect also persons and companies active in the art trade and auctioning business trading on a *professional basis* in cultural property within Switzerland. Decisive for determining professionalism is an obligation to register in the trade registry (Art. 1, provision e, CPTO). Accordingly, special duties of diligence and control measures provided for by the CPTA and CPTO *do not apply to normal collection activities* of private persons.

What triggers an obligation to register in the trade registry? Registration in the trade registry is a prerequisite of incorporation for certain forms of legal entities (in particular, stock corporations, limited liability partnerships, cooperatives). They operate without further measures on a professional basis in terms of the CPTA. Registration in the trade registry is required for all other legal entities and persons when they operate a business commercially, i.e. – in general – conduct economic activities targeted toward long-term income and achieve annual sales of at least CHF 100,000 (Art. 36 ff. Commercial Registry Ordinance SR 221.411).

Due diligence provisions in the CPTA (Art. 1, provision e.2, CPTO) apply accordingly to persons domiciled abroad and to legal entities headquartered abroad.

What?

Cultural property in terms of the Act are all objects belonging to one of the *categories* pursuant to Article 1, [☞ 1970 UNESCO Convention](#) and are considered significant property from a religious or universal standpoint for archaeology, pre-history, history, literature, art or sciences (Art. 2, para. 1, CPTA). For more on the term cultural property, refer to the [☞ Checklist cultural property](#).

The duties of diligence referred to below do not apply when the purchase price or appraised value of cultural property is *less than CHF 5,000* (Art. 16, para. 2, CPTO), but apply in all cases to archaeological, palaeontological or ethnological objects and portions of dismembered artistic or historical monuments (Art. 16, para. 3, CPTO).

Where?

Provisions of the CPTA and CPTO apply to the transfer of ownership of cultural property *within or out of or into Switzerland* (Art. 1, para. 1, CPTA). The special duties of diligence apply to persons active in the art trade and auctioning business to the extent they transfer cultural property within Switzerland (Art. 16, para. 1, provision b, CPTO).

When?

The CPTA does not apply retroactively (Art. 33, CPTA). In other words, its provisions apply only after the Act enters into force on June 1, 2005. Transactions completed prior to June 1, 2005, are not covered by the Act.

Golden rules for the art trade

Principle

Cultural property may only be transferred 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. (Art. 16, para. 1, CPTA).

Comment: Lost against the will of the owner refers in particular to illegally excavated archeological or palaeontological objects to the extent claimed as state property by the state in question (refer to Art. 724, para. 1, Swiss Civil Code, for Swiss law). This is the case for example in Egypt, Greece, Turkey and Italy. Grave robbery for example is considered larceny by finding whereby the state loses the find.

Special duties of diligence

Special duties of diligence (Art. 16, para. 2, CPTA) are derived from the general principle that no illegally acquired cultural property may be transferred (Art. 16, para. 1, CPTA), applying to all persons active professionally in the art trade and auctioning business (Art. 16, para. 1.b, CPTO).

Persons, subject to these duties of diligence, must:

- establish the identity of the supplier or seller during initial contact (Art. 16, para. 2.a); the required information includes: last name, first name, birth date, domicile address and citizenship of persons and company name and domicile address of legal entities (Art. 17, para. 1, CPTO).
- review information based on probative documents to the extent questions exist requiring a challenge to the correctness of the information (Art. 17, para. 2, CPTO);
- obtain a written declaration on the *right to dispose* of the cultural property from the supplier or seller (Art. 16, para. 2.a, CPTA);
- *inform* customers on existing import and export regulations from  contracting states to the 1970 UNESCO Convention (Art. 16, para. 2.b, CPTA);
- maintain *records* on the acquisition of cultural property (Art. 16, para. 2.c, CPTA); the required information includes: description and origin or provenance of the cultural property, date of transfer of ownership, sale price or appraised value as well as information on identity and declaration on the right to dispose.

Details on object description are regulated in Art. 1, provisions a and b, CPTO.

Records and receipts on the cultural property must be *stored for 30 years* (Art. 16, para. 3, CPTA).

Important

These special duties of diligence apply only to:

- persons active on a *professional basis* in the art trade and auctioning business (refer to Art. 1, provision e, CPTO for more on the term);
- transactions as of June 1, 2005;
- cultural property with a purchase price or appraised value of *more than CHF 5,000* (Art. 16, para. 2, CPTO) and in all cases to archaeological, palaeontological or ethnological objects and portions of dismembered artistic or historical monuments (Art. 16, para. 3, CPTO).

Inspections and sanctions

Inspections

The *Specialized Body for the International Transfer of Cultural Property* for the Federal Office of Culture inspects compliance with duties of diligence for responsible persons in the art trade and auctioning business (Art. 17 and Art. 18, provision i, CPTA).

To this end, the specialized body has access to business rooms and storage facilities of persons active in the art trade and auctioning business. On-site inspections are *announced in advance* unless a risk exists that the cultural property or associated documents will be removed from inspection (Art. 20, para. 1, CPTO). The inspections apply in particular to documents maintained on traded cultural property; they must be maintained in such a manner as to be presented pursuant to any requests for information (Art. 19, para. 2 and Art. 20, para. 2, CPTO). All necessary information on fulfilling this duty of diligence must be provided to the specialized body (Art. 16, para. 2.d, CPTA).

☞ *The Federal Act on Data Protection* applies to the processing of personal data related to inspections (Art. 30, para. 2, CPTA and Art. 21 CPTO).

Sanctions

When the specialized body has a reasonable suspicion that criminal activity is present under this Act, the specialized body files a complaint with the competent criminal prosecution authorities (Art. 17, para. 2, CPTA). The competent criminal prosecution authorities will order the *seizure* of the cultural property when suspicion exists that the cultural property was stolen, lost against the will of the owner, or illicitly imported into Switzerland (Art. 20, CPTA).

Criminal sanctions are outlined in Art. 24 ff., CPTA.

Export, import and customs formalities

Refer also to [☞ Memo “Import, Transit and Export of Cultural Property”](#)

Export / Federal registry

New customs formalities apply to some extent (refer to the following) as soon as the CPTA enters into effect. Otherwise, all other applicable export formalities remain unchanged.

The CPTA calls for the establishment of a federal registry where cultural property of significant importance and property of the federal government is registered (Art. 3, CPTA). The federal registry is currently under development. Cultural property registered in the federal registry requires a permit for the temporary export from Switzerland. Permanent export from Switzerland will not be possible.

The export may occur under the following conditions until such time as the federal government publishes the federal registry as a generally accessible electronic database:

- the export is declared to customs (as was the case to date) and the new customs formalities are fulfilled;
- any required export permits are obtained from the competent cantonal authorities (as was the case to date) to the extent required by applicable cantonal regulations. (Contact the competent cantonal authorities for more information.)

Import / Agreements with contracting states to the 1970 UNESCO Convention

With the exception of new customs formalities (see below), nothing changes with regard to import modalities that applied to date. Special import regulations, which may be agreed upon in future bilateral international agreements with [☞ contracting states](#) to the 1970 UNESCO Convention, remain reserved.

Customs formalities

General

Customs processing occurs pursuant to the provisions of customs legislation (Art. 23, CPTA). (Contact the competent customs authorities for more information.)

Customs authorities inspect the transfer of cultural property at the border (Art. 19, CPTA). Customs authorities are authorized to withhold suspicious cultural property during import, transit, and export for further clarification and report it to criminal prosecution authorities as necessary.

Customs declaration

New is that the following information must be declared at the customs declaration for cultural property during import, transit and export (Art. 25, para. 1, CPTO):

- the cultural property object type (e.g. statue) *and*
- its place of manufacture (e.g. Rome) or the place where found (e.g. Augusta Raurica) if the result of archaeological or palaeontological excavations or discoveries.

For import and transit of cultural property, persons must further declare that the export of cultural property from a [☞ contracting state](#) to the 1970 UNESCO Convention is not subject to a permit under the laws of that state (Art. 25, para. 2, CPTO).

Customs warehouse

Arrival of cultural property at customs storage facilities is considered import in terms of the CPTA. In other words, it must be declared in writing using form 11.97 (Art. 19, para. 3, CPTA and Art. 26, CPTO). The declaration (notification) is submitted to the competent customs office and must include the aforementioned information.

Practical questions

What is considered cultural property under the CPTA?

To qualify as cultural property in terms of the Act, the object must:

- belong to one of the categories provided for under Article 1, 1970 UNESCO Convention; *and*
- be significant property from a religious or universal standpoint for archaeology, pre-history, literature, art or sciences.

The question as to what cultural property and in what context is considered significant cannot be answered in the abstract, but rather is subject to the constant flux of views and is naturally dependent on its cultural context. Under the principle of individual responsibility, the owner must assess its significance on a case-by-case basis. The [☞ Checklist cultural property](#) may assist you in reaching a determination.

How old must an object be to qualify as cultural property in terms of the Act?

Age as a criterion is only found in the 1970 UNESCO Convention with regard to antiques and furniture. Accordingly, antiques and furniture must be at least 100 years old to qualify as cultural property. (Be aware, however, that furniture less than 100 years of age may fall into the categories for history or ethnology).

The UNESCO categories are determinative for Swiss regulations. In other words, age is not relevant with the exception of antiques and furniture (limitation: see above). More to the point is the question as to the property's ideal value, i.e. to ask whether or not the object in question is *significant* for religious or universal reasons of archaeology, pre-history, history, literature, art or science.

What significance will the CPTA have for the temporary export of cultural property from Switzerland?

As is currently the case, cultural property may leave Switzerland on a temporary basis (on loan to an exhibition, etc) with a document for Temporary Admission (including Carnet ATA) after the CPTA enters into effect. In principle, nothing changes regarding customs procedures. Persons required to report to customs must include, in particular, the object type and as precise a description of the place of manufacture or location of the find (archaeological or palaeontological objects) of the cultural property as possible on the customs form. The cantonal export permit must also be included to the extent required under cantonal regulations.

Contact

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